



Religion and the law: Exploring the boundaries between the right to equality based on sexual orientation and religious freedom

By

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DECLARATION

I hereby declare that this thesis is my own unaided work, and that all my sources of information have been acknowledged. To my knowledge, neither the substance of this dissertation, nor any part thereof, is being submitted for a degree at any other University.

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I dedicate this thesis to my mom. A woman of quiet strength, who believed that education was the key to the future. Her strength was an inspiration in learning how to overcome diversity and to get on with life no matter how difficult it seemed. Her philosophy of keep on keeping on helped me to get through writing this thesis. I will never forget the life lessons that she taught me. She would have been so proud of this achievement. Thank you for being the unique and special mom that you were.

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ACRONYMS

ANC	African National Congress
BOR	Bill of Rights
CC	Constitutional Court
CUA	Civil Union Act
DRC	Dutch Reformed Church
EC	Equality Court
EDU	Equality Drafting Unit
ELCSA	Evangelical Lutheran Church in Southern Africa
FORSA	Freedom of Religion South Africa
GASA	Gay and Lesbian Association of South Africa
GLOW	Gay and Lesbian Organisation of the Witwatersrand
ILGA	International Lesbian and Gay Alliance
KJV	King James Version
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex
MCSA	Methodist Church of Southern Africa
NCGLE	National Coalition for Gay and Lesbian Equality
NGKerk	Nederduitse Gereformeerde Gemeente Kerk
PAJA	Promotion of Administrative Justice Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SACRRF	South African Charter of Religious Rights and Freedoms
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission

SCA	Supreme Court of Appeal
SDA	Seventh-Day Adventist Church
UCCSA	United Congregational Church of Southern Africa
UDF	United Democratic Front

ABSTRACT

The intersection of religion and law remains complex. It is not simple to find a solution to an issue that falls within the realm of this area. The right to freedom of religion and equality are constitutionally protected and sometimes these two constitutional rights become competing fundamental human rights. The religious injunction against same-sex marriage is an issue which falls squarely within the complexity of religion and law.

With both equality and freedom of religion at odds with each other, it becomes important to balance these rights. This cannot be done without acknowledging the fact that religion has always featured predominantly in our past and influenced many aspects of our lives. However, our history of past discrimination directed at vulnerable groups must also be acknowledged. It is for this reason that this thesis examined the legal soundness of the injunction against same-sex marriage in some Christian denominations. With our constitutional objective being to bring about a cohesive society, a strong presumption in favour of equality must be considered. On this basis the thesis found that the religious injunction against same-sex marriage was unconstitutional and therefore legally unsound.

In dealing with these matters our courts need to approach the issue sensitively by considering transformative remedies without criminal sanctions. It is for this reason that the thesis also attempted to identify the most appropriate litigation strategy that affected parties can rely on when challenging the injunction against same-sex marriage. The Equality court was deemed the most appropriate forum for resolving disputes between religious denominations and their LGBTQI+ congregants. The transformative remedies which the court will consider are potentially available in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Transformative remedies are in principle more acceptable to religious denominations as they refrain from interfering with the core doctrinal beliefs of the church but also allow these religious denominations the time to review their policies and motivate for change. It also minimises the possibility of a split in the church and adheres to the doctrine of constitutional subsidiarity.

KEY WORDS

Biblical injunction against same-sex marriage, Christian religious denominations, civil unions, principle of subsidiarity, religious liberty, same-sex relationships, transformative constitutionalism, unfair discrimination, sexual orientation.

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CHAPTER ONE: INTRODUCTION

Love is simply the name for the desire and pursuit of the whole
Plato, The Symposium
C.358-370BC

1.1 INTRODUCTION

The landmark decision of the *Minister of Home Affairs v Fourie*¹ case and the adoption of the Civil Union Act (CUA)² were watershed moments in the struggle for equality and marriage for the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTQI+) community.³ In the *Fourie* case the court recognised the discriminatory way that the LGBTQI+ community were treated by being denied the benefit of marriage, and stated that:

“The exclusion of same-sex couples from the benefits and responsibilities of marriage... represents a harsh if oblique statement ... that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.”⁴

Yet, sixteen years later, and with the legislative development of the Civil Union Act, LGBTQI+ Christians are still facing exclusion in terms of an injunction against same-sex marriage within their religious denominations. The extension of marriage to same-sex couples has created a divisive issue within many Christian religious denominations. It is submitted, that the most frequent predictors of opposition to same-sex marriage in Christian religious denominations

¹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others (amici curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

² Civil Union Act 17 of 2006.

³ The LGBTQI+ acronym includes sub-cultures and will be referred to within the context of this study either as the LGBTQI+ community, ‘gay’ and/or ‘homosexual or lesbian’.

⁴ *Minister of Home Affairs v Fourie* supra (n1) at para [71].

are religious policies, rules, beliefs, and practices.⁵ These predictors impede the constitutional rights of equality and dignity of the LGBTQI+ ordained ministers and congregants of religious denominations who wish to solemnise their relationships within their Christian religious denominations. A research issue that is not often discussed, is what litigation strategy is the most appropriate to rely on when faced with allegations of discrimination, what the possible outcomes would be and, what legal remedies can be put in place considering the religious liberty of Christian denominations. It is submitted that one of ways in which to consider this issue would be to examine the Constitution and other legislative frameworks such as the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁶ to determine what works in situations such as this.

This chapter discusses (i) the background of the study which includes the legal regulation of same-sex relationships pre and post 1994, (ii) the problem statement, (iii) the aim of the study, (iv) the research question, (v) the research methodology, (vi) the structure of the thesis and (vii) the conclusion.

1.2 BACKGROUND

In 1994 constitutional democracy was introduced into South Africa by the enactment of our Constitution. The Constitution's objective is to allow all South Africans a life of equality and dignity.⁷ It recognises that diversity needs to be respected, and that constitutional protection be afforded to the most vulnerable groups in society.⁸ One such group is the LGBTQI+ community. The Constitution protects the rights of all people in South Africa. Section 9 in the Constitution specifically states that discrimination and inequality is unacceptable which means that the LGBTQI+ community would be protected, and recognised as having equal rights and respect across difference. Section 39(2) of the Constitution states that "when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". It is submitted, that this provision is important for the

⁵ BC Hayes & A McKinnon 'Belonging without believing: religion and attitudes towards gay marriage and abortion rights in Northern Ireland' (2018) 46(4) *Religion, State and Society* 351.

⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000.

⁷ Preamble – The Constitution of the Republic of South Africa, 1996.

⁸ J Sloth-Nielsen & B Van Heerden 'The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution' (2003) 17(2) *International Journal of Law, Politics and the Family* 121.

LGBTQI+ community because it gives members the right to question the common law and an opportunity to challenge the existing legislation that discriminated against them.

In order to establish why there should be a strong presumption in favour of equality in our constitutional democracy, it is important to look at our historical background of apartheid and the discrimination that the LGBTQI+ community had to endure.

1.2.1 The legal regulation of same-sex relationships under apartheid

The dictates of the Dutch Reformed Church (DRC) and legislation such as the Prohibition of Mixed Marriages Act, 1949 and the Immorality Amendment Act, 1950 reinforced the segregation and criminalisation of heterosexual extra-marital sexual relations between people of different race groups.⁹ The Marriage Act of 1961,¹⁰ reflecting the Roman-Dutch common law, was passed by Parliament and governed the solemnisation and registration of heterosexual marriages. The definition of a marriage in the Marriage Act was the “life-long voluntary union between one man and one woman to the exclusion of all others.”¹¹ Since the Marriage Act came into operation on 1 January 1962, this common law definition of marriage has been applicable to all heterosexual couples wanting to solemnise their relationships. It is submitted that this is indicative of the fact that the only recognisable union at the time was a heterosexual one. The Marriage Act governed all civil marriages but did not define the concept of marriage so the courts had to rely on the common-law definition of marriage to determine whether there was a valid civil marriage between two persons in terms of South African law.¹²

The growing gay sub-culture became evident to the governing National Party who saw this “as a threat to South Africans” society’s values and norms.¹³ According to Gomes da Costa Santos, in the obsessive control of sexuality by the Government at the time, it became clear that this was “based on the interpretations of Christianity, and more specifically Calvinism the

⁹ J Barnard ‘Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa’ (2007) 23 *South African Journal on Human Rights* 500-525 at 501. See also G Gomes da Costa Santos ‘Decriminalising homosexuality in Africa: Lessons from the South African experience’ in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* (2013) 313-333.

¹⁰ The Marriage Act, 25 of 1961.

¹¹ *Seedat’s Executors v The Master* (Natal) 1917 AD 302 at 309.

¹² *Ismail v Ismail* 1983 (1) SA 1006 (A). A Skelton & M Carnelley et al *Family Law in South Africa* (2011) 168.

¹³ *Ibid.*

ideologies of which underpinned the idea of socio-economic- political separate development.”¹⁴ This was a clear bias towards Christianity and its teachings.¹⁵

In order to deal with the gay sub-culture, in 1968 the Government proposed an amendment to the Immorality Act of 1957 thus repressing homosexuality and criminalising it.¹⁶ Section 20A of the Sexual Offences Act made homosexual acts between men a criminal offence.¹⁷ The penalty for the violation of section 20A was a R4000 fine or imprisonment of two years, or both.¹⁸ This prohibition was extended in 1988 to include woman and girls under the age of 19 years.¹⁹ It is evident then that both homosexual men and lesbian women were categorised as criminals and rejected by society.²⁰

It was only during the 1980s that homosexual movements in South Africa emerged to fight for equality.²¹ This led to political parties such as the African National Congress (ANC) recognising the rights of the homosexual community and agreeing “to include a prohibition against discrimination on the basis of sexual orientation” in the Interim Constitution specifically in its proposed Bill of Rights.²² Section 8(2) of the Interim Constitution thus prohibited unfair discrimination directly or indirectly on the ground of sexual orientation. The history of sexual orientation will be discussed later in this study.

¹⁴ G Gomes da Costa Santos ‘Decriminalising homosexuality in Africa: Lessons from the South African experience’ in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* (2013) 313-333.

¹⁵ J Van der Vyver ‘Constitutional perspective of Church-State relations in South Africa’ (2001) 1999(2) *Brigham Young University Law Review* 638.

¹⁶ The Immorality Act, 1957 was later renamed by the Immorality Amendment Act 1988 to become the Sexual Offences Act 23 of 1957.

¹⁷ Section 20A(1) of the Immorality Act, 1957.

¹⁸ Section 22(g) of the Immorality Act, 1957.

¹⁹ Section 14(3)(b) of the Immorality Act, 1957.

²⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at paras [27] and [28]; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras [31] and [32].

²¹ J Cock ‘Engendering gay and lesbian rights: The equality clause in the South African Constitution’ (2002) 26 *Woman’s Studies International Forum* 36. See also M Gevisser ‘A different fight for freedom: A history of South African lesbian and gay organisation from the 1980s to the 1990s’ in M Gevisser & E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (1995) 14-86.

²² P de Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ (2007) 23 *South African Journal on Human Rights* 437.

1.2.2 The legal regulation of same-sex relationships post 1994

The prohibition against unfair discrimination based on sexual orientation was retained in the final Constitution²³ despite public opposition, thus making South Africa the first country to recognise it as prohibited ground.²⁴

In South Africa, fundamental values such as dignity, equality, freedom and unity are authentic written expressions of natural law which are found primarily in the leading works of Roman-Dutch jurists such as Voet.²⁵ Constitutional developments in South Africa have brought to the fore the issue of social tolerance of homosexual conduct.²⁶ Section 9²⁷ of the Constitution is not only an important provision in terms of the right to equality and the prohibition of discrimination on the grounds of sexual orientation because it applies not only vertically (between individuals and the state), but also horizontally (between individuals and juristic persons).²⁸ Section 9 offers protection against unfair discrimination but may be limited in terms of section 36²⁹ of the Constitution. There is extensive jurisprudence involving same-sex couples where the Constitution's fundamental values of dignity, equality and freedom were raised.³⁰

²³ The Constitution of the Republic of South Africa Act 108, 1996.

²⁴ EC Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 1042.

²⁵ Domanski 'Fundamental principles of law and justice in the opening title of Johannes Voet's *Commentarius Ad Pandectas*' (2014) 19(2) *Fundamina* 251-265.

²⁶ AJGM Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41(1) *Journal of African Law* 100-108.

²⁷ Section 9(1) states that "Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

²⁸ AJGM Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41(1) *Journal of African Law* 100-108.

²⁹ Section 36 – the limitation clause.

³⁰ *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n20); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra (n20); *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* supra (n1); *Gory v Kolver* 2007 (4) SA 97 (CC).

The Bill of Rights came into operation on the 27 April 1994 and had an immediate effect on the state of affairs in South Africa especially within the realm of family law.³¹ Every South African was now entitled to the right to equality and equal protection of the law.³² The extension of this right and protection, and the prohibition of unfair discrimination based on grounds including race, religion and sexual orientation, saw a number of matters that our courts had to determine. These matters included the rights and privileges of partners in same-sex relationships. These rights and privileges included medical aid benefits,³³ insurance policy payouts,³⁴ the right to spousal benefits of judges,³⁵ spousal immigration permits,³⁶ parental rights of children born as a result of artificial insemination,³⁷ adoption,³⁸ and intestate succession,³⁹ amongst others. These progressive developments were piecemeal and did not address the underlying issue of a legal marriage between same-sex partners.⁴⁰

The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁴¹ was the first case in which the Constitutional Court had to determine issues relating to discrimination based on sexual orientation. This case was referred to as the ‘sodomy judgment’ because sodomy (between consenting males) was seen as a common law offence.⁴² Ackerman J held that the offence of sodomy was to punish sexual intimacy between men.⁴³ This, according to Ackerman J “degraded and devalued gay men in society” and was an indication of a constitutional violation of their dignity (according to section 10), and privacy, (according to section 14).⁴⁴ Therefore, the common law offence of sodomy was deemed unconstitutional.⁴⁵

³¹ As contained in Chapter 3 of the Constitution of the Republic of South Africa, Act 200 of 1993 and later replaced by Chapter 2 of the Constitution, 1996. Skelton & Carnelley et al *Family Law in South Africa* (2011) 168.

³² Chapter 2, Section 9 of the Constitution.

³³ *Langemaat v Minister of Safety and Security* supra (n30).

³⁴ *Farr v Mutual and Federal Insurance Co Ltd* supra (n30).

³⁵ *Satchwell v President of the Republic of South Africa* supra (n30).

³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra (n20).

³⁷ *J v Director General, Department of Home Affairs* supra (n30).

³⁸ *Du Toit v Minister of Welfare and Population Development* supra (n30).

³⁹ *Gory v Kolver* supra (n30).

⁴⁰ Skelton & Carnelley et al *Family Law in South Africa* (2011) 169.

⁴¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n20).

⁴² De Vos ‘Same-sex sexual desire and the re-imagining of the South African family’ (2004) 20 *South African Journal on Human Rights* 179. See also J Heaton ‘The right to same-sex marriage in South Africa’ (2010) 28(1) *Law in Context: A Socio-Legal Journal* 109.

⁴³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n20) at 69.

⁴⁴ *Ibid.*

⁴⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n20) at para [37].

The progressiveness of this judgment endorsed the view that we should acknowledge the differences in our society and try to accept this difference.⁴⁶ As Sachs J held:

“At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At the best, it celebrates the vitality that a difference brings to any society”.⁴⁷

The fight for equality continued and it was a matter of time before the institution of marriage being exclusively heterosexual would be challenged. In 2002 a gay couple approached the Transvaal High Court⁴⁸ for an order compelling the Minister of Home Affairs to recognise and register their marriage in terms of the Marriage Act. The basis of their argument was that marriage between same-sex couples should be seen as legally valid in terms of the Marriage Act since the common law had developed. The High Court dismissed their application but the couple persisted by appealing the court’s decision in the Supreme Court of Appeal (SCA).⁴⁹ The SCA held that same-sex couples were deprived of the right to solemnise their marriages because of the common-law definition of marriage.⁵⁰ Thus, the common-law definition of marriage needed to be developed in order to accommodate same-sex couples so that marriage would be the union of two persons instead of the union of one man and one woman.⁵¹ The outcome of the SCA was taken to the highest court being the Constitutional Court, by the Minister of Home Affairs.⁵² On 1 December 2005 the Constitutional Court delivered a judgment that would change South African history and the face of family law by recognising same-sex marriage for the first time. The Constitutional Court found that the common-law definition of marriage which was limited to heterosexual couples was unconstitutional because it did not allow same-sex couples the same benefits that marriage accorded heterosexual couples.⁵³ Furthermore it found that the marriage formula in section 30 of the Marriage Act that used the words “husband and wife” were not gender-neutral thus making section 30

⁴⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n20) at para [132]. See also H De Ru *The Recognition of Same-Sex Unions in South Africa* (LLM, UNISA) (2009) 30; Heaton ‘The right to same-sex marriage in South Africa’ (2010) 28(1) *Law in Context: A Socio-Legal Journal* 109.

⁴⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n20) at para [132].

⁴⁸ *Fourie v Minister of Home Affairs* TPD 2002-10-18 case number 17280/02.

⁴⁹ *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA).

⁵⁰ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [15].

⁵¹ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [27].

⁵² *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae)* supra (n1).

⁵³ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae)* supra (n1) at 586E-F.

unconstitutional because it excluded same-sex couples.⁵⁴ The Court suspended its findings for a period of 12 months in order to give Parliament an opportunity to correct the defect and the legislature time to promulgate legislation which would permit same-sex couples the opportunity to solemnise their relationships.⁵⁵ If Parliament was unable to cure the defect within the stipulated time of “12 months then the words ‘or spouse’ would automatically be read in” as if it also provided for “spouses” to marry. This would mean that same-sex couples would be able to marry in terms of the Act.⁵⁶ The promulgation of the Civil Union Act 17 of 2006 came into effect as a result of the *Fourie* case which afforded same-sex couples the opportunity to marry, and which significantly broadened the scope of marriage.⁵⁷ The Act not only provided for same-sex marriages, but also allowed heterosexual couples to conclude a civil union.⁵⁸ The Act also introduced a new concept in the form of a civil partnership into South African family law.⁵⁹ A civil partnership provides same-sex and opposite sex couples the opportunity to formalise their relationship without marrying each other.⁶⁰

Even though the *Fourie* case was progressive in terms of same-sex couples marrying, the discrimination against LGBTQI+ persons marrying within some religious denominations is still prevalent. This seems to be particularly true in some religious denominations who have implemented an injunction against same-sex marriage. There are many debates and discussions concerning whether LGBTQI+ persons should or should not be part of the “life of the church”, whether to accept them as members or leaders of the church or to solemnise their relations.⁶¹ Dreyer⁶² seems to think that when church communities argue and debate about issues regarding homosexuality, they should be honest about acknowledging their homophobia and prejudice around the issue in order to eradicate any harmful effects their arguments and debates may have.⁶³ With homosexuality being such a complex phenomenon within religious

⁵⁴ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae supra* (n1) at 586F-G.

⁵⁵ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae supra* (n1) at 586G-H.

⁵⁶ *Supra*.

⁵⁷ B Smith and J Robinson ‘The South African Civil Union Act 17 of 2006: A good example of the dangers of rushing into the legislative process’ (2008) 22(2) *Brigham Young University Journal of Public Law Journal* 419-439.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 (2) SA 1 (CC).

⁶² Y Dreyer ‘Prejudice, homophobia and the Christian faith community’ (2006) 27(1) *Verbum et Ecclesia* 155-173.

⁶³ *Ibid*.

denominations, there is a possibility that not all participants involved in the discussions around the acceptance or non-acceptance thereof will be neutral in their responses.⁶⁴ This is a topic that brings to the fore emotional responses from all parties and according to Dreyer:

“human beings are not able to be “objective”, but bring their own histories, experiences and feelings to all their interactions with others and the world.”⁶⁵

It is submitted that it is seldom that the practice of homosexuality occurs without some sectors of society being homophobic. This has unfortunately come down through the ages, the biblical story of Sodom seeming to be the catalyst for the rejection of homosexuality and increased homophobia. Given the number of different views about the interpretation of this story, the overall opinion seems to be that it reflects the wickedness, greed and lust which prevailed in society on a daily basis. Many Christians generally interpret the story of Sodom being destroyed because of the wicked sexual perversion in the city. Boswell on the other hand believes differently. Boswell believes that when the men of the city demanded to “know” the strangers, they meant this in the context of wanting to know who they were (since at that time all visitors had to be identified) and not in the context of wanting to “know” them in a sexual way.⁶⁶ According to Boswell, the city of Sodom was not destroyed because of its wickedness and sexual perversion but because of its inhospitality to strangers.⁶⁷ This belief is justified by Boswell stating that even Jesus believed that Sodom was destroyed for its inhospitality to strangers rather than for its sexual immorality.⁶⁸ Boswell quotes Matthew 10:14-15 (King James Version); cf. Luke 10: 10-12 to further justify the above statement:

“whosoever shall not receive you, nor hear your words, when ye depart out of that house or city, shake off the dust of your feet. Verily, I say unto you, it shall be more tolerable for the land of Sodom and Gomorrah in the day of judgment than for that city.”⁶⁹

However, even though this may be the view of Boswell, it is not the view of many religious denominations. Negative connotations regarding homosexuality seem to emanate from this

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ J Boswell *Christianity, Social Tolerance and Homosexuality* (1980) at 94.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

biblical story not only because it is viewed as distasteful, but also because it is based on a fear that homosexuals are going to disrupt the gender and sexual nature of natural law, ie the intact family will be disrupted, the social, legal and moral order of society will no longer be the same. Unfortunately, it is this type of fear that has travelled through history and is still operative today in many religious denominations in the form of an injunction against same-sex marriage. According to Fone,⁷⁰ homophobia is the last acceptable prejudice in society. With our Constitution prohibiting discrimination on the grounds of sexual orientation, religious denominations must find a way where diversity is respected.

1.3 THE PROBLEM STATEMENT

The LGBTQI+ community form part of society which has been previously disadvantaged in South Africa as mentioned above. As a minority group, they have fought for equality since the apartheid era and were finally given recognition within the final Constitution. But despite the right to equality and the prohibition of discrimination based on sexual orientation the LGBTQI+ community has, and is still suffering discrimination. Currently the fight for equality concerns the injunction against same-sex marriage by some religious denominations. The non-recognition or partial recognition of the LGBTQI+ congregants of religious denominations is seen as discriminatory against them on the grounds of their sexual orientation. This is evident in the *De Lange*⁷¹ and the *Gaum*⁷² cases. Both of these cases will be fully analysed later in the study. However for purposes of this thesis it is important to highlight the following:

From the *De Lange* case, three main issues arise for purposes of this study:

- (i) Firstly, it confirms that the “a biblical injunction against same-sex marriage”⁷³ whether it be in the form of a civil marriage (solemnised outside of the church) or religious marriage solemnised within the church) is a strongly held belief in some Christian religious denominations like the Methodist Church. Note must be taken of the fact that this practice

⁷⁰ B Fone *Homophobia: A History* (2000) 3.

⁷¹ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* supra (n61).

⁷² *Gaum and Others v Van Rensburg NO and Others* [2019] 2 All SA 722 (GP) (8 March 2019).

⁷³ Reference to the “biblical injunction against same-sex marriage” refers to biblical scriptures prohibiting same-sex marriage. Although this phrase might suggest that this is the only interpretation it should not be read in that manner. This issue is in fact highly contested with a range of perspectives. As chapter two shows there are in fact conflicting biblical passages and a variety of interpretations.

stemming from a belief concerning the theology of marriage is currently undergoing extensive debate and re-examination within the Methodist Church.

(ii) Secondly, it confirms that ordained ministers of the Methodist church who enter into civil same-sex marriages outside of the church, like for example Rev De Lange, violate the injunction against same-sex marriages and can be disciplined for doing so.

(iii) Thirdly, it also confirms that even though churches are private persons, they are bound by the prohibition against unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act⁷⁴ (hereinafter referred to as PEPUDA), which gives effect to section 9(4) of the Constitution. This statutory obligation gives rise to a conflict between the right not to be unfairly discriminated against and the right to religious freedom.

An attempt will be made to investigate the above three issues which will entail answering the question as to whether the enforcement of the biblical injunction against same-sex marriages is unconstitutional in that it unfairly discriminates against LGBTQI+ congregants on the basis of sexual orientation. As there is a conflict between the right to equality and the right to freedom of religion, this study will analyse which litigation strategy is most useful in challenging the injunction against same-sex marriage in some religious denominations.

In terms of the *Gaum*⁷⁵ case it is submitted that the judgment is correct despite the fact that the reasoning of the High Court was poor in that there were many discrepancies with how the decision was arrived at.⁷⁶ However, despite the poor judgment of the case, the judgment will be discussed in detail later in this study in order to investigate the application of the biblical injunction against same-sex marriages in terms of:

- (a) ordained ministers who enter into a same-sex civil marriage⁷⁷ outside of their religious denominations;
- (b) ordained ministers who want to enter into a same-sex Christian marriage⁷⁸ within their religious denominations; and

⁷⁴ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (also known as the Equality Act).

⁷⁵ *Gaum and Others v Van Rensburg NO and Others* supra (n72).

⁷⁶ The intricacies of the judgment will be discussed in later chapters.

⁷⁷ A same-sex civil marriage is a marriage that takes place outside of the church therefore there is no church blessing or church ceremony.

⁷⁸ A same-sex Christian marriage is a marriage that takes place in the church ie the ceremony and the blessing of the couple by an ordained minister of a religious denomination.

(c) LGBTQI+ lay congregants who want to enter into a same-sex Christian marriage within their religious denominations.

The hypothesis of this thesis is the belief that the right not to be discriminated against unfairly on the prohibited ground of sexual orientation does outweigh the right to religious freedom in terms of one or more of the three issues stated above. Within our historical context of discrimination, the impact of the injunction against same-sex marriage within some Christian religious denominations has far-reaching consequences for LGBTQI+ congregants of those denominations.

It is for this reason that this study focuses on the discrimination suffered by LGBTQI+ congregants who are faced with an injunction against same-sex marriage within their religious denominations.

1.4 THE AIM OF THE STUDY

The aim of this study is to:

- (i) Examine the legal soundness of the injunction against same-sex marriage in some Christian denominations in terms of: (i) ordained ministers who want to enter into a same-sex Christian marriage⁷⁹ within their religious denomination; (ii) ordained ministers who want to enter into a same-sex civil marriage⁸⁰ outside of their religious denomination; and (iii) LGBTQI+ lay congregants who want to enter into a same-sex Christian marriage within their religious denomination;
- (ii) To critically examine whether it is justifiable for a Christian religious denomination to unfairly discriminate against its LGBTQI+ members which include ordained ministers and lay congregants on the ground that they have a right to religious freedom; and
- (iii) To identify the most appropriate litigation strategy to rely on when challenging the injunction against same-sex marriage in some Christian denominations.

The main research question in this dissertation is: Are Christian religious denominations justified in having an injunction against same-sex marriage?

⁷⁹ Ibid.

⁸⁰ A same-sex civil marriage is a marriage that takes place outside of the church therefore there is no church blessing or church ceremony.

Sub-questions include:

- (i) To what extent are Christian religious denominations justified in unfairly discriminating against their LGBTQI+ congregants? With a focus on
 - (a) ordained ministers who only enter into a same-sex civil marriage outside of their religious denomination;
 - (b) ordained ministers who want to enter into a same-sex Christian marriage within their religious denomination; and
 - (c) LGBTQI+ lay congregants who want to enter into a same-sex Christian marriage within their religious denomination;
- (ii) What is the most appropriate forum in which to bring a claim of unfair discrimination based on an injunction against same-sex marriage?

1.5 THE RESEARCH METHODOLOGY

This thesis is based on a desktop review of relevant primary and secondary materials and sources. It is thus a critical qualitative review of literature relevant to this topic.

1.6 THE STRUCTURE OF THE THESIS

Chapter 1 provides the introduction which outlines the framework for the rest of the thesis. This forms the backbone of the study which will then be analysed in the rest of the thesis. Chapter 2 discusses homosexuality and the church and how the church understands scriptures that form part of their doctrinal beliefs around homosexuality and same-sex marriage. It also examines the spectrum of approaches and official positions of key Christian religious denominations in South Africa concerning how they understand and approach the issue of homosexuality within the church. Chapter 3 examines the constitutional framework specifically in light of equality and sexual orientation. Chapter 4 examine the constitutional framework specifically in light of the right to freedom of religion. This chapter also analyses the right to freedom of religion especially in terms of religious liberty and to determine how it is understood in terms of the injunction against same-sex marriage by some Christian religious denominations. Section 36 is also discussed in terms of how conflicting rights can be limited. Chapter 5 shifts the focus to whether the statutory framework in terms of the Civil Union Act and PEPUA could be utilised to address the purported discriminatory conduct by some religious denominations concerning the injunction against same-sex marriage. Chapter 6 is the

analysis chapter which discusses the application of the test in PEPUDA to establish whether (i) there is discrimination and (ii) whether the discrimination is unfair. Chapter 7 is the conclusion chapter which brings the study together and determines a way forward concerning recommendations that can be made.

1.7 CONCLUSION

This chapter introduced the topic and provided the background to the study, research questions and methodology and structure of the thesis. This thesis addresses complex issues around the discriminatory conduct by some religious denominations in the form of an injunction against same-sex marriage directed towards their LGBTQI+ members. It is submitted that as the source of the discrimination is the injunction against same-sex marriage derived from core doctrinal beliefs, the discrimination that LGBTQI+ members are faced with is religious in nature because those beliefs are based on the freedom of religion. Both the rights to equality and freedom of religion are protected, but these rights need to be intricately balanced by our courts in a way that one right is not trumping another. As the injunction against same-sex marriage is derived from a doctrinal belief, our courts must consider whether it would be unwise to force a religious denomination to change its doctrinal beliefs. Instead, a compromise must be reached in order that both the religious denominations' doctrinal beliefs and the equality of its LGBTQI+ congregants are respected. But, in light of South Africa's history of apartheid, a presumption in favour of equality must be considered when looking at both the right to freedom of religion and the right to equality.

This thesis aims to contribute towards the debate around the injunction against same-sex marriage and the balancing of the rights of equality and religious freedom. It analyses the relationship between religious denominations and its LGBTQI+ congregants in light of the injunction against same-sex marriage. It examines what the best litigation strategy is and, whether there is a possibility of a legal remedy in place for LGBTQI+ congregants within religious denominations who want to challenge the stance of the church in light of their doctrinal beliefs around the theology of marriage.

This study will help to deepen the understanding of this area of law and what can be addressed by the Constitution,⁸¹ the legislative framework in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁸² and what cannot be addressed by law. The limitation of this study is that it is focussed solely from a South African perspective.

⁸¹ The Constitution of the Republic of South Africa, 1996.

⁸² Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000.

CHAPTER TWO: HOMOSEXUALITY AND CHRISTIANITY

2.1 INTRODUCTION

Chapter 1 gave a brief introductory overview of the topic by discussing (i) the background which focussed on the legal regulation of same-sex relationships pre and post 1994, (ii) the problem statement, (iv) the aim of the study, (v) the research question, (vi) the research methodology used, and (vii) the structure of the thesis and the conclusion. This chapter will attempt to set out the different approaches of some key Christian religious denominations in order to assess their stance around same-sex marriage.

Homosexuality and Christianity are topics worthy of discussion, especially in light of the context of this study, where the issues are about investigating the application of the biblical injunction against same-sex marriage. Thus, the purpose of this chapter is to examine the biblical injunction against same-sex marriage and the controversy which sometimes arises because of the different ways in which biblical scriptures are understood. Because of the biblical injunction against same-sex marriage, it is not surprising that religious denominations have adopted different approaches. These different approaches cover a broad spectrum ranging from acceptance of same-sex marriage on the one hand and rejection of same-sex marriage on the other hand.

Before discussing the different approaches of these various denominations, it would be prudent to identify the relevant biblical scriptures and the debates that arise amongst Christians on this issue. The reason for this is to ascertain the different approaches within a specific context. The particular context within this study will then be highlighted in further chapters in terms of how the various denominations and their beliefs violate the rights to equality of members of the LGBTQI+ community within the church. This chapter will thus be important in determining whether it is constitutionally valid for churches to deny same-sex couples the right to marry and have their marriages solemnised within the church.

An example of the above issue is in the *Gaum*¹ judgment and the Nederduitse Gereformeerde Kerk (commonly referred to as the NG Kerk or the Dutch Reformed Church of South Africa

¹ *Gaum and Others v Van Rensburg NO and Others* 2019 (2) All SA 722 (GP).

(DRC)). This case will be discussed in detail later in the study. The decision and the approach of the NG Kerk may play an essential role in the equality analysis when it comes to the solemnisation of same-sex couples and, the constitutional validity of the injunction against same-sex marriage in Christian religious denominations.

2.2 SPECTRUM OF APPROACHES

Religion plays a vital role in societal debates, opinions, and attitudes around homosexuality. Clergy within Christian religious denominations influence how their congregants view social change.² Some religious denominations hold firm to their religious beliefs, which oppose homosexuality while trying to preserve the traditional nuclear “intact” heteronormative family, which ultimately influences how their congregants view dialogue around homosexuality and same-sex marriage.³ If religious denominations address homosexuality, they tend to do so in a realistic manner based on practical rather than theoretical considerations, seeing that the powers of the church restrict them.⁴ Accordingly, this leads to an understanding of how clergy and religious leaders influence public opinion about homosexuality.⁵

To begin understanding the acceptance or non-acceptance of homosexuality and same-sex marriage, it is perhaps prudent to start with the stance that some key Christian religious denominations in South Africa take, regarding how homosexuality and same-sex marriage are viewed by the church. It is essential to do this since there are such vastly differing views that arise. Nilson seems to capture the official stance of the church by stating that

“Homosexuality constitutes a deviation from the order of nature according to which humans are created male and female by God; moral norms based on the truth of human nature are unchangeable since 'human nature' is complete and finished”.⁶

² This influence arises out of a theory which is called a social conformity/influence theory which states that behaviour is intentionally or unintentionally influenced by others. It also includes the idea that leaders who have power or confidence can influence groups or individual people.

³ W Cadge et al ‘Uncertainty in clergy’s perspectives on homosexuality: A research note’ (2012) 54(3) *Review of Religious Research* 371-387.

⁴ PA Djupe & JR Neiheisel ‘Deliberation on gay rights and homosexuality in churches’ (2008) 40 *Polity* 411-435; PA Djupe et al ‘Whether to adopt statements on homosexuality in two denominations’ (2006) 45(4) *Journal for the Scientific Study of Religion* 609-621; D Moon *God, Sex, and Politics: Homosexuality and Everyday Theologies* (2004).

⁵ Cadge et al ‘Uncertainty in clergy’s perspectives on homosexuality: A research note’ (2012) 54(3) *Review of Religious Research* 371-387.

⁶ J Nilson *The Church and Homosexuality: A Loneranian Approach* (2001).

It is statements such as the above that are interpreted as clearly sending out the message that male and female are the gender norms that complement each other. This is notwithstanding that the Civil Union Act, 2006 was enacted to give same-sex couples the freedom to marry and create a family. It is submitted that it seems as though some religious denominations rely on a literal interpretation of these scriptures to maintain their stance concerning homosexuality. Doing this ignores the fact that the Civil Union Act is constitutionally based and enacted to give same-sex couples a choice and the right and freedom to marry.

2.2.1 Official position of the main Christian religious denominations in South Africa

These key Christian religious denominations have been identified because 86% of South Africans identify with Christian-based faith denominations, as per the table below.⁷

Table 1: The official position and difference in approach and understanding regarding same-sex marriage and homosexuality that most Christian religious denominations in South Africa adhere to.

NAME OF CHURCH	OFFICIAL POSITION ON HOMOSEXUALITY AND SAME-SEX MARRIAGE	DIFFERENCE IN APPROACH AND UNDERSTANDING	TENTATIVE SUGGESTED JUSTIFICATIONS OF APPROACH
Methodist Church of Southern Africa (MCSA) ⁸	● Accepts and embraces the LGBTQI+ community within the church.	● The Resolution on Affirming the Human Rights and Dignity of the	This denomination seems to be open to an interpretation of

⁷ 'South African Population 2022: South African Religion, Economy and Politics' *World Population Review*, available at <https://worldpopulationreview.com/countries/south-africa-population> accessed on 14 June 2022. Statistics South Africa 'General Household Survey of 2015' recorded in its survey that religious affiliations and observances can be divided into the following: 86% of South Africans believe in God and are Christians (note must be taken of the fact that Christianity was not divided into specific denominations). Other religious affiliations included Muslims who constituted 1.9% of the population, ancestral, tribal, animist or other traditional African religions constituted 5.4% of the population, Hindus who constituted 0.9% of the population, Jewish constituted 0.2% of the population, other religions constituted 0.4% of the population and, 5.2% of the population did not belong to any particular religious affiliation. It must be noted that specific individual religious denominations were not highlighted in this survey. Available at <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> accessed 20 November 2022, accessed on 3 November 2022. The data found in this survey was the latest data highlighting the percentage distribution of religious affiliations by province. Religious affiliations were not recorded in the General Household Surveys from 2016-2022.

⁸ *Methodist Book of Order* available at <https://methodist.org.za/wp-content/uploads/2017/08/Methodist-Book-of-Order.pdf> accessed on 3 February 2021; ZD Siwa et al '2019 Yearbook: The Methodist Church of Southern Africa' see 'Doctrine' p 270-273 available at <https://methodist.org.za/wp-content/uploads/2017/08/MCSA-Yearbook-2019.pdf>; accessed on 3 February 2021. Bishop Purity Malinga (Presiding Bishop of the MCSA) 'Notice of the Methodist Church of Southern Africa on the Legal Rights of LGBTQI+ Methodists' 8 October 2020, available at <https://methodist.org.za/wp-content/uploads/2020/10/Legal-Rights-of-LGBTQIA.pdf>; B

		<p>LGBTQI+ community to enter into same-sex unions is agreed upon by the majority of Circuits and Synod Executive Meetings</p> <ul style="list-style-type: none"> ● Remains in conversation about the theology of marriage, the exercise of conscience, pastoral implications, and perceived marginalisation of people in same-sex relationships ● Biblical scripture cannot alone solve the problem since scripture is open to different interpretations. ● Debate still ongoing concerning Ministers blessing same-sex relationships. ● Applications from homosexuals to be part of the ministry will be accepted. ● While the MCSA continues its development on a theology of marriage, same-sex couples and opposite-sex couples wanting to unionise in terms of the Civil Union Act (2006) will not be prevented from doing so. ● The dialogue will continue concerning the theology of marriage. ● Methodist Church in Britain (the most significant religious denomination in Britain) permits same-sex marriage⁹ 	scripture which embraces diversity
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Lindeque 'Methodist Church change stance and affirm the rights of all LGBTQI+ South Africans' *Good Things Guy*, 8 October 2020, available at <https://www.goodthingsguy.com/business/methodist-church-change-stance-and-affirm-the-rights-of-all-LGBTQI+-south-africans/>; 'Conference address 2019: Presiding Bishop -Elect Rev Purity Malinga' where first woman Presiding Bishop elect of the MCSA Rev Purity Malinga addressed conference delegates, ecumenical guests and observers at Rosebank Methodist Church in the Cape of Good Hope Synod, available at <https://methodist.org.za/download/presiding-bishop-elect-rev-purity-malingas-address-to-conference-2019/> accessed on 2 February 2021.

⁹ H Farley 'Methodist Church allows same-sex marriage in 'momentous' vote' *BBC News*, 30 June 2021, available at <https://www.bbc.com/news/uk-england-57658161> accessed on 1 July 2021.

Dutch Reformed Church of South Africa (DRC) ¹⁰	<ul style="list-style-type: none"> ●Ongoing debate - may be another interpretation of biblical texts regarding the matter. ●2015 decision by the General Synod confirms the equality of all people irrespective of their sexual orientation and maintains to uphold the dignity of all people. ●General Synod of 2016 contradicts decision made in 2015. ●<i>Gaum and Others v Van Rensburg NO and Others</i> 2019 (2) All SA 722 (GP) (8 March 2019. Outcome of case: ●Recognition of the status of same-sex civil unions. ●2016 Synod decision reversed. ●General Synod makes provision for pastors to solemnise such unions. ●Church divided on this issue. 	<ul style="list-style-type: none"> ●Still open to debate on same-sex marriage. ●Biblical scripture cannot alone solve the problem since scripture is open to different interpretations. ●Applications from homosexuals to be part of ministry will be accepted ●LGBTQI+ members of the church and pastors do not have to be celibate ●LGBTQI+ pastors can conclude a same-sex union ●Pastors allowed to marry LGBTQI+ members in the church 	<p>This denomination seems to be open to an interpretation of scripture which embraces diversity.</p>
United Congregational Church of Southern Africa (UCCSA) ¹¹	<ul style="list-style-type: none"> ●Ongoing debate. ●Is still debating the subject but acknowledges the pain 	<ul style="list-style-type: none"> ●Still open to debate on same-sex marriage. ●Biblical scripture cannot alone solve the problem 	<p>This denomination seems to be open to an interpretation of</p>

¹⁰ D Ungerer 'Kerkorde van die Nederduitse Gereformeerde Kerk: Artikels, Reglemente and Aanvullende/Toeliggende Besuite soos vasgestel deur die Algemene Sinode in Oktober 2019' available at https://kerkargief.co.za/doks/acta/AS_KO_2019.pdf accessed on 22 June 2022; 'Handelinge van die sewentiende vergadering van die Algemene Sinode van die Nederduitse Gereformeerde Kerk eMseni Christian Centre, Benoni Sondag 6 Oktober tot Vrydag 11 Oktober 2019' available at <http://ngkerk.net/wp-content/uploads/2020/10/HANDELINGE-ALG-SIN-OKT-2019-FINAAL-VOLKLEUR-GETEKEN-1.pdf> accessed on 3 February 2021; 'Verslag van Taakspan: Homoseksualiteit' available at <http://ngkerk.net/wp-content/uploads/2020/09/Verslag-Homoseksualiteit-AS-2007.pdf> accessed on 3 February 2021; E Mabuza 'Court says Dutch Reformed church's gay pastors can have same-sex unions' *TIMES LIVE*, 8 March 2019, available at <https://www.timeslive.co.za/news/south-africa/2019-03-08-court-says-dutch-reformed-churchs-gay-pastors-can-have-same-sex-unions/> accessed on 10 March 2019; 'Dutch Reformed Church loses court battle over same-sex unions' *ENCA*, 8 March 2019, available at <https://www.enca.com/news/court-overturns-dutch-reformed-church-stance-same-sex-unions> accessed on 10 March 2019; see also *Gaum and Others v Van Rensburg NO and Others* 2019 (2) All SA 722 (GP) (8 March 2019).

¹¹ See the United Congregational Church of Southern Africa's website available at <http://www.uccsa.co.za/resource.html> accessed on 7 June 2022. The church's mission statement reads 'The UCCSA, a church in five countries is called and committed to be a caring and *inclusive* community that bears testimony to the fullness of life in Church, and proclaims that in Christ there is a future' available at <http://www.sasynod.org.za/resources/uccsa-brand-guidelines/35-united-congregational-church-of-southern-africa-brand-guidelines.html> accessed on 3 February 2021; 'Annual Report' 2019 (in author's personal files); Council for World Mission

	<p>that is a reality for people on all sides of the discussion.</p> <ul style="list-style-type: none"> ●The church encourages ongoing biblical and theological reflection concerning the clinical study on the subject of homosexuality and assists pastors and members to cultivate an attitude that will help them to minister to openly gay persons 	<p>since scripture is open to different interpretations.</p> <ul style="list-style-type: none"> ●Applications from homosexuals to be part of ministry will be accepted 	<p>scripture which embraces diversity.</p>
Anglican Church of Southern Africa¹²	<ul style="list-style-type: none"> ●Ongoing debate. ●Divided opinion with its international partners over homosexuality. ●However, the church will not bless same-sex unions, although it would provide loving support and care to same-sex couples. ●Synod of Bishops in 2009 decide that gay clergy will be accepted, but they have to remain celibate. ●2016 Synod of Bishops cannot agree on pastoral guidelines for same-sex couples 	<ul style="list-style-type: none"> ●Diversity is a creation made by the almighty, and all need to be embraced in their difference. ● A culture of safety and inclusivity needs to be grounded in the theological understanding of who we are as people of God ●The debate over this issue continues. 	<p>This denomination seems to be open to an interpretation of scripture which embraces diversity.</p>
Evangelical Lutheran Church in Southern Africa (ELCSA)¹³	<ul style="list-style-type: none"> ●Opposes homosexuality and same-sex marriage. ●Same-sex marriage will not be solemnised by any of their ministers or allowed to take place within any of their churches 	<ul style="list-style-type: none"> ●Same-sex marriage is unacceptable – debate is closed. ●Same-sex marriage is against biblical scripture. Ministers will not bless same-sex relationships. 	<p>This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical</p>

‘The Organisation’ available at <https://www.cwmission.org/about/the-organisation/> accessed on 10 February 2021.

¹² Anglican Church of Southern Africa ‘Canons’ available at <https://anglicanchurchsa.org/canons/> accessed on 10 February 2021; ‘Pastoral Standards, Values and Practices’ available at <https://anglicanchurchsa.org/pastoral-standards-values-and-practices/> accessed on 10 February 2021; ‘A charter for safe and inclusive Church’ available at https://anglicanchurchsa.org/wp-content/uploads/2020/06/A_CHARTER_FOR_SAFE_AND_INCLUSIVE_CHURCH.pdf; ‘Canon 34: Of holy matrimony’ available at <https://anglicanchurchsa.org/canons/>; ‘Provincial Synod resumes debate on human sexuality’ available at <https://anglicanchurchsa.org/provincial-synod-resumes-debate-on-human-sexuality/> accessed on 3 February 2021; ‘Communique from the Bishops’ 24 September 2020 available at <https://anglicanchurchsa.org/communique-from-the-bishops/> accessed on 2 February 2021.

¹³ ‘Constitution of the Evangelical Lutheran Church in Southern Africa’ (2015) available at <https://www.elcsa.org.za/constitution.html> accessed on 10 February 2021; Lutheran World Federation ‘Equal Access, Safety and Meaningful Participation’ 1 March 2016, available at <https://www.lutheranworld.org/news/equal-access-safety-and-meaningful-participation> accessed on 2 February 2021; See S Mikkola ‘Luther, same-sex marriage, and the Evangelical-Lutheran Church of Finland: A gender-sensitive historical analysis’ (2020) 11 *Religions* 14p doi:10.3390/rel11010048.

		<ul style="list-style-type: none"> ●Applications for ministry will not be accepted by self-confessed homosexuals. 	<p>meaning of words is taken as the true meaning of a text. This interpretation then forms part of its biblical beliefs.</p>
Moravian Church of South Africa¹⁴	<ul style="list-style-type: none"> ●Mutual respect and acceptance for differing opinions related to homosexuality 	<ul style="list-style-type: none"> ●Homosexuality and same-sex marriage open for discussion ●. Ministers have the discretion whether or not to perform legal same-sex marriages in their churches. ●Applications for ministry are still under discussion and at the discretion of the Ministers. 	<p>This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical meaning of words is taken as the true meaning of a text. This interpretation then forms part of its biblical beliefs. However, since a debate has begun concerning this issue, this denomination is beginning to open itself up to an interpretation of scripture which embraces diversity</p>
Church of Jesus Christ of Latter-day Saints¹⁵	<ul style="list-style-type: none"> ●Opposes same-sex marriage. ●Marriage between a man and a woman is ordained by God; therefore, same-sex marriage is not endorsed 	<ul style="list-style-type: none"> ●Same-sex marriage is unacceptable – debate is closed. 	<p>This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical meaning of words is accepted as the true meaning of a text. This interpretation then forms part of its biblical beliefs.</p>

¹⁴ ‘Church Order of the Unitas Fratrum (Moravian Church) 2016’ available at www.unitasfratrum.org/wp-content/uploads/2017/12/COUF-Church-Order-2016.pdf accessed on 10 February 2021; ‘Southern Province Synod charts courageous path forward’ *The Moravian Church* [n.d.], available at <https://www.moravian.org/2018/06/southern-province-synod-%E2%80%A8charts-courageous-path-forward/> accessed on 2 February 2021; for information about the Moravian Church see their website <https://www.moravianchurch.co.za/about-moravian-church/> accessed on 10 February 2021.

¹⁵ ‘Church policies and guidelines’ available at <https://www.churchofjesuschrist.org/study/manual/general-handbook/38-church-policies-and-guidelines?lang=eng> accessed on 10 February 2021; ‘The latest changes to the general handbook’ 18 December 2020, available at <https://newsroom.churchofjesuschrist.org/article/general-handbook-update-december-2020> accessed on 10 February 2021; ‘Same-sex marriage’ available at <https://www.churchofjesuschrist.org/study/manual/gospel-topics/same-sex-marriage?lang=eng> accessed on 3 February 2021.

Baptist Church¹⁶	<ul style="list-style-type: none"> ● Opposes same-sex marriage. ● Homosexuality is incompatible with biblical teaching. Marriage only ordained between one man and one woman 	<ul style="list-style-type: none"> ● Same-sex marriage is unacceptable – debate is diverse. ● Same-sex marriage is against biblical scripture. ● Ministers will not bless same-sex relationships. ● Applications for ministry will not be accepted by self-confessed homosexuals. 	<p>This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical meaning of words is taken as the true meaning of a text. This interpretation then forms part of its biblical beliefs. However, since a debate has begun concerning this issue, this denomination is beginning to open itself up to an interpretation of scripture which embraces diversity</p>
Catholic Church¹⁷	<ul style="list-style-type: none"> ● Varied support for same-sex marriage and homosexuality ● Marriage is, however, a faithful, exclusive, and lifelong union between one man and one woman. 	<ul style="list-style-type: none"> ● The same-sex marriage debate is open ● Same-sex marriage is against biblical scripture ● Ministers will not bless same-sex relationships. ● Applications for ministry will not be accepted by self-confessed homosexuals. 	<p>This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical meaning of words are accepted as the true meaning of a</p>

¹⁶ Stance of the church currently remains the same. ‘Constitution and by-laws of the Baptist Union of Southern Africa’ (1993) available at https://www.baptistunion.org.za/index.php?option=com_content&view=article&id=129:constitution-and-by-laws-of-the-baptist-union-of-southern-africa&catid=8&Itemid=370 accessed on 10 February 2021; ‘A statement on the same-sex marriage issue, voting and Christian responsibility’ 21 June 2021, available at https://resources.razorplanet.com/510611-8783/785169_SamesexMarriageVotingandChristianResponsibility.pdf accessed on 3 February 2021.

¹⁷ ‘Dogmatic Constitution on the Church Lumen Gentium solemnly promulgated by His Holiness Pope Paul VI on November 21, 1964’ available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html accessed on 10 February 2021; L Swidler ‘A Catholic Constitution for the Catholic Church’ *Association for the Rights of Catholics in the Church*, 17 May 2018, available at <https://www.arcc-catholic-rights.net/index.php/constitution/a-catholic-constitution-for-the-catholic-church> accessed on 10 February 2021. ‘Vatican II (1962-1965): Four major constitutions’ *University of St Thomas* [n.d.], available at <https://libguides.stthomas.edu/c.php?g=88924&p=574125> accessed on 10 February 2021; ‘Vatican II: celebrating 50 years: Pastoral constitution on the Church in the modern world *Gaudium et Spes*’ available at <https://2o1bb93uvms11ppwm32hemxj-wpengine.netdna-ssl.com/wp-content/uploads/2013/07/Pastoral-Constitution-on-the-Church.pdf> accessed on 10 February 2021; J Diamant ‘How Catholics around the world see same-sex marriage, homosexuality’ *Pew Research Center*, 2 November 2020, available at <https://www.pewresearch.org/fact-tank/2020/11/02/how-catholics-around-the-world-see-same-sex-marriage-homosexuality/> accessed on 3 February 2021; A Prange ‘Pope Francis and homosexuality in the Catholic Church: An analysis’ *DW*, 23 October 2020, available at <https://www.dw.com/en/pope-francis-and-homosexuality-in-the-catholic-church-an-analysis/a-55371918> accessed on 3 February 2021. See also DM Doyle ‘The Catholic Church in a changing world: A Vatican II inspired approach’ available at <https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1025&context=books> accessed on 10 February 2021.

			text. This interpretation then forms part of its biblical beliefs. However, since a debate has begun concerning this issue, this denomination is beginning to open itself up to an interpretation of scripture which embraces diversity.
Seventh-Day Adventist (SDA) ¹⁸	<ul style="list-style-type: none"> ● Opposes homosexuality. Intimacy belongs only within a marriage between one man and one woman (Gen 2:24 NIV). ● Bible makes no accommodation for homosexual relationships; therefore, sexual acts outside of heterosexual marriage are forbidden. ● Opposes homosexuality and any acts associated with homosexuality 	<ul style="list-style-type: none"> ● Same-sex marriage is unacceptable – debate is closed. ● Same-sex marriage is against biblical scripture. ● Ministers will not bless same-sex relationships. ● Applications for ministry will not be accepted by self-confessed homosexuals. 	This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical meaning of words is accepted as the true meaning of a text. This interpretation then forms part of its biblical beliefs.
Uniting Presbyterian Church in Southern Africa ¹⁹	<ul style="list-style-type: none"> ● Opposes homosexuality. ● Christian marriage is an ordained covenant between one man and one woman under God for life 	<ul style="list-style-type: none"> ● Will uphold the definition of what a Christian marriage is. ● Will not bless same-sex unions. 	This denomination seems to rely on the literal approach to interpretation when interpreting scripture. The ordinary grammatical meaning of words is accepted as the true meaning of a text. This interpretation then forms part of its biblical beliefs.

¹⁸ ‘Model constitutions and operating policies’ available at [http://www.ted-adventist.org/sites/default/files/\(17\)TEDwp-d-Model%20Constitutions.pdf](http://www.ted-adventist.org/sites/default/files/(17)TEDwp-d-Model%20Constitutions.pdf) accessed on 10 February 2021; Secretariat General Conference of Seventh-day Adventists *Seventh-Day Adventist Church Manual* (2016) available at https://www.adventist.org/wp-content/uploads/2019/06/seventh-day-adventist-church-manual_2015_updated.pdf accessed on 10 February 2021; Seventh-day Adventist Church ‘Same-sex unions’ available at <https://www.adventist.org/articles/same-sex-unions/> accessed on 10 February 2021; Human Rights Commission ‘Stances of faiths on LGBTQ Issues: Seventh-day Adventist Church’ [n.d.], available at <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-seventh-day-adventist-church> accessed on 3 February 2021; ‘Constitution of the General Conference of Seventh-Day Adventists as revised at the 59th Session held in Atlanta, United States of America, June 24 to July 3, 2010’ available at [https://ted.adventist.org/sites/default/files/\(06\)Gcwp-ConstitutionBylaws.pdf](https://ted.adventist.org/sites/default/files/(06)Gcwp-ConstitutionBylaws.pdf) accessed on 10 February 2021.

¹⁹ ‘The Manual of Faith and Order of the Uniting Presbyterian Church in Southern Africa’ (2007) available at https://unitingpresbyterian.org/web/wp-content/uploads/2018/10/Manual-of-Faith-and-Order_2017.pdf accessed on 10 February 2021. ‘Confessions and Creeds’ available at <https://unitingpresbyterian.org/our-faith/confessions-and-creeds/> accessed on 3 February 2021.

Table 1 indicates the difference in the official position and understanding held by key Christian religious denominations in South Africa concerning homosexuality and same-sex marriage.²⁰ Out of the eleven (11) churches listed above, only one (1) church, the Dutch Reformed Church of Southern Africa allows the solemnisation of same-sex marriage within the church. The dialogue around homosexuality and same-sex marriage continues within the church which indicates an openness to an understanding of scripture which embraces diversity. Four (4) other churches, i.e., Methodist Church of Southern Africa, United Congregational Church of Southern Africa, the Anglican Church and, the Moravian Church are progressing by trying to create a dialogue around homosexuality and same-sex marriage and seem to be open to an understanding of scripture which embraces diversity. It is submitted that this indicates a positive move forward by the church in attempting to accept homosexuality and same-sex marriage. The other six (6) churches which are listed above i.e. the Evangelical Lutheran Church of Southern Africa, Church of Jesus Christ of Latter-day Saints, the Baptist Church, the Catholic Church, the Seventh-Day Adventist Church and, the United Presbyterian Church in Southern Africa oppose homosexuality and same-sex marriage and, believe that a Christian marriage is an ordained covenant between one man and one woman under God for life. Dialogue has not been initiated within these religious denominations. A literal interpretation of scripture concerning the theology of marriage and homosexuality is relied upon. However, there seems to be an emerging dialogue from the Catholic Church and the Baptist Church around homosexuality and same-sex marriage which indicates that perhaps these two churches are considering an interpretation of scripture which embraces diversity. This however does not take away from fact that their beliefs concerning the theology of marriage will not change in the foreseeable future.

All of the above churches agree that irrespective of whether they are deemed to be progressive or not, in their acceptance/non-acceptance of homosexuality and, same-sex marriage, that (i) to discriminate against and persecute homosexual persons is a sin; (ii) rejecting homophobia and supporting the rights of homosexual persons is the most progressive way to advance; and

²⁰ The information derived from Table 1 was taken from the individual church websites. See also Dr S Palm 'From exclusion to embrace re-imagining LGBTIQ belonging in local South African church congregations' 2019, available at <https://blogs.sun.ac.za/urdr/files/2019/03/FromExclusiontoEmbraceResearchReport.April2019.pdf> accessed on 19 October 2022.

(iii) marriage officers should not be compelled to act against their conscience or principles of their religious organisations.²¹

Even though globally the church accepts the concept of the adherence of human rights, they all have the same biblical stance concerning same-sex marriage and homosexuality, the perspective being that same-sex marriage is unbiblical and sinful; therefore, it is unacceptable.²² The issue with this is that even if the church accepts or tolerates the LGBTQI+ community it will not change its doctrinal beliefs in order to approve marriage between same-sex couples. Botha believes that homosexuality has become a church problem and is now no longer a problem that the world is experiencing outside the church.²³ It is submitted that this could be because society has progressed in the secular world in terms of the acceptance of the LGBTQI+ community, whereas its doctrinal beliefs still bind the church.

According to Botha, four major alternative churches focus on the homosexual community and their religious needs.²⁴ These four churches, namely the Reforming Church, the Hope and Unity Metropolitan Community Church, the Gay Christian Community, and the Deo Gloria Family Church, do not form part of the traditional key religious denominations listed in the table above.²⁵ It is submitted that these alternative religious denominations have moved away from key religious beliefs because of their different beliefs and message of acceptance regarding homosexuality and same-sex marriage. These churches are viewed as alternative churches where homosexuals are welcomed and can worship and participate in the "life of the church" without any fear of prejudice or discrimination. It is submitted, that churches such as the alternative religious denominations believe that all people are made in the image and likeness of God and are created equal. They also believe that marriage is not only for

²¹ PH Botha 'Christianity and homosexuals – homosexuals and Christianity' (2006) 46(398) *Word and Action* 7-10.

²² J Easthorpe 'Pride and prejudice' (2015) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 903-917. See also See C Peppler 'Same-sex marriage : A current South African Christian perspective' (2006) 2 *Conspectus: Journal of the South African Theological Seminary* 39-55; AM Lockard 'Homosexuality: Legally permissible or spiritually misguided' (2008) 5 *Conspectus: Journal of the South African Theological Seminary* 135-167; D Pratt 'Engendered danger and endangered gender: the church and homosexual clergy – A case study' (2004) 86 *Scriptura* 224-233; EM Rodriguez 'At the intersection of church and gay: A review of the psychological research on gay and lesbian Christians' (2009) 57(1) *Journal of Homosexuality* 5-38.

²³ Botha 'Christianity and homosexuals' op cit (n21).

²⁴ Botha 'Christianity and homosexuals' op cit (n21). These churches are the Reforming Church (Pretoria), the Hope and Unity Metropolitan Community Church (Johannesburg), the Gay Christian Community (Johannesburg, Durban and Cape Town) and the Deo Gloria Family Church (Pretoria and Durban).

²⁵ Ibid.

procreation but also for joy and companionship, and that there are other ways to be fruitful besides being procreative.²⁶

According to the above discussion, it is submitted that the majority of religious denominations according to Table 1 do not accept homosexuality and see it as the beginning of the erosion of traditional values, classical doctrine, and ethics, especially when it comes to family values.²⁷

2.3 BIBLICAL SCRIPTURES

When society's opinions constantly change concerning sexual *mores* and the definition of marriage, Christian believers need to refer to biblical scripture and biblical teachings around these topics. This ensures that God's word on these principles is understood, because His word is seen as relevant and authoritative for humankind.²⁸

2.3.1 The Biblical basis for marriage

The biblical basis for marriage begins in the Old Testament in the book of Genesis. Many scriptures inform heterosexual marriage, but only a few will be highlighted for purposes of this thesis.

Marriage is not specified in Genesis 1 although it clearly defines the genders that God created as male and female, instructing them to be fruitful and multiply. Genesis 1:27 states that "God created man in His image, in the image of God, He created male and female". Genesis 1:28 states that God blessed them and said, "be fruitful and multiply."

The scriptural basis for marriage begins with the account of creation in Genesis 2. In Genesis 2:18, after God created Adam, He saw that it was not good for man to be alone, so a woman was created as a companion for Adam. After creating the woman (Eve), Adam's response to God was, "this is now bone of my bones and flesh of my flesh," as stated in Genesis 2:23. It is from this basis that heteronormative relationships were created, and the basis for marriage began. Genesis 2: 24 states that "a man shall leave his father and mother and be joined to his

²⁶ Ibid.

²⁷ Botha 'Christianity and homosexuals' op cit (n21).

²⁸ JM Vorster 'Marriage and family in view of the doctrine of the covenant' (2016) 72(3) *HTS: Theological Studies* 1-8. See also Y Dreyer 'The "sanctity" of marriage – An archeology of a socio-religious construct: Mythological origins, forms and models' (2008) 64(1) *HTS: Theological Studies* 499–527; TS Beall 'Seven principles from Genesis for marriage and family' *Answers in Genesis*, 30 April 2016, available at <https://answersingenesis.org/family/marriage/seven-principles-from-genesis/> accessed on 25 January 2021.

wife, and they shall become one flesh." This is reiterated in the New Testament in Matthew 19:4-6. The union of togetherness and marriage between male and female culminates in Matthew 19:6, stating that what God has joined together, no man must separate.

The bringing together of a man and woman is conducive to a united covenant that constitutes two complementary parts ordained by God. These two complementary parts are the basis for heterosexual marriage.²⁹ A marriage between a man and a woman is not just two genders meeting as one but a "reuniting" of two genders that were intended to be together so that humanity is what it ought to be.³⁰ This was God's way of confirming the understanding of marriage by creating a male and female which become one flesh.³¹ When a man and women are joined together in holy matrimony, according to Matthew 19: 4-6, 'what God has joined together, let no man separate' is proof that (i) heterosexual marriage is ordained by God thus an ordained institution; (ii) that male and female are genders which are products of God, and (iii) that fidelity in heterosexual marriage is an important tenet. It thus stands to reason, according to Stott, that a "homosexual liaison is a break from all three divine purposes of marriage".³² Homosexuality, according to Schmidt, falls outside the parameters of marriage, and homoeroticism makes it something sinful which the church should reject.³³ It is submitted, that the perceived message is that homosexuality is not so much a problem as homoeroticism or the act of intimacy between same-sex couples. This thought pattern is thus indicative of the fact that same-sex marriage is unacceptable and not ordained by God, although this is not explicitly stated in the Bible. It is further submitted that homosexuality is an orientation, but homoeroticism/homosex is a choice, thus making it a problem. Sex in this context seems to be for procreation purposes, so it is acceptable between heterosexual couples within the confines of marriage. However, since homosexuals cannot procreate, homoeroticism between same-sex couples is perceived as an unacceptable act. Consequently, since homoeroticism is seen as inappropriate, homosexuality is thus not accepted. Therefore, according to the above, heteronormative relationships and marriages are the only acceptable marriages within the Church and in the eyes of God. It is for this reason that the injunction against same-sex marriage is applied in some Christian religious denominations.

²⁹ J Stott *New Issues Facing Christians Today* (1999).

³⁰ Ibid.

³¹ C Peppler 'Same-sex marriage: A current South African Christian perspective' (2006) 2 *Conspectus: Journal of the South African Theological Seminary* 39-55.

³² J Stott *New Issues Facing Christians Today* (1999).

³³ Ibid.

2.3.2 Biblical scriptures referred to in the argument against homosexuality and same-sex marriage

Biblical scriptures that many Christian religious denominations rely upon to justify their non-acceptance and condemnation of homosexuality and indirectly same-sex marriage are commonly referred to as “clobber scriptures or passages”.³⁴ It is submitted that this is because of the express language used in these scriptures concerning the non-acceptance of homosexuality. The most significant and commonly known texts condemning homosexuality are found in the book of Leviticus. Leviticus 18:22 and Leviticus 20:13 state that “you must not lie with a man as with a woman as it is an abomination, and you will be put to death”. Both of these scriptures in Leviticus indicate a clear warning and prohibition against homosexual eroticism and the consequence thereof. The two scriptures in Leviticus have been extended into other relevant scriptures highlighting the consequences of homoeroticism.

This begins in Jude 7 (the Old Testament), highlighting the consequences of Sodom and Gomorrah's ungodly behaviour, which involved its sexual immorality.³⁵ The consequences of homoeroticism has been referred to in Romans, Corinthians, and Timothy (in the New Testament). Romans 1: 25 -28 states that because the people worshipped idols and lied before God, God gave them over to their shameful lusts and they received the due penalty for their acts, which was a depraved mind allowing them to do what ought not to be done. 1 Corinthians 6: 9-10 are verses where Paul points out people who will be excluded from the Kingdom of God if they do not repent. This includes the “sexually immoral, idolaters, adulterers, and homosexuals” who will not enter into the Kingdom of God. 1 Timothy 1: 8-10 states that “the law was set down for the unjust” (being the lawless and disobedient, the ungodly and sinners and, for the unholy and profane). These will also not enter into the Kingdom of God.

The above biblical texts are derived from the story of Sodom and Gomorrah which can be found in Genesis 19 (the Old Testament). This story is the most critical story related to homosexual eroticism. Sodom and Gomorrah have been associated with homosexual conduct

³⁴ P Germond ‘Heterosexism, homosexuality and the Bible’ in P Germond & S De Gruchy (eds) *Aliens in the Household of God. Homosexuality and Christian Faith in South Africa* (1997) 188-232 who refers to these scriptures as the ‘six shoot’ texts (Genesis 19:1-29; Leviticus 19:22; Leviticus 20:12; Romans 1:18-32; 1 Corinthians 6:9 and 1 Timothy 1:8-11) and the Bible being a revolver. See also Deo Gloria Church ‘Sexual orientation and what the Bible says’ available at <https://www.deogloria.org/sexual-orientation> accessed on 3 February 2021.

³⁵ Jude 7 ‘... just as Sodom and Gororrah and the surrounding cities, which likewise indulged in sexual immorality and pursued unnatural desire, serve as an example by undergoing a punishment of eternal fire’.

for decades because the story describes how the men in the city wanted to have sex with two angels who appeared in the city in the form of men.³⁶

It is submitted that although the word homosexuality is not expressly used in these biblical texts, there is an assumption that homosexuality is included in what Paul is speaking about. Both the Old and New Testament scriptures illustrated above are perceived as condemnatory of sodomy. The strong language used in these scriptures is perhaps indicative of how homosexuality is against the creation of God and what He planned for humanity.³⁷ These biblical scriptures, however, have no express reference to marriage between persons of the same sex. Instead, it is implied that because homosexual relations are an abomination and sinful in the eyes of God that same-sex marriage would fall into the same category. This is perhaps why some key Christian religious denominations believe that the solemnisation of same-sex marriage is against their biblical beliefs.

Religious denominations that hold fast to their understanding of these “clobber scriptures or passages” seem to rely on the literal interpretation of scripture which is deemed a narrow approach to interpretation. Literalism in its most basic form is the understanding of a text sought in the *ipsissima verba*.³⁸ Literalism is associated closely with the literal or ordinary meaning of the word of a text.³⁹ The interpretation process begins by looking at the words of a text to understand its meaning. The primary rule is that if the language is clear in its literal and grammatical form, it must be used.⁴⁰ You may only deviate from this rule if the outcome is ambiguous, vague, or misleading.⁴¹ An example of the principle of the literal rule emanated from the Supreme Court of Appeal in the case of *SARS v Executor, Frith's Estate*.⁴² The court reiterated the traditional rule of the literal approach as the primary rule in statutory

³⁶ S Allberry ‘What does the Bible say about homosexuality?’ *Living Out*, 12 January 2021, available at <http://www.livingout/the-bible-and-ssa> accessed on 14 October 2019. See also M Masango ‘Homosexuality: A challenge to African churches’ (2002) 58(3) *HTS: Theological Studies* 956-972.

³⁷ J Punt ‘The Bible in the gay-debate in South Africa: Towards an ethics of interpretation: perspective on homosexuality and the Bible’ (2006) 93(1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa*, 419-431.

³⁸ L du Plessis *Re-Interpretation of Statutes* (2002) at 93. See also L du Plessis *The Interpretation of Statutes* (1986); and GE Devenish *Interpretation of Statutes* (1992).

³⁹ *Ibid*.

⁴⁰ Du Plessis *The Interpretation of Statutes* (1986) op cit (n38).

⁴¹ Du Plessis *Re-Interpretation of Statutes* (2002) op cit (n38) at 93.

⁴² *SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA). See also *Bhyat v Commissioner for Immigration* 132 AD at 125 and 129 and *Swanepoel v Johannesburg City Council* 1994 (3) SA 789 (A) 794B where the Appellate Division and the Supreme Court of Appeal reiterated the literal rule or approach as being an interpretation that gives meaning to the ordinary grammatical meaning of the words.

interpretation. This is because it gives the words their ordinary grammatical meaning and only departs from this interpretation if the meaning is absurd.⁴³

But ordinary language is not always unambiguous, which means that there is a chance that the interpreter of this rule may come across difficulties that are inherent in language.⁴⁴ If this is so, then the interpreter may deviate from the literal interpretation of words to another understanding in order to give meaning to the words.⁴⁵ There are many criticisms which arise out of the literal approach. The two main criticisms are that, firstly, words do not have an “intrinsic meaning in language”, therefore placing too much emphasis on the words.⁴⁶ Secondly, while dictionaries can give possible meanings to words, they are insufficient, especially regarding the context or background of the text.⁴⁷

From the above, it is apparent why there is an issue around this discussion. It is submitted that many Christian religious denominations interpret biblical scriptures literally condemning homosexuals and, indirectly same-sex marriage. By interpreting scripture in this manner, equality is not advanced, and diversity is not embraced because of the express condemnatory nature of those scriptures.⁴⁸

2.3.3 Biblical scriptures referred to in the argument for the acceptance of homosexuality and same-sex marriage

Besides the condemnatory scriptures listed above, there are also scriptures which provide for a message of love and acceptance (in legal terms, this could be referred to as dignity and worth) of all His creation. As referenced in Genesis 1:26-27, humankind (both heterosexual and homosexual) was created in the image and likeness of God.⁴⁹ It is further submitted that the assurance that all people are made in the image of God is a reminder that everyone is a sacred

⁴³ *SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) 273.

⁴⁴ Du Plessis *Re-Interpretation of Statutes* (2002) op cit (n41) at 93.

⁴⁵ Ibid at 93-94. See also Du Plessis *The Interpretation of Statutes* (1986) op cit (n40) at 31-32; and Devenish *Interpretation of Statutes* (1992) at 28-29.

⁴⁶ Devenish *Interpretation of Statutes* (1992) op cit (n38) at 26. See also CJ Botha *Statutory Interpretation* 5 ed (2014) 95-96.

⁴⁷ In *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (WLD) at 846G the court stated that ‘the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of the word in its particular context in the enactment’.

⁴⁸ M Nel ‘Pentecostals, LGBTIQ+ people and the Bible: An alternative Pentecostal hermeneutical perspective’ (2019) 5(3) *Stellenbosch Theological Journal* 515–540.

⁴⁹ Genesis 1: 26: ‘then God said let us make man in our image, according to our likeness’. Genesis 1:27 ‘So God created man in His own image, in the image of God he created male and female’.

creation. The fact that someone may look different or love differently does not take away the fact that everyone reflects the image of God. It is this love and acceptance (dignity and worth) that the LGBTQI+ community in the church relies upon to dispel the stigma of non-acceptance, and discriminatory behaviour directed at them. Many biblical scriptures talk about love and acceptance (dignity and worth); however, the following biblical scriptures are the most significant scriptures for the acceptance, protection, and love of homosexuality and same-sex marriage.⁵⁰

The scripture that encapsulates full acceptance is found in Galatians 3:28, which states that “there is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.” It is submitted that this scriptural verse challenges the concept of traditional gender roles. Paul makes it clear that God's promise extends to all people. Therefore, prejudice, non-acceptance, and divisions that historically kept people apart have no place in God's community. Leading on from this is the scripture found in Psalm 139:13, which states, “for it was you who formed my inward parts, you covered me in my mother's womb. I praise you, for *I am fearfully and wonderfully made.*”⁵¹ It is submitted that this scriptural verse indicates that God made you just the way you are by creating you while still in the womb. For LGBTQI+ Christians, this expressly shows the love of God and the fact that God does not make mistakes. Another scriptural verse of acceptance that is worthy of highlighting and relied upon by the LGBTQI+ community is found in Isaiah 56:4-5, which states “for thus says the Lord: to the eunuchs who keep my Sabbaths, who choose the things that please me and hold fast my covenant, I will give, in my house and within my walls, a monument, and a name better than sons and daughters; I will give them an everlasting name that name that shall not be cut off”. Eunuchs in biblical times were outsiders who were ostracised because they did not conform to heterosexual sexual norms. They were said to be “othered” and, because of this status, excluded from God's community by the people at the time.⁵² It is submitted that this biblical scripture is

⁵⁰ LE Williams ‘10 Bible passages that teach a Christian perspective on homosexuality’ *Sojourners*, 8 June 2017, available at <https://sojo.net/articles/10-bible-passages-teach-christian-perspective-homosexuality> accessed on 11 February 2020. See also J Punt ‘The Bible in the gay-debate in South Africa: towards an ethics of interpretation: Perspective on homosexuality and the Bible’ (2006) 93(1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 419-431.

⁵¹ My own emphasis.

⁵² Williams op cit (n50). See also Punt ‘The Bible in the gay-debate in South Africa: Towards an ethics of interpretation: perspective on homosexuality and the Bible’ (2006) 93(1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 419-431. W Brueggemann ‘How to read the Bible on homosexuality’ *Outreach –An LGBTQ Catholic Resource*, 4 September 2022, available at <https://outreach.faith/2022/09/walter-brueggemann-how-to-read-the-bible-on-homosexuality/> accessed on 16 August 2023.

a radical message of love and acceptance where God promises inclusion, love, and recognition (dignity and worth) for all who honour Him. It is submitted that for LGBTQI+ members of the Christian community, this scriptural verse highlights that even in their difference, their othering is accepted if they honour and love God.

Leading on from the issue of acceptance is the matter of protecting the LGBTQI+ community within religious denominations. The scriptural verse in this regard is found in Isaiah 43:1, which reads, “do not fear, for I have redeemed you; I have called you by your name, you are mine”. It is submitted that this emphasises the love and protection that God has for his people. God will protect his people and love all of his creation not because of something we have done or achieved but because of His devotion to all. It is submitted that if translated by the LGBTQI+ community in religious denominations, this indicates that all are called by His name and therefore do not need to feel inferior, rejected, or afraid.

Further scriptural verses relied upon are found in Matthew 22: 37-40 where Jesus says “you shall love the Lord your God with all your heart, with all your soul, and with all your mind. This is the first and great commandment. And the second is to love your neighbour as yourself. On these two commandments hang all the Law and the Prophets.” It is submitted that Matthew, in these verses, addresses all the prophetic teachings, which includes the condemnatory scriptures directed at the LGBTQI+ community by making it clear that love of God and love for your neighbour is the central command for a life of love. Love in these verses underpins all other commands. In 1 John 4:7-8, it states, “beloved, let us love one another because love is from God; everyone who loves is born of God and knows God.” It is submitted that for the LGBTQI+ Christian community, their same-sex love is from God and there is no excuse for religious denominations to believe that same-sex love and marriage is unacceptable.

It is submitted that the above scriptures are all indicative of the “pro” argument for the acceptance of same-sex marriage and homosexuality within the church. Love and acceptance, and dignity and worth should be extended to the LGBTQI+ community by religious denominations.

2.3.4 Morality and ethics of interpretation

Homosexuality and same-sex marriage fall into the category of morality and ethics that Christian religious denominations are currently having to confront. Various scholars have

written about the importance of guidelines that should assist in the ethics of biblical interpretation.⁵³ Schneiders argues that to interpret a text validly, the criterion to focus on is the “logic of probability rather than the logic of verification.”⁵⁴ Understanding scripture, according to Punt, is all about hermeneutics which creates parameters for any future or current discussion around these issues.⁵⁵ Religious denominations ought to remember that the role of the Bible in the debate around homosexuality and same-sex marriage includes many opinions and thoughts. The focus, however, must be on how interpreters and readers are interpreting these biblical texts.⁵⁶ It must also be remembered that many interpreters do not read the Bible in a neutral or unbiased way because of socio-cultural influences which constitute human life and personal experiences and preferences.⁵⁷ Interpretation includes mixed results within one's framework of reference. It is submitted that the framework of reference of religious denominations would be the teachings around the perceived sinful nature of homosexuality and indirectly same-sex marriage. This would influence the way biblical scriptures are understood. Punt argues that a hermeneutical approach to the gay debate is dependent on ancient texts and modern interpretations, which create a surplus of meaning.⁵⁸ The Second Vatican Council argues that, “each age must in its own way seek to understand the sacred books because as we interpret the biblical scriptures there is a continuation of interest and at times "lively" debate attached to this interpretation.”⁵⁹ It is submitted that modern interpreters need to project themselves back into the past where the scriptures were originally written. This presents a challenge since interpretation has become far more complex in modern times, putting the interpreter into a position of consolidating the interpretation of these texts in a modern way

⁵³ Punt ‘The Bible in the gay debate in South Africa: Towards an ethics of interpretation’ (2006) 93 *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 419-431.

⁵⁴ SM Schneiders *The Revelatory Text. Interpreting the New Testament as Sacred Scripture* (1991). See also SM Schneiders ‘Feminist ideology criticism and Biblical hermeneutics’ (1989) 19(1) *Biblical Theology Bulletin* 3-10.

⁵⁵ Punt op cit (n50).

⁵⁶ Punt op cit (n50). See also M Masango ‘Homosexuality: A challenge to African churches’ (2002) 58(3) *HTS: Theological Studies* 956-972; L Nortje-Meyer ‘Critical principles for a homosexual reading of biblical texts: an introduction’ (2005) 88(1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 174-182; J Punt ‘The Bible and the dignity of human sexuality: Compromised sexual selves and violated orientations’ (2007) 95 *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 241-252.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Pontifical Biblical Commission ‘The Interpretation of the Bible’ [n.d.], available at https://www.bc.edu/content/dam/files/research_sites/cjl/texts/cjrelations/resources/documents/catholic/pbcinterpretation.htm accessed on 11 February 2021. See also L Nortje-Meyer ‘Critical principles for a homosexual reading of biblical texts: an introduction’ (2005) 88(1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 174-182; PGR de Villiers ‘The role of theology in the interpretation of the Bible: towards a synergy between theological and historical approaches to biblical studies’ (2019) 75(1) *HTS: Theological Studies* 1-9.

fitting with the *mores* of society today.⁶⁰ To do this, one must be conscious of the cultural distance between when these scriptures were scribed and the present day. According to Bultmann,⁶¹ one way to render these historical texts understandable in today's world is to maintain the historical distance between the then and the now.⁶² Gadamer,⁶³ who developed the theory of the hermeneutical circle, argues that there must be a historical distance between the interpreter and the text they are interpreting.⁶⁴ Ricoeur's⁶⁵ thoughts on hermeneutical interpretation is that distance in interpretation is important and necessary for the correct appropriation of the text. Therefore, the methods of literal and historical analysis are necessary for the interpretation of biblical texts.⁶⁶ Biblical hermeneutics includes general hermeneutics, which means that "reason alone cannot fully comprehend the account of events given in the Bible."⁶⁷ It is submitted that the reasoning given in terms of the above authors and their interpretation of biblical hermeneutics is perhaps applicable to religious denominations and how they understand biblical scripture.

Reading biblical scriptures in isolation does not give a true reflection of the entire story of God and His people.⁶⁸ This is because the whole Bible forms the correct context in which interpretation and understanding takes place.⁶⁹ So-called "gay texts", according to Germond, cannot be the totality of interpretation in arriving at a clear understanding of the perspectives

⁶⁰ Pontifical Biblical Commission op cit (n59). Accordingly, there are many ways in which to look at how you are going to interpret biblical texts ie the sociological approach, the approach through cultural anthropology, the psychological and psychoanalytical approach or contextual approaches.

⁶¹ Rudolph Karl Bultmann was a German Lutheran theologian (1884-1976) who wrote extensively on the interpretation of biblical texts and was a prominent critic of liberal theology. See van AG Aarde 'A commemoration of the legacy of Rudolf Bultmann, born 130 years ago' (2014) 40(1) *Studia Historiae Ecclesiasticae* 251-271; de Villiers op cit (n59).

⁶² Pontifical Biblical Commission op cit (59). See also Nortje-Meyer 'Critical principles for a homosexual reading of biblical texts: an introduction' (2005) 88(1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 174-182; de Villiers op cit (n59).

⁶³ Hans George Gadamer was a German philosopher (1900-2002) known for his 1960 magnum opus, *Truth and Method* on hermeneutics. Gadamer believed that hermeneutics is a dialectical process and understanding of the text will always entail an understanding of oneself. See also N Davey 'Gadamer's Aesthetics' in *Stanford Encyclopedia of Philosophy*, 13 June 2007, available at <https://plato.stanford.edu/entries/gadamer-aesthetics/> accessed on 11 February 2021.

⁶⁴ Pontifical Biblical Commission op cit (59). See also de Villiers op cit (n59).

⁶⁵ Jean Paul Ricoeur was a French Philosopher best known for combining phenomenological description with hermeneutics. Thus, his thinking is much the same as Gadamer and Bultmann. See also P Singsuriya 'Ricoeur's method and theological self-understanding' (2019) 39(1) *Acta Theologica* 222-240.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ NJ Duff 'How to discuss moral issues surrounding homosexuality when you know you are right' in C Seow (ed) *Homosexuality and Christian Community* (1996) 144-59.

⁶⁹ Ibid.

of homosexuality.⁷⁰ These scriptures often condemn homosexuality and same-sex marriage without qualification.⁷¹ Regardless of which understanding suits the interpreter, it is the religious denomination's responsibility to correctly discern the will of God and create a dialogue with other believers, and informed people about these moral issues before arriving at a conclusive outcome.⁷²

2.4. CONCLUSION

This chapter explored the approaches of a range of Christian denominations to same sex marriage. From the above discussion, it is submitted that morality and ethics must be considered when interpreting and understanding biblical scriptures used to condemn homosexuality. Same-sex marriage is not directly referred to within any of the noted biblical texts. There is an implication that because homosexuality is regarded as an abomination to God and condemned by religious denominations, same-sex marriage will fall within the same category. Hence, the ongoing debate about the non-acceptance of same-sex marriage within the church. Since same-sex marriage is not a heteronormative institution, the non-acceptance of it within the church becomes problematic. As noted above, some Christian religious denominations are beginning to delve into debates or dialogue around the acceptance of same-sex marriage which is indicative of progressive thinking. However, from the above discussion most Christian religious denominations still believe that heteronormativity is the correct way to conclude a happy marriage and stable family. This is irrespective of the fact that the Civil Union Act 2006 was promulgated for the sole purpose of extending same-sex couples the right to marry and start a family.

As seen in Table 1, most key Christian religious denominations still have a long way to go in accepting homosexuality and same-sex marriage. Traditionally, "condemnatory" homosexual biblical texts have been associated with homoerotic behaviour.⁷³ Thus, according to some religious denominations, these scriptures are perceived as an indication that homosexual

⁷⁰ P Germond 'Heterosexism, homosexuality and the Bible' in P Germond and S De Gruchy (eds) *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (1997) 188-232. Germond refers to the 'gay-texts' as a six shooter text - the Bible is seen as a revolver with reference to six texts (Gen 19:1-29; Lev 18:22, 20:13; Rom 1:18-32; 1 Cor 6:9 and 1 Tm 1:8-11) which act as 'bullets' directed at lesbians to deny their claim for full membership in the community of faith 193.

⁷¹ Punt op cit (n50).

⁷² Ibid.

⁷³ AK Locke 'The Bible on homosexuality' (2005) 48(2) *Journal of Homosexuality* 125-156.

homoeroticism is unacceptable, immoral, and inherently sinful.⁷⁴ It is submitted that this is the stance from which religious denominations proceed with their interpretation and understanding. This creates a perception that religious denominations are firm believers that marriage should be heteronormative.⁷⁵

Heteronormative marriage is still viewed as a sacrament of God's creation within the canon of religious denominations.⁷⁶ Ecclesial opinions influence the institution of marriage, specifically heteronormative marriage.⁷⁷ Man and woman form the basis of a “moral theology of marriage”⁷⁸ and form part of the order of creation, making it important to look at sexual differences to theologise marriage.⁷⁹ Some authors disagree with this view because gender has little to do with theological significance.⁸⁰ Instead, marriage is about the social significance of two people entering into a union before God.⁸¹ If religious denominations viewed marriage in this way, it would be more about love and less about sexual difference and theologising marriage.⁸² It is submitted that religious denominations worldwide are in conversation about whether LGBTQI+ congregants should be allowed to marry or be ordained or, for that matter, hold leadership positions within the church. Unfortunately, many conversations around this issue focus on the fact that the Bible clearly reflects the will of God in this matter.⁸³ However, it is submitted that, if religious denominations are focussing on these specific condemnatory scriptures to condemn their LGBTQI congregants, then it must also practice the other Levitical codes and purity codes stated in those very same scriptures.⁸⁴

It is submitted that the message of non-acceptance implies that heteronormativity is the only correct way in which to live in society. This highlights the fact that LGBTQI+ congregants will have to continue to fight for the same type of equality as their heterosexual counterparts. They

⁷⁴ K Dodge ‘Homosexuality: The Biblical-Christian view’ *Bible.org*, 18 July 2013, available at <https://bible.org/article/homosexuality-biblical-christian-view> accessed on 18 July 2019.

⁷⁵ The Marriage Act defines marriage as the binding of one man to one woman to the exclusion of all others.

⁷⁶ Y Dreyer ‘Decentering sexual difference in public and ecclesial discourses on marriage’ (2008) 64(2) *HTS: Theological Studies* 715-738.

⁷⁷ *Ibid.*

⁷⁸ CC Roberts *Creation and Covenant: The Significance of Sexual Difference in the Moral Theology of Marriage* (2007). See also Y Dreyer ‘The sanctity of marriage – an archaeology of a socio-religious construct: Mythological origins, forms and models’ (2008) 64(1) *HTS: Theological Studies* 499-527.

⁷⁹ *Ibid.*

⁸⁰ G Ward ‘The erotics of redemption – after Karl Barth’ (1998) 8 *Theology and Sexuality* 52-72.

⁸¹ D McCarthy *Sex and Love in the Home: A Theology of the Household* (2001).

⁸² *Ibid.*

⁸³ IJJ Spangenberg ‘Is God a ventriloquist and is the Bible God’s dummy? Critical reflections on the use of the Bible as a warrant for doctrines, policies and moral values’ (2017) 116(2) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 208-223. See biblical texts above.

⁸⁴ PRP Carroll *Wolf in the Sheepfold: The Bible as a Problem for Christianity* (1991) 81.

will always be seen as the “other”. By reviewing the above condemnatory scripture, religion will always outweigh equality and diversity and the presumption of equality will be difficult to achieve.

It is submitted that there seems to be no clear-cut and direct answers to the problems facing sexuality, morality, and ethics that Christians and churches grapple with today. Many scholars have written and reflected on this issue, and they conclude that the Bible must be seen as written by people living in a world that is different from the one we currently live in.⁸⁵ Therefore, the Bible must be read critically within this context, taking into account the changing *mores* of society and the achievement of transformation within South Africa.

The difficulty with the above discussion lies in trying to bridge the gap between how to address same-sex marriage and homosexuality within religious denominations. Religious denomination are more frequently finding themselves at a crossroads when faced with a human-rights agenda and biblical principles. The question is whether they will stand their ground concerning the adoption of the political correctness of a human rights-based approach or stand their ground in the denunciation of homosexuality based on biblical principles.⁸⁶ To accommodate all equally,⁸⁷ there must be a strong presumption in favour of equality especially since we come from a past that discriminated unfairly against the LGBTQI+ community. The question arises concerning how our courts will balance the conflicting rights of equality and freedom of religion. Perhaps this will become clearer in the following chapters dealing with the constitutional framework focussing on the right to equality and religion.

⁸⁵ J Barr *The Bible in the Modern World* (1980) 7; J Barton *People of the Book? The Authority of the Bible in Christianity* (1988); Carroll Wolf *in the Sheepfold* (1991); PR Davies *Whose Bible is it Anyway?* (1995) 204.

⁸⁶ PH Botha ‘Christianity and homosexuals – homosexuals and Christianity’ (2006) 46(398) *Word and Action* 7-10.

⁸⁷ J Easthorpe ‘Pride and prejudice’ (2015) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 903-917.

CHAPTER THREE:

THE CONSTITUTIONAL FRAMEWORK – EQUALITY AND SEXUAL ORIENTATION

3.1 INTRODUCTION

This chapter will focus on the constitutional framework, specifically the right to equality and the right not to be discriminated against based on sexual orientation. Given the focus of this thesis, it is essential to examine how the courts have interpreted not only the right to equality but also how it applies to the listed ground of sexual orientation.

Firstly, it is important to note that when a court has to determine the issues around ordained ministers solemnising same-sex marriages, it considers that those in favour of solemnising same-sex marriages will rely primarily on the right to equality. In contrast, those against solemnising same-sex marriages will rely primarily on the right to freedom of religion. Secondly, it becomes vital to explore how these rights have been interpreted and applied by the courts post-apartheid. Thirdly and more specifically, a discussion around how the courts have interpreted and applied the right not to be discriminated against unfairly on the ground of sexual orientation will be carried out.

In this chapter, this author is going to set out and discuss the above. In the next chapter (which also looks at the constitutional framework) the right to freedom of religion with a specific focus on the right to religious liberty rather than religious equality will be examined.

3.2 THE RIGHT TO EQUALITY

3.2.1 Introduction

The right to equality is guaranteed in section 9 of the Constitution. Section 9 provides that:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

According to Currie and De Waal, there are five subsections in section 9. The first sets out the principle of equality which gives “the right to equal protection and benefit of the law”.¹ The second looks at achieving equality by dealing with affirmative action.² The third lists the prohibited grounds of unfair discrimination.³ The fourth extends the prohibitions of unfair discrimination on a horizontal level.⁴ The fifth presumes that state or private discrimination is unfair if based on the listed prohibited grounds of discrimination.⁵ What is vital regarding the fourth point is the horizontal application that prohibits not only the state from discrimination but also private actors.

Although there is no hierarchy of rights within the Bill of Rights, equality occupies a predominant role in the Constitution as a whole and the Bill of Rights in particular.⁶ Evidence of the predominant role that equality plays in the Bill of Rights can be found in the fact that, not only is the right to equality the first substantive right in the Bill of Rights but also that the concept of “equality” is referred to in three other sections within the Bill of Rights, namely section 7(1),⁷ section 36⁸ and section 39(1)(a).⁹ Further evidence of the predominant and

¹ Section 9(1) of the Constitution. I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 215.

² Section 9(2) of the Constitution. Currie & De Waal *ibid*.

³ Section 9(3) of the Constitution. Currie & De Waal *ibid*.

⁴ Section 9(4) of the Constitution. Currie & De Waal *ibid*.

⁵ Section 9(5) of the Constitution. Currie & De Waal *ibid*.

⁶ Currie & De Waal *op cit* (n1) at 210.

⁷ Section 7(1) states that “the Bill of Rights is the cornerstone of democracy” and affirms the democratic values of equality, dignity and freedom.

⁸ Section 36 provides that the Bill of Rights may only be limited in terms of the law of “general application for reasons that can be considered to be reasonable and justifiable in an open and democratic society based on equality, human dignity and freedom.”

⁹ Section 39(1) states that when a court, tribunal, or forum “interprets the Bill of Rights, it must promote the values that underlie an open and democratic society based on equality, human dignity, and freedom.”

important role that equality plays can be found in section 37 of the Constitution which provides that section 9 is a non-derogable right even in times of an emergency. The importance of equality was reiterated in the *Hugo*¹⁰ case by Goldstone J, who stated that

“The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle. The importance of the equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.”¹¹

The predominant role that equality plays in the Constitution in general and the Bill of Rights in particular, has been referred to by the Constitutional Court in more than one case. In the case of *Fraser*,¹² Mohamed J stated that equality is central to the Constitution.¹³ In the *Van Heerden*¹⁴ case, Moseneke J stated that “equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core value and a foundational value”.¹⁵ It then stands to reason that the right to equality must be understood in this context.

Equality is fundamental to South African society because of the country’s history of apartheid.¹⁶ Apartheid’s social and legal system was based on inequality and discrimination felt by many in South African society.¹⁷ It is for this reason that in post-apartheid South Africa, equality plays such an important role.

¹⁰ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

¹¹ *Supra* at para [74].

¹² *Fraser v Children’s Court Pretoria North and Others* 1997 (2) SA 261 (CC).

¹³ *Supra* at para [20].

¹⁴ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

¹⁵ *Supra* at para [22].

¹⁶ See *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); *Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (CC); *Shalabi and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (30) ILJ 868 (EqC). See also M McGregor ‘Employees right to freedom of religion versus employer’s commercial interests: A balancing act in favour of religious diversity: a decade of cases’ (2013) 25 *South African Mercantile Law Journal* 223-244.

¹⁷ Currie & De Waal op cit (1) 212.

3.2.2 The right to equality in its historical context

The concept of apartheid can usually be traced back to the theoretical ideas of H.F. Verwoerd. In his younger days, Verwoerd believed in the “inherent superiority of Western culture”.¹⁸ He believed that white people had to lead development.¹⁹ Verwoerd’s philosophy was based on the creation of “separate development”.²⁰

In 1947 D.F. Malan (the established leader of Afrikaner nationalism) appointed Paul Sauer (Malan’s closest political associate) to head up the Sauer Commission that would turn apartheid into a comprehensive racial policy.²¹ Verwoerd’s theoretical ideas were accepted by the Sauer Commission whose main purpose was to control the influx of black people into urban areas.²² A report was developed around Verwoerd’s theoretical ideas. The report formed the basis of apartheid thinking and was incorporated into the National Party’s manifesto for the 1948 election.²³

Apartheid was introduced by the National Party after it won the general elections in 1948.²⁴ This was largely due to their “programme of apartheid” which meant the “separate development of the various racial groups”.²⁵ The National Party passed a range of apartheid laws to ensure racial separation in “all aspects of political, social and economic life”.²⁶ The laws also ensured the control of the movement of black South Africans, and their economic activities.²⁷ These laws aimed to separate the white race from the non-white races and separate further the black, coloured and Asian race groups.²⁸ This was to reduce their political power.²⁹

¹⁸ JJ Venter ‘H.F. Verwoerd: Foundational aspects of his thought’ (1999) 64(4) *Koers* 417.

¹⁹ Venter op cit (n18) 420.

²⁰ Venter op cit (n18) 420.

²¹ H Giliomee ‘The making of the Apartheid Plan, 1929-1948’ (2003) 29(2) *Journal of Southern African Studies* 388-389.

²² H Giliomee ‘The making of the Apartheid Plan, 1929-1948’ op cit at 389. See also JP Brits ‘“The voice of the ‘people’? Memoranda presented in 1947 to the Sauer commission by ‘knowledgeable’ Afrikaaners’ (2000) 32(1) *Kleio* 61-83.

²³ Giliomee ‘The making of the Apartheid Plan, 1929-1948’ op cit (n21) 390.

²⁴ Giliomee ‘The making of the Apartheid Plan, 1929-1948’ op cit (n21) 373-392.

²⁵ D Hobart Houghton ‘The significance of the Tomlinson Report’ *SAHO: South African History Online*, [n.d.], available at <https://www.sahistory.org.za/sites/default/files/archive-files2/asjan57.4.pdf> accessed on 16 February 2022.

²⁶ ‘The history of separate development in South Africa’ *SAHO: South African History Online*, 27 August 2019, available at <https://www.sahistory.org.za/article/history-separate-development-south-africa> accessed on 16 February 2022.

²⁷ Giliomee ‘The making of the Apartheid Plan, 1929-1948’ op cit (21) 373-392.

²⁸ ‘The history of separate development in South Africa’ *SAHO: South African History Online* op cit (n26).

²⁹ ‘The history of separate development in South Africa’ *SAHO: South African History Online* op cit (n26).

Indigenous groups were separated into homelands, accounting for approximately 13% of South Africa's land.³⁰ The basic principle of the separate development policies was that black South Africans were granted rights and freedoms but only within the confines of their designated homelands.³¹

In 1958 Hendrik Verwoerd became Prime Minister.³² It was at that time that the refinement of apartheid took place in the form of a "separate-but-equal" policy. The policy strongly advocated a theory of "separate nations." Verwoerd argued strongly that if there were contact between the different race groups, it would hinder their 'evolution into nationhood'.³³ He fought for and believed that the different tribal nations would be given equal political rights in their homelands.³⁴ He thus transformed the apartheid policy into a system of completely separate development.³⁵

Apartheid was based on certain key ideas which included amongst others: (i) South Africans being divided into four distinct racial groups (black, white, coloured and Indian);³⁶ (ii) black South Africans being further divided into ethnic groups and separated into homelands consigning them to become separate "nations".³⁷ This was in order to reduce their political power;³⁸ (iii) each racial and ethnic group were governed separately;³⁹ (iv) education at primary, secondary and higher education levels was separated in such a manner that non-whites were not allowed to attend or be educated alongside whites;⁴⁰ (v) the white population of South Africa was seen as racially superior to any other race group.⁴¹

The whole system of apartheid was implemented through the law. Legislation was enacted to provide bureaucratic control, which was necessary for the application of apartheid policies.⁴²

³⁰ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

³¹ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

³² 'Hendrik Frensch Verwoerd' *SAHO: South African History Online*, 5 November 2020, available at <https://www.sahistory.org.za/people/hendrik-frensch-verwoerd> accessed on 16 February 2022.

³³ Ibid.

³⁴ Ibid.

³⁵ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

³⁶ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

³⁷ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

³⁸ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

³⁹ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

⁴⁰ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

⁴¹ 'A history of apartheid in South Africa' *SAHO: South African History Online* 5 May 2022, available at <https://www.sahistory.org.za/article/history-apartheid-south-africa> accessed on 20 October 2022.

⁴² A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1(4) *International Journal of Constitutional Law* 591.

It is submitted that apartheid laws were loosely divided into two broad categories, namely those aimed at promoting grand apartheid and those aimed at promoting petty apartheid.

3.2.2.1 Grand Apartheid

A wide range of statutes were passed to implement grand apartheid. Among the most significant were the following:

- The Population Registration Act 30 of 1950
- The Bantu (Black) Authorities Act 68 of 1951
- The Promotion of Bantu Self-Government Act 46 of 1959, and
- The Group Areas Act 36 of 1966.

The Population Registration Act required that each citizen of South Africa be classified and registered from birth in accordance with their racial characteristics.⁴³ The determination of classification of the citizens of South Africa was perceived by linguistics, physical appearance and social acceptability.⁴⁴ The South African population was divided into White, Black and Coloured. Coloured was further subdivided into sub-categories of Cape Coloured, Cape Malay, Griqua, Chinese and Indian.⁴⁵ Individual race was reflected in a person's identity number.⁴⁶ This Act was repealed by the Population Registration Act 114 of 1991.

The Bantu (Black) Authorities Act made provision for creating regional and territorial authorities for ethnic groups in the reserves.⁴⁷ Tribal authorities were created and chiefs and headmen were given positions of authority to decide on allocation of land and the development of welfare and pension systems.⁴⁸ The traditional leadership were, to some extent, representatives of the White government⁴⁹ in that they were chosen specifically to enforce

⁴³ Section 5 of the Population Registration Act 30 of 1950.

⁴⁴ P O'Malley '1959. Population Registration Act No 30' *O'Malley Archives* [n.d.], available at <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01838.htm> accessed on 20 October 2022.

⁴⁵ O'Malley '1950. Population Registration Act No 30' op cit (n44).

⁴⁶ 'Key legislation in the formation of apartheid' *Helen Suzman* [n.d.], available at <https://www.cortland.edu/cgis/suzman/apartheid.html#:~:text=The%20Population%20Registration%20Act%20No, in%20the%20individual's%20Identity%20Number> accessed on 20 October 2022.

⁴⁷ 'Bantu Authorities Act of 1951' *SAHO: South African History Online* 1 September 2019, available at <https://www.sahistory.org.za/archive/bantu-authorities-act-1951> accessed on 16 February 2022.

⁴⁸ Ibid.

⁴⁹ Ibid.

government policies to the detriment of their popularity.⁵⁰ The reserves later became self-governing with the enactment of the Promotion of Bantu Self-Government Act.

Among the laws passed to promote grand apartheid was the Promotion of Black Self-Government Act.⁵¹ This Act extended the Bantu (Black) Authorities Act of 1951.⁵² The Act created 10 ethnic homelands each with a degree of self-government.⁵³ The aim of the Act was to grant the homelands independence thereby depriving them of their South African Citizenship.⁵⁴ This enabled the government to claim that there was no black majority in the country because they were in their designated homeland.⁵⁵ It would also prevent blacks from merging into a single nationalist organisation.⁵⁶ Black South Africans were given citizenship of their homeland, giving them full political rights within that specific homeland that they found themselves in.⁵⁷

To create urban separation, the Group Areas Act was created.⁵⁸ This Act created segregated racial zones where members of specific race groups could live and work.⁵⁹ The Act aimed to eliminate mixed areas favouring the segregated regions, allowing the South African people to develop separately.⁶⁰ The separate development policy goal enabled the National Party to maintain white supremacy.⁶¹ It imposed within South Africa control measures over all interracial property transactions and occupation.⁶² The Act displaced hundreds of people within South Africa, separating families, friends and communities. The Act was one way to control the lives of certain race groups such as Coloureds, Indians and Blacks.⁶³ It became a criminal offence for a member of one racial group to reside in an area designated for another racial group.⁶⁴ The Act's effect had far-reaching implications and impacted people and communities

⁵⁰ Ibid.

⁵¹ 'The history of separate development in South Africa' *SAHO: South African History Online* op cit (n26).

⁵² P O'Malley '1959. The Promotion of Bantu Self-Government Act No 46' *O'Malley Archives* [n.d.], available at <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01899.htm> accessed on 20 October 2022.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ P O'Malley 'The Group Areas Act of 1950' *SAHO: South African History Online* 15 March 2021, available at <https://www.sahistory.org.za/article/group-areas-act-1950> accessed on 20 October 2022.

⁵⁹ Ibid.

⁶⁰ SD Girfin 'Race and race classification' in E Rycroft (ed) *Race and the Law of South Africa* (1984) 1-10.

⁶¹ Ibid.

⁶² O'Malley 'The Group Areas Act of 1950' op cit (n58).

⁶³ O'Malley 'The Group Areas Act of 1950' op cit (n58).

⁶⁴ O'Malley 'The Group Areas Act of 1950' op cit (n58).

in South Africa.⁶⁵ One of the implications of this was brought about by the Natives Resettlement Act 19 of 1954, commonly known for its pass laws. It required Blacks to carry their pass books with them, which had to be officially stamped to serve as proof that they were allowed in an urban area that they were not allocated to for a period of time.⁶⁶ This type of law further entrenched the issue of segregation between Black and White South Africans, causing white people to have control over the urban areas and most of South Africa.⁶⁷

With the separation of Blacks, Coloureds and Indians in their separate developments, the Population Registration Act 30 of 1950 was created. It declared that every South African had to register themselves as part of four racial groups: White, Coloured, Indian, and Black. The classification was determined by linguistic skills, social skills and physical appearance.⁶⁸ A phenomenon noticed was the applications of several White females to be reclassified as Chinese to contract valid marriages and cohabit lawfully with their spouses.⁶⁹ This Act was repealed and replaced by the Group Areas Act 77 of 1957 which in turn was repealed and replaced by the Group Areas Act 36 of 1966.

3.2.2.2 Petty Apartheid

A wide range of statutes were passed to implement petty apartheid. Among the most significant were the following:

- The Prohibition of Mixed Marriages Act 55 of 1949
- The Immorality Act 23 of 1950, and
- The Reservation of Separate Amenities Act 49 of 1953.

Amongst the many laws passed to promote petty apartheid, was the Prohibition of Mixed Marriages Act 55 of 1949. The Act prohibited marriage and/or sexual relations between white people and people from other race groups who fell into the race categories of either Coloured,

⁶⁵ O'Malley 'The Group Areas Act of 1950' *SAHO: South African History Online* 15 March 2021 op cit (n58).

⁶⁶ P De Vos and W Freedman *South African Constitutional Law in Context* (2014) 17.

⁶⁷ D Bilchitz 'Constitutional change and participation of LGBTI groups: A case study of South Africa' *IDEA: Institute for Democracy and Electoral Assistance* 31 December 2015, available at <https://www.idea.int/publications/catalogue/constitutional-change-and-participation-lgbti-groups-case-study-south-africa> accessed on 8 March 2021.

⁶⁸ O'Malley '1950. Population Registration Act No 30' op cit (n44).

⁶⁹ Girfin op cit (n60).

Indian or Black.⁷⁰ The Act criminalised marriages between people of different races. Several people were arrested for violating the provisions of this Act.⁷¹

To maintain separate development and separation of the different races, the Immorality Act of 1927 prohibited sexual relations between Whites and other racial groups. The Act was amended in 1950 (The Immorality Amendment Act of 1950), prohibiting Whites and other racial groups from indulging in unmarried sexual intercourse.⁷² The Immorality Act 23 of 1957 (subsequently renamed the Sexual Offences Act, 1957) repealed the 1927 and 1950 Acts and replaced them with “a clause prohibiting immoral or indecent acts between Whites and any other race group”.⁷³ The maximum penalty for defying the prohibitions was the imprisonment of both partners for a period of up to seven years.⁷⁴ The Act also prohibited “sexual intercourse with people under the age of 16, brothel-keeping and living off the proceeds of prostitution”.⁷⁵

The Reservation of Separate Amenities Act was created to further the separation of the different races. This Act was designed to separate Whites and Blacks in social spaces and, by the creation of laws and regulations, imposed restrictions and segregation of the different race groups.⁷⁶ The separation of social spaces included transport, cinemas, restaurants, hotels, beaches, schools and universities, to name but a few.⁷⁷

⁷⁰ J Beningfield *The Frightened Land: Land, Landscape and Politics in South Africa in the Twentieth Century* (2006).

⁷¹ Ibid.

⁷² A Carolin ‘Apartheid’s Immorality Act and the fiction of heteronormative whiteness’ (2017) 54(1) *Tydskrif vir Letterkunde* 111-128. See also J Martens ‘Citizenship, civilisation and the creation of South Africa’s Immorality Act, 1927’ (2007) 59(1) *South African Historical Journal* 223-241.

⁷³ Ibid. See also P O’Malley ‘1957. Immorality Amendment Act No 21’ *O’Malley Archives* [n.d.], <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01837.htm> accessed on 16 February 2022.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ SE Donaldson ‘The legacy of the Separate Amenities Act: Perceptions of recreation and future planning in the Northern Province, South Africa’ (1996) 13(6) *Development Southern Africa* 871-879.

⁷⁷ P O’Malley ‘1953. Reservation of Separate Amenities Act No 49’ *O’Malley Archives* [n.d.], <https://omalley.nelsonmandela.org/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01857.htm> accessed 30 November 2022. See also V Cadman ‘Open beaches: the receding tide of apartheid’ (1986) 3(3) *Indicator South Africa* 1-4.

3.2.2.3 Apartheid and same-sex relations

The Immorality Act also codified unlawful carnal intercourse and other related acts, including the common law prohibition on same-sex sexual relations.⁷⁸ The Immorality Act, when enacted, did not specifically address same-sex offences. The common law applied to any unnatural offences, but the statutory offences began affecting public conduct like public displays of gay sex and cross dressing by gay men, until 1967.⁷⁹ After a raid on a gay party in a private home in a wealthy suburb of Johannesburg in 1966,⁸⁰ the legislature sought to tighten up on homosexual activity when, as an amendment to the Immorality Act, it sought to initiate a compulsory three year prison term for a single offence by gay men and lesbian woman.⁸¹ This was strongly opposed by the LGBTQI+ community, which caused the Parliamentary Select Committee to drop the legislation.⁸² Amendments to the Immorality Act were made in 1969 with regard to raising the age of consent of male homosexual activity to 19 years⁸³ and making male to male intimacy illegal at a party.⁸⁴ By the second half of the twentieth century, most of the provisions punishing non-procreative sex were directed towards homosexuality.⁸⁵ In August 1985, the President's Council Ad Hoc committee put forward new recommendations concerning homosexuality.⁸⁶ The committee suggested that a more thorough investigation was needed in three areas being, (i) criminal prohibitions should be extended to include women in

⁷⁸ P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' (1996) 12 *South African Journal on Human Rights* 274-275. Through Roman-Dutch law tradition there were specific restrictions on same-sex intimacy that became law in South Africa. Roman-Dutch law prohibited and punished all non-procreative sexual activity right up to the beginning of the twentieth century where the common law specifically punished sodomy, mutual masturbation and 'other unnatural sexual offences' between men.

⁷⁹ See M Gevisser 'A different fight for freedom: A history of South African Gay and Lesbian Organization from the 1950s to 1990s' in M Gevisser and E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (1995).

⁸⁰ Known as The Forest Town Raids. G Retief 'Keeping Sodom out of the laager: State repression of homosexuality in Apartheid South Africa' in M Gevisser and E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (1995) 99-111. See also Gevisser 'A different fight for freedom' op cit (n79) 30-31.

⁸¹ Retief op cit (n80), Gevisser 'A different fight for freedom' op cit (n79).

⁸² Retief op cit (n80), Gevisser 'A different fight for freedom' op cit (n79). The Parliamentary Committee was reviewing the legislation on behalf of parliament.

⁸³ Section 14(b) of the Immorality Amendment Act, 1969.

⁸⁴ Section 20A of the Immorality Amendment Act, 1969. 'A party' defined in the Act means any occasion where more than two persons are present.

⁸⁵ E Cameron 'Unapprehended felons: Gays and lesbians and the law in South Africa' in M Gevisser and E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (1995) 91 citing *S v V* 1967 (2) SA 17 (E) (holding masturbation between men was still a crime). Sodomy prosecutions and convictions increased dramatically, for example in 1992 there were 428 prosecutions and 283 convictions and "unnatural sexual offences" also increased, for example in 1992 there were 26 prosecutions and 24 convictions. See K Botha and E Cameron 'Sexual privacy and the law' (1993) 4 *South African Human Rights Yearbook* 219, 224.

⁸⁶ Gevisser 'A different fight for freedom' op cit (n79) 60.

gay conduct (ii) society should express its abhorrence of homosexuality and (iii) what forms of punishment or rehabilitation programmes would be most appropriated for homosexuals.⁸⁷

The apartheid regime was criticised worldwide for its discriminatory laws. LGBTQI+ movements were established during this period and they were able to table their issues onto the anti-apartheid agenda.⁸⁸ In 1982 the Gay and Lesbian Association of South Africa (GASA) was launched. This was the first national lesbian and gay movement in South Africa. GASA did not place itself within the anti-apartheid struggle.⁸⁹ As a result, it was seen as unsympathetic to the apartheid movement which resulted in its removal from the International Lesbian and Gay Alliance (ILGA).⁹⁰

Lesbian and Gays against Oppression (LAGO) was formed in 1986 and had direct links with anti-apartheid groups.⁹¹ In 1988 Simon Nkoli, a gay anti-apartheid activist formed the Gay and Lesbian Organisation of the Witwatersrand (GLOW) which was seen as the first black gay and lesbian organisation. GLOW committed itself to a “non-racist, non-sexist and non-discriminatory democratic future”.⁹² With GLOW having paved the way forward in the fight against apartheid, the Western Cape Organisation of Lesbian and Gay Activists (OLGA) was created. OLGA was led by anti-apartheid activists who were instrumental in affiliating OLGA with the United Democratic Front (UDF) which was politically aligned with the African National Congress (ANC) in its fight for democracy.⁹³ OLGA’s affiliation with the UDF helped to disseminate knowledge about the issues surrounding LGBTQI+ rights.⁹⁴

As an affiliate of the UDF, OLGA was able to make important submissions to the Constitutional Committee of the African National Congress lobbying for the protection of LGBTQI+ rights in its draft constitution.⁹⁵ The ANC had not implemented a policy on sexual

⁸⁷ Gevisser ‘A different fight for freedom’ op cit (n79) 60.

⁸⁸ J Cock ‘Engendering gay and lesbian rights: The equality clause in the South African Constitution’ (2002) 26 *Woman’s Studies International Forum* 36.

⁸⁹ B Luirink *Moffies Gay Life in South Africa* (2000) 21.

⁹⁰ P De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ (2007) 23 *South African Journal on Human Rights* 435. See also S Croucher ‘South Africa’s democratisation and the politics of gay liberation’ (2002) 28 *Journal of South African Studies* 324; Cock ‘Engendering gay and lesbian rights’ op cit (n88).

⁹¹ EC Christiansen ‘Ending the apartheid from the closet: Sexual orientation in the South African constitutional process’ (1997) 32 *International Law and Politics* 1023.

⁹² R Louw ‘Sexual orientation’ (1997) 8 *South African Human Rights Yearbook* 260.

⁹³ Christiansen ‘Ending the apartheid from the closet’ op cit (n91) 1024.

⁹⁴ J Nicol ‘If we can’t dance to it, it is not our Revolution’ in N Hoad et al (eds) *Sex and Politics in South Africa* (2005) 72-84.

⁹⁵ Bilchitz ‘Constitutional change and participation of LGBTI Groups’ op cit (n67).

orientation until the late 1980s because senior ANC officials dismissed LGBTQI+ issues as irrelevant.⁹⁶

Important personal interventions by gay rights activists played a role in the inclusion of sexual orientation in the Interim Constitution's Bill of Rights.⁹⁷ These interventions were borne out of a need to voice their displeasure with being discriminated against. Peter Tatchell in London and Simon Nkoli in South Africa were two important activists who mobilised the connection between gay rights and the anti-apartheid struggle, thus expanding the conception of liberation.⁹⁸ Anti-apartheid activists from OLGA and GLOW met with various members of the ANC which included Albie Sachs (who was a member of the constitutional working committee), impressing upon them the importance of including rights for the LGBTQI+ community on the ANC agenda.⁹⁹ Edwin Cameron, a leading human rights lawyer at the time, argued in favour of the prohibition of all forms of discrimination.¹⁰⁰ Cameron also argued for the principle of non-discrimination which should include sexual orientation in the Constitution.¹⁰¹ Cameron believed that the campaign should be approached practically by not insisting on the inclusion of same-sex marriage and adoption at that stage since those topics were still controversial even within the anti-apartheid movement.¹⁰²

It was only when the Interim Constitution began being drafted did the ANC begin to formally recognise the rights of the LGBTQI+ community.¹⁰³ They agreed only then to include in the proposed Bill of Rights the prohibition of discrimination based on sexual orientation.¹⁰⁴ Several influential members of the ANC supported and continue to support the LGBTQI+ movement. These included Anglican Archbishop Desmond Tutu who believed that fighting against homophobia and heterosexism was a worthy moral crusade;¹⁰⁵ Albie Sachs (former constitutional lawyer and Constitutional Court judge) who maintained that democracy means

⁹⁶ Cock 'Engendering gay and lesbian rights' op cit (n88).

⁹⁷ Gevisser 'A different fight for freedom' op cit (n79) 14.

⁹⁸ Cock 'Engendering gay and lesbian rights' op cit (n88).

⁹⁹ De Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' op cit (n90) 436. See also Cock 'Engendering gay and lesbian rights' op cit (n88).

¹⁰⁰ E Cameron 'Sexual orientation and the constitution: a test case for human rights' (1993) 110 *South African Law Journal* 450–472.

¹⁰¹ Bilchitz 'Constitutional change and participation of LGBTI Groups' op cit (n67).

¹⁰² Bilchitz 'Constitutional change and participation of LGBTI Groups' op cit (n67). See also De Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' op cit (n90).

¹⁰³ De Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' op cit (n90) 437.

¹⁰⁴ De Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' op cit (n90) 437.

¹⁰⁵ P Germond and S de Gruchy (eds) *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (1997).

that people can be free to be whom they want to be¹⁰⁶ and, Edwin Cameron (gay rights activist and Constitutional Court judge) acknowledged that interventions with members of the technical committees were influential during the drafting of the interim constitution.¹⁰⁷ Section 8(2) of the Interim Constitution thus “prohibited unfair discrimination directly or indirectly on the ground of sexual orientation”. This was seen by the LGBTQI+ community as a victory (albeit temporary) in their struggle for human rights and the liberation of the oppressed.¹⁰⁸ This, however, impressed upon them the fact that their focus should now shift to “ensuring that sexual orientation was retained in an enumerated equality clause” within the final Constitution.¹⁰⁹ Groups wanting to influence the process of the drafting of the Final Constitution focused on drafting submissions to the various themed committees ensuring sufficient support for the retention of sexual orientation in the equality clause from political parties and members of Parliament. This was pursued by LGBTQI+ activists through the National Coalition for Gay and Lesbian Equality (NCGLE) which was viewed as a national body lobbying for the inclusion of the equality clause within the Final Constitution.¹¹⁰

However, by October 1995 in the working draft of the final Constitution, the inclusion of sexual orientation as a protected class was still being identified as a “contentious and outstanding issue”.¹¹¹ Discussions around sexual orientation being protected as a “universally accepted fundamental right” was supported by the Technical Committee of Theme Committee Four (of the Constitutional Assembly) in its Explanatory Memoranda prepared for the Constitutional Committee.¹¹² The Committee referred to the similarity between discrimination based on sexual orientation and other forms of discrimination in human rights documents.¹¹³ It highlighted the fact that the “listed grounds of discrimination in international law related to characteristics and choices that formed part of an integral human personality and identity”.¹¹⁴

¹⁰⁶ Gevisser ‘A different fight for freedom’ op cit (n79) 82.

¹⁰⁷ S Croucher ‘South Africa’s democratisation and the politics of gay liberation’ (2002) 28(2) *Journal of Southern African Studies* 315-330.

¹⁰⁸ De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n90) 436. See also Christiansen ‘Ending the apartheid from the closet’ op cit (n91).

¹⁰⁹ Bilchitz ‘Constitutional change and participation of LGBTI groups’ op cit (n67).

¹¹⁰ CF Stychin ‘Constituting sexuality: The struggle for sexual orientation in the South African Bill of Rights’ (1996) 23(4) *Journal of Law and Society* 461. See also Cock ‘Engendering gay and lesbian rights’ op cit (n88); De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 432-465.

¹¹¹ Christiansen ‘Ending the apartheid from the closet’ op cit (n91) 1032.

¹¹² The Technical Committee of Theme Committee Four dealt with fundamental rights. Section 2: Equality, available at <https://www.justice.gov.za/legislation/constitution/history/REPORTS/TC4-09105.PDF> accessed on 30 October 2022.

¹¹³ Ibid.

¹¹⁴ Ibid.

The Technical Committee's arguments and recommendations for the inclusion of sexual orientation in the Final Constitution were based on various international human rights documents since there was a notable absence of human rights documents in South Africa. The problem however was that there were no formal international human rights documents which explicitly included protection of the LGBTQI+ community or prohibited discrimination based on sexual orientation.¹¹⁵ This meant that development had to be considered where international human rights bodies could begin interpreting certain rights which extended to LGBTQI+ members.¹¹⁶

The arguments of the National Coalition for Gay and Lesbian Equality (NCGLE) were to focus on a narrative of non-discrimination and equality.¹¹⁷ This was because the NCGLE did not want to speak about gay rights but instead about equality.¹¹⁸ The NCGLE's submissions to the Constitutional Assembly (i) emphasised the fact that all forms of discrimination were similar in that discrimination against the LGBTQI+ community displayed the same basic features as discrimination based on the grounds of race and gender;¹¹⁹ (ii) that on the basis of scientific evidence, sexual orientation was natural and could not be changed;¹²⁰ (iii) that homoeroticism was universal and found in all parts of society and culture, and, protecting the LGBTQI+ community would not infringe on the rights of heterosexuals.¹²¹ The NCGLE submissions demonstrated a clear argument in seeking to secure sexual orientation in the final Constitution. This was done in a non-threatening way but with a strong underlying message for the basic demand for equality.¹²²

In October 1995 the Constitutional Committee agreed to follow the Technical Committee's recommendation which included the retention of sexual orientation as a category protected from unfair discrimination in the Final Constitution.¹²³ This was despite fragmented

¹¹⁵ Christiansen 'Ending the apartheid from the closet' op cit (n91) 1035.

¹¹⁶ H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19(2) *Fundamina* 221-250.

¹¹⁷ See also De Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' op cit (n91).

¹¹⁸ Cock 'Engendering gay and lesbian rights' op cit (n88).

¹¹⁹ Cock 'Engendering gay and lesbian rights' op cit (n88).

¹²⁰ Stychin op cit (n110) 471.

¹²¹ Stychin op cit (n110) 471-473.

¹²² Bilchitz 'Constitutional change and participation of LGBTI Groups' op cit (n67).

¹²³ Christiansen 'Ending the apartheid from the closet' op cit (n91) 1042. See also de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19(2) *Fundamina* 232.

organisations, public opposition and limited legal precedent.¹²⁴ By the end of the process, the inclusion and retention of sexual orientation in the equality clause in the Final Constitution was supported by virtually all parties,¹²⁵ thus making South Africa the first country in the world to expressly protect the rights of the LGBTQI+ community by prohibiting discrimination on the basis of sexual orientation.¹²⁶

For LGBTQI+ activists this was seen as an achievement with regard to the political context of South Africa.¹²⁷ It is submitted that this was a historical moment for South Africa. A country that came out of an era with very little in the way of human rights to a place where democracy could be developed and human rights highlighted. This meant that protection from discrimination on the grounds of sexual orientation for minority orientations such as the LGBTQI+ community was acknowledged in an equal and non-discriminatory manner. This transformative era would see the inclusion of the LGBTQI+ community and the invalidation of the common-law offence of sodomy and related statutory offences by the Constitutional Court.¹²⁸

In light of the historical context, it is not surprising that the right to equality features so prominently in the Constitution which expressly prohibits unfair discrimination on the basis of sexual orientation. Thus, the importance of the constitutional commitment to equality and a strong presumption in favour of equality must recognise the patterns of inequality.¹²⁹ It is submitted that to progress as a democratic country, our past must be remembered enabling us to learn from it and move forward in a constitutionally correct manner by respecting the rights and values within our Constitution.

Now that the history of apartheid has been summarised, I will turn to and focus on the right to equality in section 9 of the Constitution.

¹²⁴ Christiansen 'Ending the apartheid from the closet' op cit (n91) 1042, de Ru op cit (n123) 232.

¹²⁵ Bilchitz 'Constitutional change and participation of LGBTI Groups' op cit (n67).

¹²⁶ Section 8(2) of the Interim Constitution and confirmed by s 9(3) of the Constitution, 1996.

¹²⁷ De Vos 'Same sex marriage: The right to equality and the South African Constitution' (1996) 22(2) *South African Public Law* 355-382.

¹²⁸ Bias towards the LGBTQI+ community and anti-gay laws continued until overturned by the Constitutional Court in 1996. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

¹²⁹ Currie & De Waal op cit (n1) 212.

3.2.3 Understanding Section 9 of the Constitution

3.2.3.1 Introduction

To address South Africa's past transgressions and the progress made in our democratic society, the Bill of Rights (BOR) contains a specific right to equality. The right to equality is guaranteed in section 9 of the Bill of Rights.¹³⁰ It occupies an important place in the South African legal order, which is an essential component of the Constitution.¹³¹ With equality being both a right and a value, it can fulfil a number of roles in the process of constitutional interpretation in our courts.¹³²

Because of the importance of the right to equality, South Africa has a rich jurisprudence with regard to equality cases that have been decided at the Constitutional Court. However, it is important to distinguish between those cases in which a person wants to challenge legislation because it infringes the right to equality and those in which a person seeks to challenge both public and private conduct on the ground that it infringed the right to equality. In cases where a person wants to challenge a legislative provision, they have to rely directly on sections 9(1), 9(2) and 9(3). This is because legislation can be declared invalid only if it infringes the Constitution itself. It cannot be declared invalid if it infringes other legislation, for example, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). In those cases where a person wants to challenge public or private conduct, they cannot rely directly on section 9. Instead, they have to rely on PEPUDA. This is because of the principle of subsidiarity, which provides that if a person alleges that one of their constitutional rights has been infringed, they must rely on legislation that has already been adopted to protect that right rather than relying on the constitutional right itself.¹³³

¹³⁰ Section 9 states that (1) "Everyone is equal before the law and has the right to protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken; (3) the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

¹³¹ S Jagwanth 'Expanding equality' 2005 *Acta Juridica* 131-148.

¹³² Ibid.

¹³³ De Vos & Freedman *South African Constitutional Law in Context* op cit (n66) chapter 13.

The principle of subsidiarity is important and must be adhered to. This was reiterated in the *De Lange*¹³⁴ case, where the Constitutional Court stated that “when there is legislation that gives effect to the Constitution, you cannot bypass that legislation and rely directly on the Constitution without challenging that piece of legislation that falls short of the constitutional standard”.¹³⁵ In *My Vote Counts NPC*,¹³⁶ the court held that the principle of subsidiarity is important for three reasons:

“First, by allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation; second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights; and third, allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of ‘two parallel systems of law’”.¹³⁷

In the remainder of this chapter, the focus will be on those cases in which a person challenges legislation directly against sections 9(1), 9(2) and 9(3). The cases in which a person relies on PEPUDA will be discussed in Chapter 5. The relationship between subsection 9(1), 9(2) and 9(3) has been considered by the Constitutional Court in a number of cases,¹³⁸ but the leading cases are generally considered to be *Prinsloo*,¹³⁹ *Van Heerden*¹⁴⁰ and *Harksen*.¹⁴¹ Before turning to discuss these cases, however, it is important to consider the relationship between formal and substantive equality. This is because our courts have adopted a substantive approach

¹³⁴ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* (2015) ZACC 53.

¹³⁵ *Supra*. See also *My Vote Counts NPC v Speaker of the National Assembly and Others* (2015) ZACC 31 where the majority judgment repeated the importance of the principle of subsidiarity and the need to adhere to it; *Sali v National Commissioner of the South African Police Service and Others* (2014) ZACC 19; 2014 (9) BCLR 997 (CC) at para [4] and *MEC for Education, KwaZulu-Natal, and Others v Pillay* (2007) ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para [40].

¹³⁶ *My Vote Counts NPC v Speaker of the National Assembly* *supra* (n135) 160. See also *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para [73] where O’Regan J held that ‘where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.’

¹³⁷ *Ibid*.

¹³⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC); *MEC for Education: KwaZulu-Natal & Others v Pillay* Case CCT 51/06, 2008 (1) SA 474 (CC); *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) amongst others.

¹³⁹ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC).

¹⁴⁰ *Minister of Finance and Another v van Heerden* 2004 (6) SA 121 (CC).

¹⁴¹ *Harksen v Lane and Others* 1998 (1) SA 300 (CC).

towards equality which has influenced the interpretation of section 9 of the Constitution. Each one of these cases will be discussed in turn.

But, before we elaborate on these cases, a discussion on the difference between formal and substantive equality needs to be had.

3.2.3.2 Formal equality versus substantive equality

3.2.3.2.1 Formal equality

Formal equality requires that all people in the same situation be treated the same.¹⁴² People should not be treated differently because of irrelevant characteristics such as race, colour, gender or religion.¹⁴³ De Vos reiterates this, by stating that formal equality does not accommodate difference but demands neutrality.¹⁴⁴ According to Smith, formal equality stems from the Aristotelian formula that like cases should be treated alike.¹⁴⁵ Thus, this formula finds itself expressed as direct discrimination or equal treatment, which makes it unlawful to treat a person any other way except equally based on their race, colour, gender or religion.¹⁴⁶ As Fredman notes, inequalities continue despite the introduction of formal equality.¹⁴⁷ This is accredited to five characteristics: “(i) the assumption that a person can be distracted from their colour, gender or religion and dealt with in terms of merit, (ii) assuming that the aim of formal equality is identical treatment, (iii) basing formal equality on a universal person; (iv) that formal equality is a relative concept and (v) it is based on a negative conception of freedom.”¹⁴⁸ Formal equality is thus a concept according to which all people must be treated the same, even if such treatment reinforces “existing inequalities and presupposes that all persons are equal-bearers of rights in a just social order”.¹⁴⁹ This indicates that the likelihood of formal equality having serious limitations is a given. Flax argues that advocating sameness undermines the

¹⁴² A Smith ‘Equality constitutional adjudication in South Africa’ (2014) 14(2)4 *African Human Rights Law Journal* 609-632.

¹⁴³ Ibid.

¹⁴⁴ De Vos and Freedman *South African Constitutional Law in Context* op cit (n66).

¹⁴⁵ Smith ‘Equality constitutional adjudication in South Africa’ op cit (n142).

¹⁴⁶ Smith ‘Equality constitutional adjudication in South Africa’ op cit (n142).

¹⁴⁷ S Fredman ‘Facing the future: Substantive equality under the spotlight’ in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) ch 2.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

important norm of the value of diversity.¹⁵⁰ Substantive equality is then the only way to address the limitations found in formal equality.

3.2.3.2.2 Substantive equality

Substantive equality requires an examination, not only of the legal, but also of the social, economic and political context of inequality.¹⁵¹ It recognises that the equal treatment of different people can merely reinforce existing inequalities. Thus, differential treatment is sometimes necessary to achieve equality. Substantive equality is directed more towards an outcome-based idea of equality which also incorporates indirect discrimination.¹⁵² The South African Constitution subscribes to the substantive notion of equality.¹⁵³ Moseneke J in the *van Heerden*¹⁵⁴ case explained substantive equality in the South African context as follows:

“This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantages in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable, because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society”¹⁵⁵

According to Woolman, equality and dignity are equally important, clearly illustrating the inter-connectedness between the two rights.¹⁵⁶ In *Prinsloo*,¹⁵⁷ the Constitutional Court held that

¹⁵⁰ J Flax ‘Beyond equality: Gender, justice and difference’ in G Block & S James (eds) *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (1992) ch 11.

¹⁵¹ Jagwanth op cit (n131) 131-148.

¹⁵² Smith op cit (n142).

¹⁵³ *President of the Republic of South Africa v Hugo* supra (n10) 41 where Justice O’Regan stated that ‘although the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality’ (para [112]).

¹⁵⁴ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

¹⁵⁵ Supra at para [27].

¹⁵⁶ S Woolman ‘Dignity’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008-) 6.

¹⁵⁷ *Prinsloo v Van Der Linder and Another* 1997 (3) SA 1012 (CC).

equality does not lie “in treating everyone in the same way, but in treating everyone with equal concern and respect”.¹⁵⁸ Deane and Brijmohanlall believe that it may be the very essence of equality to treat people differently in order to accommodate their different needs and interests.¹⁵⁹ Our Constitution¹⁶⁰ gives expression to this.

It is at this point prudent to discuss the three dimensions of section 9, being section 9(1), section 9(2) and section 9(3).

3.2.3.3 The three dimensions in terms of section 9

As mentioned above, when a law is challenged because it infringes section 9, it is important to distinguish between a law that “differentiates” in terms of section 9(1), a law that “gives effect to restitutionary measures” in terms of section 9(2) and, a law that “discriminates” in terms of section 9(3). The idea of differentiation seems to lie at the heart of South Africa’s equality jurisprudence.¹⁶¹ However, not all forms of differentiation are seemingly problematic constitutionally.¹⁶² In a modern country, it is essential to regulate the affairs of its inhabitants to harmonise the interests of its people.¹⁶³ Differentiation occurs daily between private individuals and institutions, which are not problematic. However, some forms of differentiation infringe on the right to equality guaranteed in section 9 of the Constitution. Sections 9(1), 9(2) and 9(3) apply differently in different situations, which requires the court to use different tests to arrive at a specific outcome.¹⁶⁴ This is done to ensure consistency concerning the structure and focus of the legal framework. The legal framework will provide an easy and effective legal test to determine whether the right to equality has indeed been breached.¹⁶⁵

3.2.3.3.1 Section 9(1)

Section 9(1) provides for “equality before the law and the right to equal protection and benefit of the law”. This stance is important as our law of equality removes us from our discriminatory

¹⁵⁸ *Prinsloo* supra (n157) at paras [32]-[33].

¹⁵⁹ T Deane and R Brijmohanlall ‘The Constitutional Court’s approach to equality’ (2003) 44(2) *Codicillus* 92-100.

¹⁶⁰ Constitution of the Republic of South Africa, 1996.

¹⁶¹ *Prinsloo v Van der Linde* supra (n157) at para [23].

¹⁶² De Vos & Freedman *South African Constitutional Law in Context* op cit (n66) 425.

¹⁶³ *Prinsloo v Van der Linde* supra (n157) at para [24].

¹⁶⁴ P De Vos & W Freedman *South African Constitutional Law in Context* 2 ed (2021) ch 13.

¹⁶⁵ *Ibid.*

past.¹⁶⁶ This can only be achieved within our South African context by adopting a substantive approach to equality.¹⁶⁷ But this is not as simple as it seems. It is almost impossible to treat all people within a country without differentiation, but that differentiation must be legitimate,¹⁶⁸ which means that not all differentiation will amount to unequal treatment.¹⁶⁹ Section 9(1) is concerned with laws that differentiate between people. Differentiate in this context means any laws that distinguish between groups or categories of people. As said above, not all forms of differentiation are problematic.¹⁷⁰ For example, differentiating between blind and sighted children. Both should be treated the same but, when it comes to access to education, blind and sighted children need to be treated differently. It is not sufficient to send a blind child to a school for sighted children where they will be disadvantaged in terms of their educational needs. Our commitment to equality requires government to create special schools which accommodate blind children and take into account the specific educational needs of those children. However, there are some forms of differentiation which infringe on the right to equality. For example, if a law differentiates on one of the listed grounds in section 9(3), then it is presumed to be discriminatory and must be tested against section 9(2) or 9(3). An example would be allowing heterosexual couples the benefit of marrying in a church and denying that same benefit to same-sex couples. If a law does not differentiate on one of the listed grounds, it is classified as a mere differentiation and must be tested against section 9(1). The standard set down in section 9(1) is the test for rationality. If a mere differentiation is rational, it does not infringe section 9(1) and is constitutionally valid. If a mere differentiation is irrational, it does infringe section 9(1) and is constitutionally invalid.

To demonstrate how the courts interpret mere differentiation in terms of section 9(1), the case of *Prinsloo*¹⁷¹ will be discussed. The case involved a challenge to the constitutionality of section 84 of the Forest Act 122 of 1984. The Act aimed to regulate the prevention and control of fires by creating fire-control areas where plans of compulsory fire controls were

¹⁶⁶ This however is not without its difficulties as Sachs J stated in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC): 'Uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference... Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference' (para [132]).

¹⁶⁷ *Minister of Finance v Van Heerden* supra (n154) at para [31].

¹⁶⁸ *Prinsloo v Van der Linde* supra (n154) at para [24].

¹⁶⁹ Currie and De Waal op cit (n1) 218.

¹⁷⁰ De Vos & Freedman *South African Constitutional Law in Context* (2014) op cit (n66) 425.

¹⁷¹ 1997 (3) SA 1012 (CC).

established.¹⁷² Landowners outside of the fire-control areas were not obliged to embark on fire-control areas but were encouraged to do so.¹⁷³ Section 84 of the Act created a presumption of negligence by the landowner regarding fires occurring in areas outside a fire control area.¹⁷⁴ The presumption was not assumed in controlled areas.¹⁷⁵ The applicant's land was located outside a fire-control area and, in terms of section 84 of the Act it was presumed that he was negligent. In the Transvaal Provincial Division, damages were claimed against the applicant for a fire that started on his land and spread to the respondent's land.¹⁷⁶

In terms of section 84, the applicant had to refute negligence. He challenged the constitutionality of section 84 because it violated the right to be presumed innocent in terms of the Interim Constitution.¹⁷⁷ This meant that the Act differentiated between landowners in fire-controlled areas and landowners in non-fire control areas.¹⁷⁸ The court had to look at the criteria that separates "legitimate differentiation from constitutionally impermissible differentiation".¹⁷⁹ The court held that in a modern country "it is essential to regulate the affairs of its inhabitants and impossible to do so without differentiation and classifications", which impact people differently.¹⁸⁰ In such cases, the court held that differentiation that falls within this category is rarely unfair.¹⁸¹ Thus, in this instance, it would be appropriate to refer to this differentiation as 'mere differentiation'.¹⁸²

The court then had to look at whether there was a rational relationship between the purposes of section 84 and the means or mechanism that section 84 adopts in order to achieve that purpose.¹⁸³ In doing this, the court held that the purpose of the Act was to prevent veld fires and impose compulsory participation in fire control areas to prevent fires from spreading.¹⁸⁴ Specific statutory duties with attached penalties were imposed for non-compliance.¹⁸⁵ According to the court, in non-controlled areas landowners were not obliged to embark on fire-

¹⁷² *Prinsloo* supra (n154) at para [1].

¹⁷³ *Prinsloo* supra (n154).

¹⁷⁴ *Prinsloo* supra (n154) at para [2].

¹⁷⁵ Currie and De Waal op cit (n1) 219.

¹⁷⁶ *Prinsloo v Van der Linde* supra (n154) at para [3].

¹⁷⁷ *Prinsloo* supra (n154) at para [9].

¹⁷⁸ *Prinsloo* supra (n154) at para [16].

¹⁷⁹ *Prinsloo* supra (n154) at paras [17], [23].

¹⁸⁰ *Prinsloo* supra (n154) at para [23].

¹⁸¹ *Prinsloo* supra (n154).

¹⁸² *Prinsloo* supra (n154) at para [25].

¹⁸³ *Prinsloo* supra (n154) at para [35].

¹⁸⁴ *Prinsloo* supra (n154) at para [39].

¹⁸⁵ *Prinsloo* supra (n154) at para [39].

control practices but encouraged to do so by different means.¹⁸⁶ The court considered if a rational relationship between the purpose of the law and the differentiation imposed by the law existed.¹⁸⁷ The court held that it could be demonstrated that there was a rational relationship between the purpose and the means it sought.¹⁸⁸ The court held that the differentiation shown to landowners in fire-controlled areas and landowners in non-controlled areas could not be seen as infringing the dignity of the landowner outside of the fire-control area.¹⁸⁹ The court found that the differentiation was rational and therefore constitutionally valid.¹⁹⁰ The court found that the provisions of section 84 were rational and, therefore constitutionally valid.¹⁹¹ The case was referred back to the TPD in order to continue with the claim for damages.¹⁹²

As seen above, the rationality requirement in section 9(1) is to prevent arbitrary differentiation. As stated in the *Prinsloo*¹⁹³ case, the state must act in a rational manner when interpreting mere differentiation.¹⁹⁴

3.2.3.3.2 Section 9(2)

Section 9(2) applies where the legislative provision aims to give effect to restitutionary measures or affirmative action measures.¹⁹⁵ This is a provision that differentiates on one of the grounds listed in section 9(3). If a provision within a piece of legislation seeks to apply a restitutionary measure, the court must first test the constitutionality of that specific provision under section 9(2).¹⁹⁶ If it complies with section 9(2), then the inquiry ends because the provision would be deemed to be constitutionally valid and cannot be tested against section 9(3).¹⁹⁷ Section 9(2) addresses equality issues imposed by policies and legislation directed towards previously disadvantaged persons. As said above, the principle of subsidiarity prevents

¹⁸⁶ Currie and De Waal op cit (n1).

¹⁸⁷ Currie and De Waal op cit (n1).

¹⁸⁸ *Prinsloo v Van der Linde* supra (n154) at para [40].

¹⁸⁹ *Prinsloo* supra (n154) at para [41].

¹⁹⁰ *Prinsloo* supra (n154) at para [41].

¹⁹¹ *Prinsloo* supra (n154) at para [40].

¹⁹² *Prinsloo* supra (n154) at para [43].

¹⁹³ *Prinsloo* supra (n154).

¹⁹⁴ *Prinsloo* supra (n154) at para [25].

¹⁹⁵ *Minister of Finance v Van Heerden* supra (n154).

¹⁹⁶ *Minister of Finance v Van Heerden* supra (n154).

¹⁹⁷ *Minister of Finance v Van Heerden* supra (n154) at para [33].

our courts from addressing policies not imposed by legislation as this must be dealt with under PEPUDA.¹⁹⁸

A case illustrating how the court interprets section 9(2) is the case of *Van Heerden*.¹⁹⁹ This matter was an appeal from the Cape High Court declaring that Rule 4.2.1 of the Political Office-Bearers Pension Fund was discriminatory and constitutionally invalid.²⁰⁰ The respondent Mr Van Heerden served as a National Party Member of Parliament from 1987 to 1994.²⁰¹ With the onset of the new democratic Parliament in 1994, he returned to Parliament until 1999. Mr Van Heerden was a member of the Pension Fund and in 1993 this pension fund changed to a Closed Pension Fund (CPF). The tricameral Parliament set up the CPF to provide pensions exclusively for political officer bearers at that time.²⁰² The CPF included exclusionary features such as (i) only members of the old Parliament and office bearers who held office before 1994 could be members.²⁰³ This meant that no new members would be admitted to the Fund, and (ii) if by 1994 you were a member of the old Parliament who had not served for seven and a half years, you were only entitled to a gratuity.²⁰⁴

It was only in 1998 that Parliament created its new pension scheme. The applicant argued that the measures in terms of section 4.2.1 constituted limited affirmative action²⁰⁵ because of the three categories that members were put into, and the contribution based on a differential scale that each member had to make toward the fund.²⁰⁶ The High Court found that the provisions

¹⁹⁸ *De Lange v Presiding Bishop of the Methodist Church* supra (n134) 53. See also *My Vote Counts NPC v Speaker of the National Assembly and Others* supra (n135) 31 where the majority judgment repeated the importance of the principle of subsidiarity and the need to adhere to it; *Sali v National Commissioner of the South African Police Service* supra (n135) at para [4] and *MEC for Education, KwaZulu-Natal, and Others v Pillay* supra (n138) at para [40].

¹⁹⁹ *Minister of Finance v Van Heerden* supra (n154).

²⁰⁰ *Minister of Finance* supra (n154) at para [3].

²⁰¹ *Minister of Finance* supra (n154) at para [3].

²⁰² *Minister of Finance* supra (n154) at paras [3], [4].

²⁰³ *Minister of Finance* supra (n154) at para [5].

²⁰⁴ *Minister of Finance* supra (n154) at para [5].

²⁰⁵ *Minister of Finance* supra (154) at paras [17]-[18].

²⁰⁶ The three different categories of members according to the rules of the Fund were: "Category A Member" shall mean a Member who has been notified to the Trustees by the Employer as a Member who has not reached age 49 years and who is not a member of the Closed Pension Fund. Category B Member' shall mean a Member who has been notified to the Trustees by the Employer as a Member who has reached age 49 years and who is not a member of the Closed Pension Fund. 'Category C Member' shall mean a Member who is a member of the Closed Pension Fund." (para 10). Rule 4.2.1 varied the contributions according to a differentiated scaled being: "The Employer shall make contributions towards the retirement benefit of each Member in its Service at the rate of: (a) in the case of a Category A Member, one twelfth of 17 per cent of his Pensionable Salary; (b) in the case of a Category B Member (i) for the period of 27 April 1994 to 30 April 1999, one twelfth of 20 per cent of his Pensionable Salary; . . . (c) in the case of a Category C Member (i) for the period of 27 April 1994 to 30 April 1999, one twelfth of 10 per cent of his Pensionable Salary" (para 10).

that were challenged were discriminatory.²⁰⁷ The High Court justified this by stating that if a person has to rely on section 9(2) in order to justify discriminatory measures, then the onus of proof is on them to prove the achievement of equality.²⁰⁸ The High Court found that the Minister and the Fund had failed to discharge the onus.²⁰⁹ This was because the measures justified under section 9(2) had no rational connection to the end that they purported to achieve.²¹⁰ The High Court held that Rule 4.2.1 was not a measure designed to advance a previously disadvantaged group.²¹¹ The court held further that there was no causal nexus between the means and the end.²¹² The High Court found that the provisions did unfairly discriminate on the ground of race and declared them to be unconstitutional and invalid.²¹³ The Minister then appealed at the Constitutional Court (CC).

In the Constitutional Court (CC), the essence of the appellant's complaint was that the High Court misunderstood the true nature of the constitutional protection of equality. The applicants believed that the High Court resorted to a formal rather than a substantive notion of equality.²¹⁴ The applicants argued that the purpose of the scheme's differentiation of employer benefits was to advance equality.²¹⁵ On the other hand, the respondent argued that the differentiation was informed by race, and that the remedial measures under section 9(2) constituted positive discrimination if based on a ground set out in section 9(3).²¹⁶ The respondents contended that the scheme was unfair. According to the court, the issue in this matter was whether the measure passed muster under section 9(2).²¹⁷

Looking at the restitutionary measures, the court held that there must be a comprehensive understanding of the concept of equality.²¹⁸ Restitutionary measures, according to the court, must be designed to advance previously disadvantaged persons to achieve equality.²¹⁹ Restitutionary equality is fundamental to our equality protection.²²⁰ According to the court,

²⁰⁷ *Minister of Finance* supra (n154) at para [13].

²⁰⁸ *Minister of Finance* supra (n154) at para [13].

²⁰⁹ *Minister of Finance* supra (n154) at para [13].

²¹⁰ *Minister of Finance* supra (n154) at para [14].

²¹¹ *Minister of Finance* supra (n154) at para [15].

²¹² *Minister of Finance* supra (n154) at para [14].

²¹³ *Minister of Finance* supra (n154) at para [15].

²¹⁴ *Minister of Finance* supra (n154) at para [17].

²¹⁵ *Minister of Finance* supra (n154) at para [17].

²¹⁶ *Minister of Finance* supra (n154) at para [19].

²¹⁷ *Minister of Finance* supra (n154) at para [36].

²¹⁸ *Minister of Finance* supra (n154) at para [28].

²¹⁹ *Minister of Finance* supra (n154) at para [28].

²²⁰ *Minister of Finance* supra (n154) at para [30].

sections 9(1) and 9(2) both contribute to achieving equality.²²¹ Accordingly, section 9 embraces a “substantive conception of equality, including measures to redress existing inequality”.²²² The court held that the primary object of remedial measures is to promote equality.²²³ Thus, differentiation aimed at advancing persons previously disadvantaged by unfair discrimination is warranted if it can be shown that it conforms to the internal test set out by section 9(2).²²⁴

According to the court, the internal test of section 9(2) involves three requirements that need to be considered to determine whether a measure falls within section 9(2).²²⁵ Firstly, whether the measure targets persons or categories of persons previously disadvantaged by unfair discrimination.²²⁶ The court held that to determine whether redress is designed to advance a previously disadvantaged group, it must favour the group in section 9(2).²²⁷ In this matter, the majority of new parliamentarians were excluded by past apartheid laws.²²⁸ Secondly, whether the measure is designed to advance persons who were previously disadvantaged by unfair discrimination.²²⁹ According to the court, “remedial measures are directed at a future outcome” that is difficult to predict. However, “they must be reasonably capable” of achieving the desired outcome.²³⁰ The court held that remedial measures are not based on prejudicing others. Therefore, it must be established that there was no less “an onerous way in which the remedial objective” could be achieved.²³¹ Thirdly, whether the measure promotes the achievement of equality.²³² The court held that achieving this goal often comes at a price for those that are previously advantaged. However, action must be taken to advance the position of previously disadvantaged persons by unfair discrimination.²³³ The court stated that our constitutional vision is to have a non-racial and non-sexist society. Everyone must be recognised and treated as a person with equal worth and dignity.²³⁴ Accordingly, a measure should not constitute an abuse of power or impose undue harm on those excluded from its benefits.²³⁵

²²¹ *Minister of Finance* supra (n154) at para [30].

²²² *Minister of Finance* supra (n154) at para [31].

²²³ *Minister of Finance* supra (n154) at para [32].

²²⁴ *Minister of Finance* supra (n154) at para [32].

²²⁵ *Minister of Finance* supra (n154).

²²⁶ *Minister of Finance* supra (n154) at para [38].

²²⁷ *Minister of Finance* supra (n154) at para [38].

²²⁸ *Minister of Finance* supra (n154) at para [38].

²²⁹ *Minister of Finance* supra (n154) at para [39].

²³⁰ *Minister of Finance* supra (n154) at para [41].

²³¹ *Minister of Finance* supra (n154) at para [43].

²³² *Minister of Finance* supra (n154) at para [44].

²³³ *Minister of Finance* supra (n154) at para [44].

²³⁴ *Minister of Finance* supra (n154) at para [44].

²³⁵ *Minister of Finance* supra (n154) at para [44].

The court held that the differentiated scale of employer contributions, as highlighted by the three different categories in section 4.2.1, improved persons previously disadvantaged in terms of pension benefits.²³⁶ The court further held that the scheme was designed to diminish the inequality between privileged and previously disadvantaged parliamentarians.²³⁷ Thus, it promoted the achievement of equality. The court held that the evidence before it demonstrates a causal nexus between the “membership differentiation” and each class's relative need for increased pension benefits.²³⁸ On this basis, the court held “that it is in the interests of justice to grant the application for leave to appeal”.²³⁹ The order of the court was that the “High Court declaring Rule 4.2.1 unconstitutional and invalid must be set aside”.²⁴⁰

From the above, it is evident that section 9(2) imposes a positive obligation on the state to act to ensure that everyone equally enjoys all rights and freedoms.²⁴¹ It is submitted that remedial measures are not seen by the Court as a form of positive discrimination. Instead they are seen as an inherent part of the substantive right to equality.

3.2.3.3.3 Section 9(3)

Section 9(3) becomes applicable when differentiation amounts to discrimination. Discrimination is a specific form of differentiation.²⁴² Section 9(3) lists grounds on which unfair discrimination is prohibited.²⁴³ The grounds are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. This is not a closed list.²⁴⁴ The courts have held that differentiation based on any one of these listed grounds is discrimination.²⁴⁵ According to

²³⁶ *Minister of Finance* supra (n154) at para [45].

²³⁷ *Minister of Finance* supra (n154) at para [45].

²³⁸ *Minister of Finance* supra (n154) at para [45].

²³⁹ *Minister of Finance* supra (n154) at para [57].

²⁴⁰ *Minister of Finance* supra (n154) at para [66].

²⁴¹ Currie and De Waal op cit (n1) 219.

²⁴² Currie and De Waal op cit (n1) 222.

²⁴³ Ibid. See also K Govender ‘Equality, sexuality and taking rights seriously’ (2008) 29(1) *Obiter* 1-18.

²⁴⁴ Section 9(3) of the Constitution.

²⁴⁵ *Harksen v Lane* NO 1998 (1) SA 300 (CC) at para 53. See also TP Van Reenen ‘Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa’ (1997) 12 *South African Public Law* 160.

section 9(5), discrimination based on any one of the listed grounds is unfair unless the contrary is proved.²⁴⁶

In addition to the listed grounds, differentiation on analogous grounds may also be prohibited.²⁴⁷ An analogous ground refers to attributes that can impair or impact adversely on human dignity.²⁴⁸ An example could be citizenship²⁴⁹ or HIV-status.²⁵⁰ In the *Harksen v Lane*²⁵¹ case the court held that when it comes to proving that an unspecified ground is analogous to the specified grounds set out in section 9(3), the applicant must show “(i) that it is based on characteristics that have the potential to impair the fundamental dignity of human beings; or (ii) that it is based on characteristics that have the potential to affect them adversely in a comparably serious manner”.²⁵² The court further held that:

“[w]hat the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity”.²⁵³

According to the court, the test to determine differentiation on a specified or unspecified ground is objective and not subjective.²⁵⁴ Unfair discrimination could be deemed to be differential treatment that is hurtful, harmful or demeaning.²⁵⁵ According to Currie, unfair discrimination occurs when a law or conduct treats a person differently for no good reason by making them feel inferior or less deserving of respect than others.²⁵⁶

The case of *Harksen*²⁵⁷ illustrates how section 9(3) is applied. The test for determining whether discrimination is unfair was seen in the *Harksen* case, where a definitive interpretation was

²⁴⁶ Govender op cit (243) 7.

²⁴⁷ Govender op cit (243) 7.

²⁴⁸ Ibid. See also Currie and De Waal op cit (n1) 223.

²⁴⁹ *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC).

²⁵⁰ *Hoffman v South African Airways* [2000] 11 BCLR 1235 (CC).

²⁵¹ *Harksen v Lane NO* supra (n245).

²⁵² *Harksen v Lane NO* supra (n245) at para [46].

²⁵³ *Harksen v Lane NO* supra (n245) at para [49].

²⁵⁴ *Harksen v Lane NO* supra (n245) at para [47].

²⁵⁵ Currie and De Waal op cit (n1) 223.

²⁵⁶ Currie and De Waal op cit (n1).

²⁵⁷ 1998 (1) SA 300 (CC).

utilised to establish a three-pronged approach or test. The test requires the court to “(i) determine whether the provision differentiates between people or categories of people on a listed or analogous ground, (ii) establish whether the differentiation amounts to unfair discrimination and (iii) “if the discrimination is found to be unfair, then the court will have to determine whether it can be justified under section 36”.²⁵⁸ The issue that the court had to decide upon was whether certain provisions in the Insolvency Act 24 of 1936 violated the equality clause.²⁵⁹ According to section 21 of the Act, the sequestration of the estate of one of the two spouses has the effect of vesting in the master or trustee.²⁶⁰ The aim of section 21 is to ensure that property belonging to the insolvent ends up in the estate.²⁶¹ It was contended that the “vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them”.²⁶²

The court held that attacks on legislation based on the provision within section 8 of the Interim Constitution²⁶³ require careful analysis of the facts of each case.²⁶⁴ In analysing section 8(1), the court held that the first enquiry is based on “whether the provision does differentiate between people or categories of people”.²⁶⁵ If it does differentiate, then there must be a “rational connection between the differentiation and the government purpose it is designed to achieve”.²⁶⁶ If there is “no rational connection to a legitimate government purpose”, then the provision violates section 8(1) of the Interim Constitution.²⁶⁷ If there is a rational connection, it is necessary to proceed to section 8(2) to determine whether the differentiation amounts to unfair discrimination.²⁶⁸ Under section 8(2), determining unfair discrimination requires a two-

²⁵⁸ *Harksen v Lane* supra (n245) at para [54].

²⁵⁹ *Harksen v Lane* supra (n245) at para [7].

²⁶⁰ *Harksen v Lane* supra (n245) at paras [8]-[14].

²⁶¹ *Harksen v Lane* supra (n245) at para [36].

²⁶² *Harksen v Lane* supra (n245) at para [40].

²⁶³ Section 8 provides that “(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. (b) . . . (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”

²⁶⁴ *Harksen v Lane* supra (n245) at para [41].

²⁶⁵ *Harksen v Lane* supra (n245) at para [42].

²⁶⁶ *Harksen v Lane* supra (n245).

²⁶⁷ *Harksen v Lane* supra (n245) at para [44].

²⁶⁸ *Harksen v Lane* supra (n245).

stage analysis.²⁶⁹ Firstly, whether the differentiation amounts to discrimination and secondly, whether it amounts to unfair discrimination.²⁷⁰ The court advised that these two stages of the enquiry should be kept separate.²⁷¹ According to the court, if the differentiation is on an unspecified ground, it must be based on characteristics that can impair the dignity of persons or affect them fundamentally.²⁷² The court stated this must be determined objectively.²⁷³ To determine whether the discrimination constitutes unfairness, various factors need to be considered.²⁷⁴ These factors include:

- “(i) The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage. If the complainants are part of a group which has suffered discrimination in the past, then it is more likely that the discrimination will be unfair;
- (ii) The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed at impairing the complainant’s dignity but is aimed at achieving a worthy and important societal goal, such as furthering the equality of all, this may have an important bearing on whether the complainants have in fact suffered the impairment in question;
- (iii) The extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”²⁷⁵

If it is found that the discrimination is unfair from the above factors, then the provision in question will be in violation of section 8(2). Once this is determined, the court will then proceed to section 33 (section 36 of the final Constitution).

In light of the above analysis, the court then considered the constitutionality of section 21 of the Insolvency Act.²⁷⁶ Concerning differentiation, the court held that the position of women in our society had changed radically in terms of economic activity and contributions towards the

²⁶⁹ *Harksen v Lane* supra (n245) at para [45].

²⁷⁰ *Harksen v Lane* supra (n245).

²⁷¹ *Harksen v Lane* supra (n245).

²⁷² *Harksen v Lane* supra (n245) at para [46].

²⁷³ *Harksen v Lane* supra (n245) at para [47].

²⁷⁴ *Harksen v Lane* supra (n245) at para [51].

²⁷⁵ *Harksen v Lane* supra (n245) at para [51]. See also W Freedman ‘Understanding the right to equality’ (1998) 115(2) *South African Law Journal* 246.

²⁷⁶ *Harksen v Lane NO* supra (n245) at para [55].

common household.²⁷⁷ According to the court, this statutory mechanism is appropriate, and the legislature acted rationally.²⁷⁸ Regarding onus, the court held that section 21 transferred “onus from the Master or a trustee” to the insolvent estate.²⁷⁹ Accordingly, a rational connection is created between section 21 and the legitimate governmental purpose behind its enactment.²⁸⁰ Therefore section 21 does not violate the provisions of section 8(1) of the interim Constitution.²⁸¹

In determining whether there was discrimination, the court had to determine whether the differentiation between the solvent spouses and other persons dealing with insolvents constituted discrimination.²⁸² The differentiation, in this case, is on an unspecified ground that can demean persons and violate their dignity.²⁸³ Therefore, according to the court, section 21 discriminates against the solvent spouse of an insolvent.²⁸⁴

In determining unfair discrimination, the court pointed out that the onus laid with the applicant.²⁸⁵ The court's responsibility was to consider the various factors laid down to determine unfair discrimination. On that basis, the court found that the applicant had not discharged the onus of proving unfair discrimination.²⁸⁶ The court then held that section 21 was not inconsistent with the interim Constitution.²⁸⁷

According to Albertyn, the impact of discrimination on a person or a group of persons is fundamental in the enquiry of fairness.²⁸⁸ In *National Coalition for Gay and Lesbian Equality*,²⁸⁹ the Constitutional Court described its approach to this as “comprehensive and nuanced” where all factors need to be considered to determine discrimination.²⁹⁰

²⁷⁷ *Harksen v Lane* supra (n245) at para [57].

²⁷⁸ *Harksen v Lane* supra (n245) at para [58].

²⁷⁹ *Harksen v Lane* supra (n245). See also *Prinsloo v Van der Linde and Another* supra (n154) at para [56].

²⁸⁰ *Harksen v Lane* supra (n245) at para [58].

²⁸¹ *Harksen v Lane* supra (n245) at para [60].

²⁸² *Harksen v Lane* supra (n245) at para [61].

²⁸³ *Harksen v Lane* supra (n245).

²⁸⁴ *Harksen v Lane* supra (n245).

²⁸⁵ *Harksen v Lane* supra (n245).

²⁸⁶ *Harksen v Lane* supra (n245).

²⁸⁷ *Harksen v Lane* supra (n245) at para [79].

²⁸⁸ C Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 79.

²⁸⁹ 2000 (2) SA 1 (CC) at paras [32]-[40].

²⁹⁰ Ibid.

In light of the above discussion of section 9 it is prudent to now turn to a discussion of sexual orientation which is inextricably linked to section 9. Given the focus of this thesis it is important to examine the manner in which the Constitutional Court has interpreted and applied the right not to be unfairly discriminated against specifically on the grounds of sexual orientation. It is this specific right that must be weighed up against the right to religious freedom.

Over the past 25 years, the LGBTQ+ community in South Africa has taken full advantage of this right and used it to successfully challenge a wide range of laws and policies that unfairly discriminated against gays and lesbians. One of the consequences of this phenomenon is that the Constitutional Court has produced a significant body of case law and a rich and sophisticated sexual orientation jurisprudence. This jurisprudence will be analysed in the next section.

3.3 SEXUAL ORIENTATION

Section 9(3) of the Constitution prohibits discrimination based on sexual orientation. Rejection and non-acceptance of homosexuality and same-sex relationships have led many LGBTQI+ persons to live closeted lives where it was safer for them to fit into a heteronormative society.²⁹¹ Some authors articulate this as the law having an adverse effect on couples within same-sex relationships through the constant threat of arrest and imprisonment.²⁹² They go further by stating that historically the LGTBQI+ community suffered discrimination by being marginalised in South Africa by denying them various forms of sexual expression.²⁹³

But, with the constitutional provisions of equality, human dignity, and the recognition of sexual orientation, the LGTBQI+ community had an opportunity “to question the constitutionality of the common law and certain provisions of legislation that excluded them from recognition and protection during apartheid”.²⁹⁴ This led to a rich jurisprudence of case law where the courts interpreted and applied sexual orientation in light of various issues. The following cases are chosen and will be discussed because they are the leading cases on the right not to be discriminated against on the ground of sexual orientation: *National Coalition for Gay and*

²⁹¹ C Calhoun *Feminism the Family and the Politics of the Closet: Lesbian and Gay Displacement* (2003) 101.

²⁹² D Bilchitz and M Judge ‘For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa’ (2007) 23(3) *South African Journal on Human Rights* 468.

²⁹³ Ibid.

²⁹⁴ De Ru op cit (n116) 232. See also JA Robinson and J Swanepoel ‘Same-sex marriage in South Africa: The road ahead’ (2017) 7(1) *Potchefstroom Electronic Journal* 86.

*Lesbian Equality and Another v Minister of Justice*²⁹⁵ and, *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs*.²⁹⁶ Each of these cases will be discussed in turn. But, before we turn to discussing the case law itself, it will be prudent to briefly consider the manner in which the concept of sexual orientation itself has been defined and interpreted.

3.3.1. Legal definition of sexual orientation

Sexual orientation according to Botha and Cameron is a neutral term which embraces homosexual and heterosexual orientations, therefore the notion that it applies only to same-sex sexual orientations is inaccurate.²⁹⁷ Ackermann J in the *National Coalition for Gay and Lesbian Equality v Minister of Justice*²⁹⁸ relied heavily on an article by Cameron to define what sexual orientation is.²⁹⁹ Cameron's article advocates for protecting the LGBTQI+ community which is a "uniquely vulnerable group" within the ambit of the Constitution.³⁰⁰ Cameron argues that the LGBTQI+ community should be protected because the law has been more concerned about homosexual conduct than homosexual identity.³⁰¹ Furthermore, discrimination reaches well beyond political categories of orientation. In fact, it affects everyone who identifies as having a predisposition to the same sex.³⁰² For this reason, the LGBTQI+ community should be included in the protection of the Constitution. In defining sexual orientation, Ackermann J adapted Cameron's definition of sexual orientation³⁰³ with his own by defining it as:

²⁹⁵ 1999 (1) SA 6 (CC).

²⁹⁶ 2006 (1) SA 524 (CC).

²⁹⁷ PH Botha and E Cameron 'Sexual Orientation' (1994) 5 *South African Human Rights Yearbook* 286.

²⁹⁸ 1999 (1) SA 6 (CC).

²⁹⁹ Cameron op cit (n100) 452. As Ackermann J says in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para [23], 'The article is a revised version of an inaugural lecture delivered by the author on 27 October 1992 on the acceptance by him of an *ad hominem* professorship in law at the University of the Witwatersrand. Despite the fact that it was conceived some 18 months prior to the adoption of the interim Constitution, its depth and lucidity of analysis is just as instructive in the present era when sexual orientation has indeed achieved constitutional protection'. See also *S v H* 1993 (1) SA 120 (C) where Ackermann J again refers to Cameron's article specifically in terms of homosexuals being discriminated against and harmed (page 456), that informed current attitudes on homosexuality which is that it is a natural sexual variant which is not linked to any pathology (page 458) and that the privacy argument reinforces the idea that homosexual intimacy is unacceptable. Note must be taken that Ackermann did not try to define homosexuality in this case but instead stated that it was unnecessary to express any views on the sexual preferences of the party since the facts of the case do not require it (page 129).

³⁰⁰ Ibid.

³⁰¹ Cameron op cit (n100) 452.

³⁰² Cameron op cit (n100) 452.

³⁰³ Cameron believes that sexual orientation 'is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex.

“... sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex”³⁰⁴

Ackermann J went on to say that the concept of “sexual orientation must be given a generous interpretation” in terms of section 9(3) of the Constitution.³⁰⁵ In other words, it must be equally applicable to bisexual or transsexual persons as well as to persons who on a single occasion may be attracted to a member of their own sex.³⁰⁶ It is submitted that what Ackermann J says here is in line with what Botha and Cameron³⁰⁷ say in terms of sexual orientation being a neutral term.

It is interesting to note that our courts have adopted a broad and generous approach which is in keeping with our constitutional principles. The broad and generous approach adopted is welcomed because the notion of sexual orientation is an evolving concept which can accommodate future developments in this field.

3.3.2 Jurisprudential developments

3.3.2.1 Introduction

Since the mobilisation and lobbying of the gay rights movement to include sexual orientation as a protected ground in the Constitution,³⁰⁸ legal activists (like the NCGLE) since 1994 have taken every opportunity to litigate in order to promote equality amongst the LGBTQI+ community.³⁰⁹ However, this was done in a strategic manner in terms of deciding when and in what order constitutional challenges regarding LGBTQI+ discrimination cases would be taken

Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex. But the question of definition is obviously not only terminological: it is also political and theoretical’ (page 452).

³⁰⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [20].

³⁰⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [21].

³⁰⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [21].

³⁰⁷ Botha and Cameron op cit (n297) 286.

³⁰⁸ Cock op cit (n88) 36.

³⁰⁹ De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 432-465.

to court.³¹⁰ As part of its litigation strategy the NCGLE decided that the prohibition on male sodomy which criminalised homosexuality in South Africa should be the first Constitutional challenge taken to the courts.³¹¹ According to De Vos, the thinking behind this was that if the NCGLE was successful with the sodomy challenge it would lead to a “strong jurisprudential foundation and, could later be used as a precedent to challenge other more difficult discrimination cases”.³¹² Accordingly, De Vos believes that this strategy worked because it led to many “important legal victories which paved the way for the Fourie case” and the acceptance of same-sex marriage.³¹³ It is important to note that legal activists did not want to speak about gay rights but more about equality and this is what came through in the cases that went to court.³¹⁴ However, even though there are many sexual orientation cases, only three of the more well-known cases will be discussed.

3.3.2.1.1 *National Coalition for Gay and Lesbian Equality v Minister of Justice*³¹⁵

The *National Coalition for Gay and Lesbian Equality v Minister of Justice*³¹⁶ (the ‘Sodomy case’) was the first case where the constitutional court handed down a judgment that concerned alleged discrimination based on sexual orientation. This case addressed the issue of the prohibition and criminalisation of intimate relations between two consenting adult males. This was in terms of section 20A of the Sexual Offences Act.³¹⁷

The court first looked at the High Court decision, which summarised the stages of a section 9 discrimination inquiry.³¹⁸ The stages of section 9 will not be repeated since they have been discussed above. The High Court found that the common law offence of sodomy differentiated

³¹⁰ De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 443. See also R Louw ‘A decade of gay and lesbian equality litigation’ in M du Plessis & S Pete (eds) *Constitutional Democracy in South Africa 1994-2004: Essays in Honour of the Howard College School of Law* (2004) 65, 66.

³¹¹ De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 443. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299).

³¹² De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 445.

³¹³ De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 445.

³¹⁴ Cock op cit (n88) 37.

³¹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299).

³¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299).

³¹⁷ Section 20A of the Sexual Offences Act states that “(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence. (2) For the purposes of subsection (1) ‘a party’ means any occasion where more than two persons are present. (3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law.”

³¹⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) 11-13.

between heterosexual and homosexual people.³¹⁹ The court, however, still had to establish fairness. It did this by looking at the sodomy laws. The court looked at various factors to determine whether the discriminatory provision impacted unfairly on the complainants.³²⁰ These factors included looking at (i) the position of the complainants in society and how they had suffered in the past, (ii) the nature of the provision and its purpose and how it was achieved and (iii) and any other relevant factors.³²¹ With discrimination being a specified ground, the court stated that “the sodomy laws reinforced existing social prejudices”, which had a severe psychological impact on gay men at a deep level.³²² Thus, the discrimination impaired their fundamental dignity, which confirms that the discrimination suffered was unfair and in breach of section 9 of the 1996 Constitution.³²³ However, this did not conclude the court's analysis concerning fairness.

The second thing that the court considered was the rights to dignity (s 10) and privacy (s 14) in terms of the 1996 Constitution. Ackermann J stated that the right to “dignity requires us to acknowledge the worth of all people” in South Africa³²⁴ and that the sodomy laws did not do that. As such, the sodomy laws became an invasion of one’s dignity and were, therefore, a clear breach of section 10 of the Constitution.³²⁵

The third constitutional concept that the court looked at was in terms of privacy (s 14) within the Constitution. The court stated that privacy recognises that we are all entitled to a private space where relationships can be nurtured without any interference.³²⁶ Expressing one’s sexuality is central to privacy, especially if it is consensual and not harming another.³²⁷

Under section 36(1), the court had to consider “whether the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” A full discussion of section 36 is undertaken in the next chapter and will therefore not be fully discussed here. In balancing the process, the court had to consider the relationship “between

³¹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [11].

³²⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299).

³²¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [19].

³²² *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [26].

³²³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [26].

³²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [28].

³²⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [28].

³²⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [32].

³²⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [32].

the limitation and its purpose and less restrictive means to achieve the purpose”.³²⁸ When the court considered the factors listed in section 36 of the Constitution, it found that the limitation represented a severe infringement that affects one’s ability to achieve self-identification and self-fulfilment.³²⁹ In looking at whether the limitation had any purpose and importance, the court stated that there was no valid purpose since the views came from a section of society that based their prejudice on their private moral views.³³⁰

In light of the above, the court stated that “gay men were a minority in society” and suffered disadvantages, which affected them psychologically, violating their dignity, personhood, and identity.³³¹ Ackermann J held that section 20A of the Sexual Offences Act amounts to unfair discrimination and cannot be justified in terms of section 36 of the Constitution.³³² The court further held that the “moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose”.³³³ For this reason the court stated that there was no justification for the limitation.³³⁴ Sachs J in his minority judgment stated that even though the Constitution cannot destroy homophobic prejudice it can prevent public institutions from perpetuating such prejudice.³³⁵ Sachs J further stated that “equality means the equal concern across difference therefore, it does not imply a merging of behaviour” but it must acknowledge the acceptance of difference.³³⁶

It is clear from the above case that there are factors that the Court considers when deciding whether the discrimination is unfair. The key factors include: (i) the history of the discrimination suffered; (ii) the nature at which the discrimination occurs; (iii) the level of vulnerability of the group being discriminated against; and (iv) the deep psychological harm that is suffered by this community. Peripheral harm in this instance must also be considered in that it goes beyond the immediate impact of dignity and self-esteem. It opens up the LGBTQI+ community to violence, denial of facilities, accommodation and opportunities, for instance, the prohibition against marrying within the church and having to live with an injunction against

³²⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [35]. See also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para [88].

³²⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [36].

³³⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [37].

³³¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [26].

³³² *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [76].

³³³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [37].

³³⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [37].

³³⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [130].

³³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299) at para [130].

same-sex marriage which forms part of some religious denominations beliefs; (vi) the reinforcement of existing societal prejudices which increases the negative effects on their lives; and (v) the need to celebrate and promote difference and diversity within our society and communities.

This case was seen as a precedent to other LGBTQI+ cases where rights were challenged on a constitutional basis.³³⁷ It is for this reason that the *Fourie*³³⁸ case is discussed next. This is because it highlights how our courts have begun to look at the equality and inclusiveness of the LGBTQI+ community.

3.3.2.1.2 *Minister of Home Affairs and Another v Fourie and Another*³³⁹

A far-reaching development worth discussing after the “Sodomy case”,³⁴⁰ which changed the landscape for the LGBTQI+ community, was the case of *Fourie*.³⁴¹ This case dealt with the challenging of the constitutionality of section 30(1) of the Marriage Act³⁴² which provided that marriage is the coming together of one man and one woman to the exclusion all others. This meant that the marriage between two same-sex people would not be permitted. The issue the court had to deal with was whether the common law and statutory definitions of marriage within the Marriage Act 25, 1961 constituted unfair discrimination. The outcome of the case was a progressive step towards accepting marriage between same-sex individuals who wanted to solemnise their relationship. The court referred to the cases of *National Coalition for Gay and Lesbian Equality v Minister of Justice*³⁴³ (Sodomy case) and the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,³⁴⁴ reiterating that these cases highlighted the negative impact that society has on the LGBTQI+ community.³⁴⁵ The court noted that marriage discrimination still persisted in South Africa despite the Constitution’s express

³³⁷ De Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ op cit (n91) 443, 445. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Gory v Kolver* 2007 (4) SA 97 (CC).

³³⁸ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

³³⁹ *Minister of Home Affairs and Another v Fourie* supra (n338).

³⁴⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299).

³⁴¹ 2006 (1) SA 524 (CC).

³⁴² Marriage Act 25 of 1961.

³⁴³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra (n299).

³⁴⁴ 2000 (2) SA 1 (CC).

³⁴⁵ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [49].

prohibition against discrimination based on sexual orientation.³⁴⁶ In reviewing other LGBTQI+ cases, the court found that (i) family formations are evolving rapidly and it is unacceptable to impose one form as the only socially and legally acceptable one; (ii) that there has been a long history of marginalisation of gays and lesbians; (iii) that the “legal regulation of family law rights of gays and lesbians” is not comprehensive; and (iv) that our Constitution has enabled us to depart from “a past based on intolerance and exclusion and moved us forward” as a society where all are equal and respected.³⁴⁷

The court discussed the significance of marriage, stating that excluding same-sex couples from marrying represented a harsh statement that they are outsiders.³⁴⁸ The court stated that if heterosexuals have the option of marrying, then same-sex couples should have that option as well.³⁴⁹ The court stated that the common-law definition of marriage was not inclusive because there is no appropriate provision for same-sex couples to marry which is unconstitutional.³⁵⁰

The State made four proposals to leave the features of a traditional marriage unchanged. This included the procreation argument, respect for the religious argument, the international law argument and the family law pluralism argument. The court dismissed each argument. The court held that the procreation argument was demeaning to couples who chose “to adopt children and couples who elected to not have children”.³⁵¹ Thus, the procreation argument was found lacking in terms of same-sex couples being afforded the “same degree of dignity and respect shown to heterosexual couples”.³⁵² The religious argument was rejected because religious doctrine cannot be used as a source for interpreting the Constitution.³⁵³ The court went further by stating that there should be mutual respect between the religious and the secular.³⁵⁴ The outcome would not compel “religious officials to perform same-sex marriages if it offended their religious beliefs”. Instead, the secular and the religious must not collide but “co-exist in a constitutional realm based on diversity”.³⁵⁵ The court rejected the state’s

³⁴⁶ *Minister of Home Affairs and Another v Fourie* supra (n338).

³⁴⁷ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [59].

³⁴⁸ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [71].

³⁴⁹ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [72].

³⁵⁰ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [82].

³⁵¹ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [86].

³⁵² *Minister of Home Affairs and Another v Fourie* supra (n338) at para [87].

³⁵³ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [92].

³⁵⁴ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [95].

³⁵⁵ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [98].

argument that “international law recognises and protects only heterosexual marriage”.³⁵⁶ The court held that there is nothing in international law instruments to suggest that the family must follow a particular model to be a fundamental part of society.³⁵⁷ The final argument that the state proposed was concerning family law and its reliance on section 15(3)³⁵⁸ of the Constitution.³⁵⁹ The court rejected this argument stating that section 15(3) does not prevent legislation from recognising marriages established by religion or tradition. It is a section that is permissive, indicative of “constitutional sensitivity”, which favours diversity when it comes to marriage.³⁶⁰

The court held that Parliament should bear in mind two things. One was that the aim of the new measure must be based on the presumption of equality.³⁶¹ The second is to avoid a remedy that seemingly provides equal protection, but in its application would produce new forms of marginalisation.³⁶² Differential treatment according to the court does not necessarily in itself violate the dignity of others but when separation results in harmful behaviour then it becomes constitutionally undesirable.³⁶³ With that said the court gave Parliament 12 months to cure the defect and if they failed to do so within the specified timeframe, the words ‘or spouse’ would be automatically read into the Marriage Act.³⁶⁴

It is interesting that the court stated categorically that the heart of this case should be to diminish the isolation of same-sex couples because marriage plays an important role in society and to exclude same-sex couples from this institution would be injurious.³⁶⁵ It is submitted that although this statement made by the court was profound, same-sex couples are still being excluded from having their same-sex relationships solemnised and blessed within the church. This is despite the fact that the court stated that the secular and the sacred should respect each

³⁵⁶ *Minister of Home Affairs and Another v Fourie* supra (n338).

³⁵⁷ *Minister of Home Affairs and Another v Fourie* supra (n338).

³⁵⁸ Section 15(3) of the Constitution states that “(a) This section does not prevent legislation recognising— (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution”.

³⁵⁹ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [106].

³⁶⁰ *Minister of Home Affairs and Another v Fourie* supra (n338) at paras [108]-[109].

³⁶¹ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [149].

³⁶² *Minister of Home Affairs and Another v Fourie* supra (n338) at para [150].

³⁶³ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [152].

³⁶⁴ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [162].

³⁶⁵ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [155].

other by co-existing through the accommodation of diversity.³⁶⁶ The author agrees with the court when it stated that religious beliefs should not determine the constitutional rights of others.³⁶⁷ And, importantly, the Constitution and the law should step in and counteract unfair discrimination directed towards minority groups such as the LGBTQI+ community.³⁶⁸

It is submitted that the above cases are all progressive in terms of determining that the LGBTQI+ community be treated with equal respect and afforded the dignity that they deserve. Same-sex marriage in terms of the Civil Union Act may well have an effect on the homophobia and prejudice in society given the symbolic nature of the way marriage is generally viewed within society.³⁶⁹ But, how the right to being different and being accepted for that in terms of marrying one's same-sex partner within the church, is something that is yet to be established. Hopefully, equal respect, dignity and inclusivity will be the way in which this issue will be viewed considering that the court is being progressive in its attempt to afford equality and dignity to the LGBTQI+ community.

3.4 CONCLUSION

From the above discussion, it is clear that with our historical past of racial discrimination and inequality, the constitutional right to equality has become a fundamental right in South Africa. Substantive equality requires the law to ensure an equality outcome.³⁷⁰ This means that section 9 must be read and understood in light of a substantive conception of equality. Invoking section 9 of the Constitution in cases dealing with discrimination indicates that there is a provision differentiating between people or groups of people.³⁷¹ The equality test developed in the case of *Harksen*³⁷² is a test that will direct the courts as to how disputes of equality should be examined. It is a test that became a firm foundation for dealing with our equality jurisprudence. Courts since the *Harksen* judgment now rely on section 9(1), section 9(2) or section 9(3) to analyse the differentiation complained of. This has created a solid framework of rich jurisprudence for equality case law within South Africa.

³⁶⁶ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [98].

³⁶⁷ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [98].

³⁶⁸ *Minister of Home Affairs and Another v Fourie* supra (n338) at para [92].

³⁶⁹ De Vos 'The 'inevitability' of same-sex marriage in South Africa's post-apartheid state' op cit (n91) 464.

³⁷⁰ Currie & De Waal op cit (n1) 222. See also Govender op cit (n243) 131-148.

³⁷¹ Currie & De Waal op cit (n1) 222. See also Govender op cit (n243) 131-148.

³⁷² *Harksen v Lane* supra (n245).

However, there is still a considerable amount of potential that could be used for transformational change that our courts can integrate into applying the law. Cases that come before the court regarding sexual orientation involving ordained ministers and lay congregants facing an injunction against same-sex marriage in some religious denominations is one such example where the courts can utilise the equality test and substantive equality.³⁷³ Courts must fully embrace substantive equality for the full benefit of all groups that have suffered past discrimination and continue suffering disadvantages.

³⁷³ See *Gaum and Others v Van Rensburg NO and Others* [2019] 2 All SA 722 (GP). This case is discussed in ch 4.

CHAPTER FOUR:

THE CONSTITUTIONAL FRAMEWORK - RIGHT TO FREEDOM OF RELIGION

4.1 INTRODUCTION

The previous chapter examined the constitutional right to equality and the right not to be discriminated against on the basis of sexual orientation. Section 9 and its three dimensions were analysed in detail in order to understand the right to equality and how it would apply to religious denominations. Sexual orientation was also discussed in order to examine how the courts have determined discrimination cases based on this prohibited ground.

This chapter is a continuation of the investigation of the constitutional framework. The purpose of this chapter is to analyse the right to freedom of religion especially in terms of religious liberty.¹ This chapter will provide a brief historical context of religion in South Africa. It will examine what the concept of religion is, the two dimensions of the right to religion i.e. the right to religious equality and the right to religious liberty, but will focus on the right to religious liberty, and finally a discussion on how conflicting constitutional rights can be limited in terms of section 36 of the Constitution.

Religious freedom is a constitutional right which is guaranteed in our law. The right to freedom of religion is guaranteed in section 15 of the Constitution which states that:

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

¹ Religious liberty is the freedom for religions to follow their own beliefs and their own practices even if they are discriminatory or unfair. Religious liberty in the context of this study not only protects religious beliefs but also protects religious practices.

The right to religious freedom features prominently in the Bill of Rights although not as extensively as the right to equality. The right to freedom of religion appears in section 9(3) which features religion as a protected ground on which one may not discriminate, section 16(2)(c) provides that “the right to freedom of expression does not extend to “the advocacy of hatred that is based on race, ethnicity, gender or religion, that constitutes incitement to cause harm” and, section 31 gives all South Africans the right to choose and enjoy religion as they please but within the boundaries of the Bill of Rights. It is therefore not surprising that religious freedom features prominently, this is partly because South Africa is a religious country and partly because of South Africa’s history which favored one religion and in fact one denomination above all others.²

Proof that South Africa is a religious country is evident in the Statistics South African General Household Survey of 2015.³ It was recorded in the survey that religious affiliations and observances can be divided into the following: 86% of South Africans believe in God and are Christians (note must be taken of the fact that Christianity was not divided into specific denominations). Other religious affiliations included Muslims who constituted 1.9% of the population, ancestral, tribal, animist or other traditional African religions constituted 5.4% of the population, Hindus who constituted 0.9% of the population, Jews constituted 0,2% of the population, ‘other’ religions constituted 0,4% of the population, and 5.2% of the population did not belong to any particular religious affiliation.⁴

Freedom of religion read together with freedom of association in section 18⁵ and section 31⁶ of the Constitution guarantees a level of autonomy for religious denominations to run their

² See T Kuperus ‘Resisting or embracing reform? South Africa’s democratic transition and NGK-State relations’ (1996) 38(4) *Journal of Church and State* 841-872 who argues that the political involvement of the NG Kerk with the State began in the early 1900s when it justified apartheid. Between 1948 and 1978 the NGK (Dutch Reformed Church -DRC) and the State were indistinguishable. After 1961 the DRC followed the lead of the State. From 1979 to 1994 the DRC and State exhibited a relationship of mutual engagement where key political issues were agreed upon.

³ Statistics South Africa ‘General Household Survey 2015’ available at <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> accessed 20 November 2022. The data found in this survey was the latest data highlighting the percentage distribution of religious affiliations by province. Religious affiliations were not recorded in the General Household Surveys from 2016-2022.

⁴ Ibid.

⁵ Section 18 of the Constitution provides that ‘everyone has the right to freedom of association’.

⁶ Section 31 of the Constitution provides that ‘(1) persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to (a) enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic association and other organs of civil society; (2) the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights’.

affairs without outside interference.⁷ Freedom of association can then be said to be interlinked with religious freedom.⁸ As much as religious denominations have the freedom of association to carry out their business and maintain their autonomy, individuals also have the right to freedom of association to express their beliefs and to take part in religious practices which are in line with their convictions.⁹ This is where the conflict of rights may collide.¹⁰ Section 31(2)¹¹ however prevents any religious practice which is contrary to the Bill of Rights from being carried out.¹² Both freedom of association and freedom of religion are linked to religious liberty as well as religious equality.¹³ However, neither freedom of religion nor freedom of association are absolute rights and may be limited in terms of the law of general application and the Constitution.¹⁴

4.2 HISTORICAL CONTEXT

It is evident that religion has always been and still remains important in South Africa. It is argued by some theologians that in order to determine freedom of religion in a country, “the relationship between the church and the state must be examined”.¹⁵ There are two concepts that are important in the historical relationship between church and state. These models will not be discussed in detail but will just be mentioned. The Constantinian model and Theocratic models

⁷ M Eastman ‘Religion, belief and opinion’ in I Currie and J De Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 314-336.

⁸ S De Freitas ‘Freedom of association as a foundational right: religious associations and *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*’ (2012) 28(2) *South African Journal on Human Rights* 258-272. See also P Lenta ‘Taking diversity seriously: Religious associations and work related discrimination’ (2009) 126(4) *South African Law Journal* 827-860; G Pienaar ‘The interaction between freedom of association, the free exercise of religion and equality: congress: freedom of religion under a new constitutional dispensation in South Africa’ (2002) 43(1-2) *Dutch Reformed Theological Journal* 266-275.

⁹ De Freitas op cit (n8) 258-272. See also Lenta ‘Taking diversity seriously’ op cit (n8) 827-860; Pienaar op cit (n8) 266-275. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

¹⁰ Eastman op cit (n7) 314-336. *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC); *De Lange v Presiding Bishop, Methodist Church of Southern Africa* 2016 (2) SA 1 (CC); *Gaum and Others v Van Rensburg NO and Others* [2019] 2 All SA 722 (CC).

¹¹ Section 31(2) of the Constitution provides ‘that the rights may not be exercised in a manner inconsistent with any provisions of the Bill of Rights’.

¹² *South African National Christian Forum and Others v Minister of Co-operative Government and Traditional Affairs; Muslim Lawyers Association and Others v South African Police Services and Others; Solidariteit Helpende Hand NPC and Others v Minister of Co-operative Governance and Traditional Affairs; Freedom of Religion South Africa NPC v Minister of Cooperative Governance and Traditional Affairs and Others* (2021/01432; 2021/3002; 2021/3344; 2021/2619) [2021] ZAGPJHC 866.

¹³ Pienaar op cit (n8) 266-275.

¹⁴ Lenta op cit (n8) 827-860.

¹⁵ Lenta op cit (n8) 827-860. See also AWG Raath ‘Die reformatoriese grondslae van die verhouding tussen kerk en staat in die vroeë Kaapse volksplating (1602-1708): Enkele regsfilosofiese implikasies’ (2000) 26(2) *Studia Historiae Ecclesiasticae* 24-49; T Kuperus ‘Resisting or embracing reform? South Africa’s democratic transition and NGK-State relations’ (1996) 38(4) *Journal of Church and State* 841-872.

are clear about the role religion plays within society.¹⁶ The Constantinian model holds that the “political authorities are dominant over church authorities.”¹⁷ The Theocratic model holds that “religion in society resides within the church and how they understand their religion.”¹⁸ However, Coertzen argues that there is historical evidential proof that the Constantinian model was prevalent in South Africa from 1652-1994.¹⁹

Be that as it may, from 1652 when South Africa was under Dutch rule, the Dutch appointed their first minister of religion and church council who were responsible for the spiritual care and ecclesiastical matters of their congregants.²⁰ The Nederduitse Gereformeerde Kerk (or Dutch Reformed Church) was the only church at the time which was granted exclusive rights and protection by the settlers.²¹ Between 1737 and 1795 various missions were developed in South Africa by missionaries such as George Schmidt who founded the Protestant mission called the Moravian Brethren.²² 1795 was when the British occupied the Cape for the first time and the church continued to operate but with the interference of the state.²³ The second time the British occupied the Cape was in 1806 until 1910 where Christianity continued as it was previously.²⁴ After the Union of South Africa in 1910, the church-state relationship continued but under different governments.²⁵ The Dutch Reformed Church was still the predominant church at the time.²⁶ However, by the middle of the 19th century there were many European denominations of Christianity that had developed missions in South Africa.²⁷ Internal disputes within the European denominations led to splits where African independent churches were

¹⁶ P Coertzen ‘Constitution, charter and religions in South Africa’ (2014) 14 *African Human Rights Law Journal* 126-141, see also P Coertzen ‘Freedom of religion in South Africa: Then and now 1652-2008’ (2008) 29(2) *Verbatum et Ecclesia JRG* 345-367.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Coertzen ‘Freedom of religion in South Africa’ op cit (n16). See also R Britz ‘Reflections on the ecclesiastical interpretation of 6th April 1652 as a South African symbolic date: Research’ (2004) 24(1) *Acta Theologica* 1-24.

²¹ Kuperus op cit (n15) 841-872. See also Coertzen op cit (n20) 345-367.

²² M Eze *Intellectual History in Contemporary South Africa* (2016) 54-58. See also S Thorne *Congregational Missions and the Making of an Imperial Culture in Nineteenth-Century England* (1999) 81-83.

²³ See also Coertzen ‘Freedom of religion in South Africa’ op cit (n20) 345-367. Coertzen ‘Constitution, Charter and religions in South Africa’ op cit (n16) 126-141.

²⁴ Coertzen ‘Freedom of religion in South Africa’ op cit (n20) 345-367. Coertzen ‘Constitution, Charter and religions in South Africa’ op cit (n16) 126-141.

²⁵ Coertzen ‘Constitution, Charter and religions in South Africa’ op cit (n16) 126-141.

²⁶ Coertzen ‘Freedom of religion in South Africa’ op cit (n20) 345-367. See also Coertzen ‘Constitution, Charter and religions in South Africa’ op cit (n16) 126-141. See also Kuperus op cit (n15) 841-872.

²⁷ P Harrison *South Africa's Top Sites: Spiritual* (2004) 11-16.

founded such as the Zion Christian Church, Nazareth Baptist Church, Pentecostal Christian church to name but a few.²⁸

Interestingly, throughout the history of the church and religion in South Africa, as Kuperus argues, the Dutch Reformed Church was the predominant church with the most influence when it came to church and state relations.²⁹ Coertzen argues that there was no freedom of religion but rather a case of religious denominations being tolerated by the state.³⁰ It was only in 1994 that freedom of religion was guaranteed because of the Interim Constitution and finalised in the 1996 Constitution under section 15 of the Constitution.

It is submitted that the above is evidence that while there was religious liberty during the apartheid era, religious equality was not practiced. Instead, Christianity was favoured and, in particular, the Dutch Reformed Church was favoured over all other denominations.

4.3 MEANING OF RELIGION

The word “religion” is derived from the Latin word “*religare*” which means “to tie or to bind fast.”³¹ According to Henrico,³² religion is not defined within the Constitution which allows courts to interpret the right within the constraints of the Bill of Rights in terms of section 39 of the Constitution.³³ Henrico argues that definitions of concepts or terms should be defined in a way that brings clarity or a clear understanding.³⁴ Because there is no clear definition, our courts have tried to define religion in various cases.

In the case of *S v Lawrence*, *S v Nagel*, *S v Solberg*³⁵ Chaskalson P referred to the case of *R v Big M Drug Mart Ltd*³⁶ where Dickson CJC defined religion as:

²⁸ Ibid.

²⁹ Kuperus op cit (n15) 841-872.

³⁰ Coertzen ‘Freedom of religion in South Africa’ op cit (n20) 345-367.

³¹ R Henrico ‘Understanding the concept of ‘religion’ within the constitutional guarantee of religious freedom’ (2015) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 784.

³² Ibid. See also R Steinmann ‘The core meaning of human dignity’ (2016) 19 *Potchefstroom Electronic Law Journal* 32p.

³³ Section 39(1) provides that ‘when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom (b) consider international law and (c) consider foreign law.’

³⁴ Henrico op cit (n31) 784-803.

³⁵ 1997 (4) SA 1176 (CC).

³⁶ (1985) 1 SCR 295.

“The essence of the concept of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”³⁷

In *Christian Education South Africa v Minister of Education*³⁸ Sachs J was mindful of the definition given to religion by Chaskalson P in the *Lawrence*³⁹ case stating that:

“There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. ... Yet freedom of religion goes beyond protection the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.”⁴⁰

In *Prince v President, Cape Law Society*,⁴¹ although the court relied on the definition by Dickson CJC in the *R v Big M Drug Mart Ltd*⁴² case, Ngcobo J sought to look for a deeper understanding of religion by stating that:

“Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. ... For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.”⁴³

The derivate ‘*religare*’ explains the power religion has over people and their communities. Ordinarily religion is associated with a particular faith and worship system of transcendent

³⁷ *R v Big M Drug Mart* supra (n36) at para [92].

³⁸ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

³⁹ *Christian Education South Africa* supra (n38) at para [18] where Sachs J stated that he ‘cannot offer a better definition than this of the main attributes of freedom of religion’.

⁴⁰ *Christian Education South Africa* supra (n38) at para [36].

⁴¹ *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

⁴² *R v Big M Drug Mart Ltd* supra (n36).

⁴³ *Prince v President, Cape Law Society* supra (n41) at para [42]. See also *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 747 (CC) at para [146] where O’Regan J in her minority judgment had a very similar definition as Ngcobo J in the *Prince* case stating that ‘a religious belief is personal, and need not be rational nor need it be shared by others. A court must simply be persuaded that it is a profound and sincerely held belief’; *Dlamini v Green Four Security* 2006 (11) BLLR 1074 (LC) at para [16]; *POPCRU v Department of Correctional Services* 2010 (10) BLLR 1067 (LC) at para [15].

deities.⁴⁴ This is why there are so many forms of religion and various ways of being religious which are ways of making people human.⁴⁵ However, there is no express definition of the term ‘religion’ that can inform one as to what religious freedom means.⁴⁶

In the case of *Publication Control Board v Gallo (Africa) Ltd*,⁴⁷ Rumpff CJ considered various dictionary meanings of what “religion” is and stated that “religious beliefs are highly subjective and are founded on faith.”⁴⁸ From the judgement one can deduce that “religion is not considered on its own but rather as a subjective concept founded on faith which may not be considered as objectively reasonable.”⁴⁹ Courts have held that a particular belief must be a genuine part of your religious faith and it must be sincerely held.⁵⁰ The fact that your belief or practice must be a genuine part of your religion featured prominently in the case of *Dlamini v Green Four Security*.⁵¹ The applicants in this case were security guards who belonged to the Baptised Nazareth Group. As part of the tenets of their faith, they believed that men should not shave their beards.⁵² As a result of this, the applicants were dismissed from their positions for failing to obey an instruction from their employer to shave their beards.⁵³ As the court began examining the facts of the case, it found that since the applicants were selective about which tenets of their faith they would follow,⁵⁴ there was some flexibility around the observances of their faith.⁵⁵ The court stated that the expert evidence of the priest of the Baptised Nazareth Group was unable to demonstrate that not shaving or trimming their beards was an essential tenet of their faith.⁵⁶ The court thus rejected his evidence because the applicants were unable to demonstrate that trimming or shaving their beards was essential in practices their faith.⁵⁷ In deciding how to approach the case, Pillay J considered the fact that if the interest of faith and the standard exacted by the workplace could not be met then one interest has to yield to

⁴⁴ *MEC for Education: KwaZulu-Natal v Pillay* supra (n43) at para [146].

⁴⁵ PM Lenaghan ‘Restoring the historical deficit: The exercise of the right to freedom of religion and culture in democratic South Africa’ (2013) 29 *South African Journal on Human Rights* 296.

⁴⁶ Henrico op cit (n31) 784-803. An example of a definition of religion can be found in *The Concise Oxford Dictionary* (1999) 1209 which defines ‘religion’ as ‘the belief in the worship of a superhuman controlling power, especially a person God or gods ... a particular system of faith and worship.’

⁴⁷ *Publication Control Board v Gallo (Africa) Ltd* 1975 (3) SA 665 (A) 672.

⁴⁸ *Publication Control Board v Gallo (Africa) Ltd* supra (n47) at 673B-C.

⁴⁹ *Publication Control Board v Gallo (Africa) Ltd* supra (n47) at 673B-C. See also Henrico op cit (n31) 785.

⁵⁰ *Dlamini v Green Four Security* 2006 (27) ILJ 2098 (LC) at para [23]. See also *Christian Education South Africa v Minister of Education* supra (n38).

⁵¹ *Dlamini v Green Four Security* supra (n50).

⁵² *Dlamini v Green Four Security* supra (n50) at para [2.]

⁵³ *Dlamini v Green Four Security* supra (n50).

⁵⁴ *Dlamini v Green Four Security* supra (n50) at para [66].

⁵⁵ *Dlamini v Green Four Security* supra (n50) at para [26].

⁵⁶ *Dlamini v Green Four Security* supra (n50) at para [26].

⁵⁷ *Dlamini v Green Four Security* supra (n50) at para [26].

the other.⁵⁸ Pillay J went on to state that to balance freedom of religion with other rights and, the interests of the workplace which is home to diverse religions, a “balance must be struck sensitively.”⁵⁹ In balancing their rights, Pillay J found that the impact of the clean-shaven rule in their beliefs would have been more serious had the applicants being inflexible in the way that they practiced their religious beliefs.⁶⁰ Pillay J went further by stating that the religious rule prohibiting the applicants from shaving their beards was not enforced by a penalty, whereas the workplace rule did have a penalty attached to it.⁶¹ Therefore, the “workplace rule must prevail.”⁶² In light of the above, the court held that the applicants were not discriminated against and their dismissal was not unfair.⁶³ It is submitted that it is interesting to note that normally courts accept that a person’s religious beliefs are sincerely held and this is what the matter is decided on, but in this case, the court investigated the sincerity of the religious belief itself.

In the *S v Lawrence*⁶⁴ case, the court held that “religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights.”⁶⁵ The court also stated that “religion is not just a question of belief or doctrine. It is part of a way of life (a practice), of a people, temper and culture”.⁶⁶ It is clear that religion and belief go hand in hand and the influence of it is far reaching in that it affects the way people think, feel, communicate and behave. Sarat argues that “while freedom of religion or belief rightly means that people have the right to live in accordance with their belief, it does not mean that others should necessarily bear the burden of that right.”⁶⁷

A useful description of religion is by Witte who believes that:

“religion ---- embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values ...the idea of the holy”⁶⁸

⁵⁸ *Dlamini v Green Four Security* supra (n50) at para [31].

⁵⁹ *Dlamini v Green Four Security* supra (n50) at para [31].

⁶⁰ *Dlamini v Green Four Security* supra (n50) at para [66].

⁶¹ *Dlamini v Green Four Security* supra (n50) at para [66].

⁶² *Dlamini v Green Four Security* supra (n50) at para [66].

⁶³ *Dlamini v Green Four Security* supra (n50) at para [66].

⁶⁴ *S v Lawrence* 1997 (4) SA 1176 (CC).

⁶⁵ *S v Lawrence* supra (n64) at para [36].

⁶⁶ *S v Lawrence* supra (n64) at para [33].

⁶⁷ A Sarat *Religion and the Law* (2012).

⁶⁸ J Witte *Religion and the American Constitutional Experiment. Essential Rights and Liberties* (1999) 230.

In considering the lack of a clear dictionary definition of religion, it is submitted that religion is an outward expression of an inner belief in a particular deity with whom one has a personal spiritual connection. It is a personal religious belief that should be practiced without fear of reprisals and need not be understood by others or shared by others. This is what makes religious belief personal. Attempting to define religion is complex and our courts should try not to articulate a definition that is “incapable of precise determination.”⁶⁹

4.4 THE TWO DIMENSIONS OF THE RIGHT TO FREEDOM OF RELIGION

4.4.1 Introduction

The separation of church and state is important in complying with the separation of powers within South Africa’s new constitutional order. The relationship between the church and the state is regulated and governed by two principles or dimensions. The first dimension is the right to religious liberty where the state should not interfere with religious beliefs and second is the right to religious equality where the state must not favour one religion over the other. These two dimensions need to be explained to promote an understanding of how they relate to freedom of religion.⁷⁰ For purposes of this thesis we will be concentrating on the right to religious liberty.

4.4.2 Religious liberty

Religious liberty can be understood as operating within the realms of free choice without the interference of the state. Freedman believes that religious liberty is concerned with practices that pressurise individuals into practicing conflicting religious beliefs.⁷¹ Unlike the religious equality dimension, which is aimed at ensuring the state does not favour one religion over another, the religious liberty dimension of the right is aimed at protecting an individual’s right to practice his or her religious beliefs. It follows, therefore, that any law that directly (and possibly indirectly) prohibits a person from holding a belief or manifesting that belief in practice would infringe this dimension of the right. Similarly, any law that directly and

⁶⁹ Henrico op cit (n31) 784-803.

⁷⁰ W Freedman ‘Church-state relations and the right to religious freedom’ (1999) 1 *Journal of South African Law* 157.

⁷¹ Ibid.

indirectly coerced a person into holding a particular belief or manifesting that belief in practice would infringe this dimension. For example, forcing children to say the Lord's Prayer at Assembly or a Sports Event. Decisions regarding religious matters should be made by church institutions, for example houses of worship and the individuals themselves.⁷²

4.4.3 Religious equality

Religious equality can be understood as treating all religions in the same way. In other words, governments should not favour one religion over another or favour all religions over non-religion.⁷³ The separation between church and state is determined by the way in which government treats the practice of religion and non-religion.⁷⁴

4.4.4 *S v Lawrence, S v Negal, S v Solberg*⁷⁵

The issue of religious liberty and religious equality was discussed in the case of *S v Lawrence, S v Negal, S v Solberg*.⁷⁶ All the appellants were part of the Seven Eleven chain store.⁷⁷ Each of the cases concerned selling of alcohol and the contravention of the terms of the grocer's wine license.⁷⁸ Mrs Lawrence sold wine after closing hours during the week.⁷⁹ Ms Solberg sold wine on a Sunday.⁸⁰ Mr Negal ignored the liquor licence that permitted only the sale of table wine and sold cider and beer at his store.⁸¹ All three appellants were convicted for contravening the terms of the grocer's wine licence.⁸² According to the Liquor Act⁸³ the holder of a grocer's wine licence was prohibited from selling any alcohol other than wine and, all restricted the hours and days on which alcohol could be sold.⁸⁴ The appellants defence was that the sections that they were supposed to have infringed were themselves unconstitutional and invalid. The

⁷² 'An introduction to religious liberty' *BJC*, available at <https://bjconline.org/religiousliberty/> accessed on 10 April 2021.

⁷³ Freedman 'Church-state relations and the right to religious freedom' op cit (n70) 157.

⁷⁴ Freedman 'Church-state relations and the right to religious freedom' op cit (n70) 157.

⁷⁵ *S v Lawrence, S v Negal, S v Solberg* 1997 (4) SA 1176 (CC).

⁷⁶ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

⁷⁷ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [1].

⁷⁸ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [2].

⁷⁹ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [2].

⁸⁰ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [2].

⁸¹ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

⁸² *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [4].

⁸³ Liquor Act 27 of 1989.

⁸⁴ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [2].

appellants challenged the unconstitutionality of sections 87-90 of the Liquor Act. Section 87 provides that:

“The holder of a grocer’s wine licence . . . shall at all times carry on the business of a general dealer (which shall include dealing in groceries and foodstuffs), and may carry on or pursue any other business (excluding a business to which any other licence relates) or trade or occupation, on the licensed premises.”⁸⁵

Section 88(1) only allowed table wine to be sold, and prohibited the sale of any other alcohol under the grocers wine licence.⁸⁶ Section 90(1) concerned the time in which table wine could be sold which was “on any day between 08:00 to 20:00 except on a closed day and a Saturday and, on any Saturday between 08:00 and 17:00 except on a closed day.”⁸⁷ A closed day was deemed to be a Sunday, Good Friday and Christmas Day.⁸⁸

The appellants argued that the sections were inconsistent with the right to freedom of religious belief and opinion guaranteed by section 14 of the Interim Constitution (now section 15 of the final Constitution).⁸⁹

Lawrence’s appeal was based on the argument that section 90(1)⁹⁰ hindered her right to economic activity.⁹¹ The court held that economic activity does not imply that one has unconstrained freedom to trade whenever they wish.⁹² The court further held that the hours restricting the sale of alcohol was rational and that the restrictions do not constitute a breach of section 26 of the interim Constitution.⁹³ The appeal was dismissed.

⁸⁵ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [6].

⁸⁶ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [6].

⁸⁷ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [6].

⁸⁸ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [6].

⁸⁹ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [4].

⁹⁰ Section 90(1) concerned the time in which table wine could be sold which was “on any day between 08:00 to 20:00 except on a closed day and a Saturday and, on any Saturday between 08:00 and 17:00 except on a closed day”.

⁹¹ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [61].

⁹² *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [63].

⁹³ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [70]. Section 26 concerned economic activity. Section 26(1) provided that ‘every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory. Section 26(2) provided that subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Negal's appeal was based on the fact that it was irrational for grocers to be permitted to sell wine and not beer and cider.⁹⁴ Prohibiting the sale of beer and cider according to the appellant was inconsistent with the Constitution and invalid.⁹⁵ The court held that the prohibition against selling beer and cider did not arise out of the provisions of section 87-90 of the Liquor Act. Instead the prohibition was in place to prevent selling liquor without a license.⁹⁶ The court held that if the appellant wanted to sell beer and cider the way to do that was to apply for a licence to trade as a liquor store and not a grocers' wine licence.⁹⁷ The appeal was dismissed.

Solberg's appeal was based on the argument that the chosen closed days⁹⁸ were indicative of the provision constituting an infringement of religious freedom based on section 14 of the interim Constitution.⁹⁹ With the appellant failing to convince the court of her argument, the appeal was dismissed.

Chaskalson P's judgment with which Langa DP, Ackerman and Kriegler JJ, concurred found that there was no violation of the right to freedom of religion in the prohibition of the sale of alcohol on a Sunday. Therefore, the provision was constitutionally valid. Sachs J with Mokgoro concurring found that while the prohibition on the sale of alcohol on a Sunday infringed the right to freedom of religion, it was however a justifiable limitation making the provision constitutionally valid. In a dissenting judgment O'Regan with Goldstone and Madala JJ concurring, disagreed with the majority and found that the prohibition on the sale of alcohol on a Sunday infringed the right to freedom of religion and that the infringement was not a justifiable limitation. This according to O'Regan made the provision constitutionally invalid.¹⁰⁰ O'Regan and Sachs JJ found that section 14 was broad enough to include equitable considerations whilst Chaskalson P viewed section 14 as limited in its scope.¹⁰¹ Chaskalson's justification for this was that there would be a contravention of section 14 only if a person was pressured into observing the practises of "a particular religion or placing constraints in their

⁹⁴ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [72].

⁹⁵ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [78].

⁹⁶ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [73].

⁹⁷ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [78].

⁹⁸ A closed day was defined in section 2 of the Liquor Act as a Sunday, Good Friday, Ascension Day, Day of the Vow and Christmas Day which were celebrated as religious days.

⁹⁹ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [86].

¹⁰⁰ Freedman 'Church-state relations and the right to religious freedom' op cit (n70) 158.

¹⁰¹ Freedman 'Church-state relations and the right to religious freedom' op cit (n70) 158.

observance of their own religion.”¹⁰² The learned judge went on to say that “in developing our own jurisprudence under section 14 of the interim constitution and section 15 of the final constitution we should be careful not to blur this distinction.”¹⁰³ He argued further that “section 14 does not include an establishment clause and that we ought not to read into its provisions principles pertaining to the advancement or inhibition of religion by the state.”¹⁰⁴ If this is done, according to Chaskalson the “implications would be far reaching and beyond the scope and purpose of section 14.”¹⁰⁵

On the other hand, O’Regan argued that preferring one religion over another should not be permitted within our new constitutional order.¹⁰⁶ Firstly because it would result in indirect coercion and secondly it would be endorsing the preference of one religion over another when there is a wide diversity of religions in society.¹⁰⁷ Therefore according to O’Regan it is not enough to be satisfied that there is no direct pressure of religious belief in a particular case. Our courts must also be satisfied that one religion is not preferred over another.¹⁰⁸

Sachs J stated that the Constitution is aimed at protecting minority groups who have different beliefs. The learned judge argued that the “quality of a belief cannot be dependent on the number of its followers or on how widespread or not its acceptance or ideas may be.”¹⁰⁹ Therefore the state is prohibited from favouring one religion over another.¹¹⁰ Sachs disagreed with Chaskalson on his stance concerning section 14 when he said that coercion must be established first before you say it is breached.¹¹¹ He went on to say section 14 is undermined when the state endorses a particular faith.¹¹² By the state endorsing a particular faith it has the effect of dividing the “nation into insiders who belong and outsiders who are tolerated.”¹¹³ This according to Sachs is prohibited in a “multi-faith heterodox society contemplated by our Constitution.”¹¹⁴

¹⁰² *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [104]. See also Freedman ‘Church-state relations and the right to religious freedom’ op cit (n70) 156-163.

¹⁰³ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹⁰⁴ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹⁰⁵ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹⁰⁶ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹⁰⁷ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹⁰⁸ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹⁰⁹ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [160].

¹¹⁰ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [160].

¹¹¹ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [179].

¹¹² *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹¹³ *S v Lawrence, S v Negal, S v Solberg* supra (n75).

¹¹⁴ *S v Lawrence, S v Negal, S v Solberg* supra (n75) at para [179].

O'Regan J and Sachs J's judgments both found that section 14 included both religious liberty and the religious equality dimensions. Although religious liberty and religious equality are inter-related, this thesis is concerned primarily with religious liberty. The freedom for religions to follow their own beliefs and their own practices even if they are discriminatory or unfair.

4.5 RELIGIOUS LIBERTY

4.5.1 Introduction

Religious liberty not only encompasses religious beliefs but also religious practices. Religious liberty has an element of human rights attached to it. It can thus be perceived as "moral in that it may be considered as a special case having a natural right to liberty."¹¹⁵ This means that if human rights are the natural rights that humans have then there is a human right to religious liberty which encompasses religious practices.¹¹⁶

It has been argued that the term religion is seldom used on its own because it is used with the term belief.¹¹⁷ This is evidenced in the preamble of the South African Charter of Religious Rights and Freedoms (SACRRF).¹¹⁸ The preamble provides that:

"WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions¹¹⁹; and, WHEREAS religious belief may deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationships in our lives and in society, and may therefore contribute to the common good."¹²⁰

¹¹⁵ R Audi 'Religious liberty conceived as a human right' in R Cruft, S Matthew Liao, M Renzo (eds) *Philosophical Foundations of Human Rights* (2015) 407-422. See also M Penrose 'Equal justice under law: navigating the delicate balance between religious liberty and marriage equality' (2021) 61(1) *Washburn Law Journal* 191-220.

¹¹⁶ Ibid.

¹¹⁷ Henrico op cit (n31) 787.

¹¹⁸ As amended 6 August 2009 and signed 21 October 2010 at the University of Johannesburg.

¹¹⁹ South African Charter of Religious Rights and Freedoms As amended 6 August 2009 and signed 21 October 210 at the University of Johannesburg at a3.

¹²⁰ South African Charter of Religious Rights and Freedoms op cit (n119) at a8.

It is apparent from the SACRRF that there is a close nexus between the concepts of religion and belief.¹²¹

Religious practice on the other hand seems to be slightly different. Religious practices are viewed at times by non-believers as “bizarre, illogical or irrational”¹²² but also need the protection that is guaranteed by the right to freedom of religion. This does not however mean that religious institutions should violate the rights of their congregants.¹²³ Sachs J in the *Christian Education* case¹²⁴ stated that:

“Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial.”¹²⁵

As mentioned above religious liberty not only protects religious beliefs but also protects religious practices. It can be understood as operating within the realms of free choice without the interference of the state. This may become problematic if and when that liberty is used to harm others within the church. The question then arises as to whether religious liberty gives permission to religious denominations to practice their religion in a way that causes harm? Harm caused may manifest itself in various forms and may have long term physical and psychology effects.

Rembe and Mokhoathi believe that religious liberty cannot be allowed to violate the human dignity of congregants in their practice of beliefs.¹²⁶ If human dignity is violated then religious institutions should be held accountable.¹²⁷ They further believe that our Constitution does not clarify the limitations of religious liberties.¹²⁸ It merely defines religious liberties as per section 15(1) of the Constitution as “the right to freedom of conscience, religion, thought, belief and opinion”. There are no boundaries set in the case of religious institutions or establishments for

¹²¹ Henrico op cit (n31) 787.

¹²² *Prince v President, Cape Law Society, and Others* 2000 (2) SA 797 (CC) at para [42]. See also *MEC For Health, Limpopo v Rabalago and Another* 2018 (4) SA 270 (LP).

¹²³ NS Rembe and J Mokhoathi ‘Religious liberties and the constitution of South Africa: A call for religious accountability’ (2017) 116(1) *Scriptura* 1-10.

¹²⁴ *Christian Education South Africa v Minister of Education* supra (n38).

¹²⁵ *Christian Education South Africa v Minister of Education* supra (n38) at para [19].

¹²⁶ Rembe and Mokhoathi op cit (n123).

¹²⁷ Rembe and Mokhoathi op cit (n123).

¹²⁸ Rembe and Mokhoathi op cit (n123).

practices that violates the law.¹²⁹ Different faiths and religions differ on what constitutes religion. This in itself is acceptable, however, it becomes problematic when those beliefs become practices that are harmful to congregants. It is submitted that religious liberty must be curtailed in cases where an exercise of that liberty leads to the unjustifiable infringement of the rights of others.

Religious liberty if abused may manifest itself in physical and psychological harm. Three categories of physical and psychological harm will be discussed. The discussion will begin by firstly outlining religious practices that infringe on constitutional values and cause harm; secondly, religious practices that are prohibited by the law of general application, and; thirdly, religious practices that infringe on other general rules.

4.5.2 Physical and psychological effects

Note must be taken of the fact that religious practices which result in physical and psychological harm may be prohibited by a law of general application, even if they are mandated by religious beliefs. This however is not as simple as it sounds. If the harm takes the form of physical or possible psychological harm, then it can usually be prohibited without infringing the Constitution.¹³⁰ This is especially true when it is harm to a vulnerable group.¹³¹ However, if the harm takes the form of undermining other constitutional values, such as dignity, equality and, privacy to name but a few, it might be more difficult to weigh up these values.¹³² This may have to be done on a case-by-case basis. There are two further complicating factors. The first is if the law directly targets the practices of a particular religion then it will most likely be unconstitutional even if the practice is harmful. This means that the law must be a law of general application which just happens to prohibit a religious practice.¹³³ The second is if the law is of general application and prohibits a religious practice, then the question that arises is whether it is possible to reasonably accommodate that religious practice.

¹²⁹ Rembe and Mokhoathi op cit (n123).

¹³⁰ See *MEC For Health, Limpopo v Rabalago and Another* 2018 (4) SA 270 (LP); *South African National Christian Forum and Others v Minister of Co-operative Government and Traditional* supra (n12) 866.

¹³¹ See *MEC For Health, Limpopo v Rabalago* supra (n130) and *South African National Christian Forum and Others v Minister of Co-operative Government and Traditional* supra (n12) 866.

¹³² See *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) (27 August 2008); *De Lange* supra (n10) and *Gaum and Others v Van Rensburg NO* supra (n10).

¹³³ An example of a law of general application could be for instance the Drugs and Drug Trafficking Act 140 of 1992 or the Schools Act 84 of 1996.

To untangle all the above an examination of religious liberty jurisprudence will now be discussed.

4.5.3 Religious practices that infringe constitutional values and cause harm

At times a religious practice may cause harm by infringing on congregants right to equality in favour of its own right to freedom of religion. In cases such as these, these conflicting constitutional rights have to be balanced proportionally in order for justice to be done. The courts will do this on a case-by-case basis. Our courts have considered several cases dealing with religious practices that infringe on constitutional values that cause harm. The two cases focussed in this section are the *De Lange*¹³⁴ and *Gaum*¹³⁵ cases.

(a) *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another*¹³⁶

De Lange was ordained as a minister in the Methodist Church of Southern Africa in 2006.¹³⁷ She served the Brackenfell and Windsor Park congregations in Johannesburg.¹³⁸ The church and its officials were aware of and accepted the sexual orientation of De Lange and her partner who lived together in the manse of the church.¹³⁹ As De Lange's relationship became more serious they decided that they would like to marry each other.¹⁴⁰ The intention to marry was announced by De Lange to her congregation.¹⁴¹ Following her announcement the church informed De Lange that she had breached rule 4.8.2 of the Laws and Disciplines of the church which states: "that Ministers shall observe and implement the provisions of the Laws and

¹³⁴ *De Lange v Presiding Bishop of the Methodist Church* supra (n10).

¹³⁵ *Gaum and Others v Van Rensburg NO* supra (n10) 52.

¹³⁶ *De Lange v Presiding Bishop of the Methodist Church* supra (n10). This case was mentioned in Chapter 2 and Chapter 3 but not discussed fully. Please Note: the discussion of the *De Lange* case is referred to by J Easthorpe in the article 'Pride and Prejudice: *De Lange v The Presiding Bishop, The Methodist Church of Southern Africa and Another* 2015 (1) SA 106 (SCA)' 2015(4) *Tydskrif vir die Suid-afrikaanse Reg* 903-918.

¹³⁷ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para 3. See also J Easthorpe 'Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 (2) SA 1 (CC)' (2016) 30(3) *Agenda* 115-123.

¹³⁸ *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* unreported judgment of the Western Cape High Court, Cape Town, Case No 11159/2013 (26 June 2013) at para [3].

¹³⁹ *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* supra (n138) at para [5]. See also Easthorpe 'Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church*' op cit (n137) 115-123.

¹⁴⁰ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para 5.

¹⁴¹ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para 5.

Disciplines and all other policies, decisions, practices and usages of the church.”¹⁴² Until such time as a decision was made concerning the theology of marriage and same-sex marriage, ordained ministers of the church were to adhere to the policies, practices and usages of the church recognising only heterosexual marriages.¹⁴³ The church suspended De Lange pending disciplinary action.¹⁴⁴ The District Disciplinary Committee found her guilty and suspended her without emoluments.¹⁴⁵ The matter was referred to arbitration by De Lange in terms of rule 5.11 of the Laws and Disciplines of the Church.¹⁴⁶ Before the outcome of the arbitration, De Lange began litigation proceedings in the High Court challenging the church’s decision.¹⁴⁷

De Lange’s arduous journey took her through the High Court, Supreme Court of Appeal and the Constitutional Court.

In the Constitutional Court there were two immediate issues that the court had to examine and decide upon: (i) whether to overturn the decisions of the Supreme Court of Appeal and the Western Cape High Court with regard to the arbitration award and (ii) to determine whether there was an unfair discrimination claim.¹⁴⁸

When dealing with the first issue concerning the arbitration award, the Constitutional Court held that although the High Court and the Supreme Court of Appeal concluded that Ms. De Lange showed no reasonable cause to set the award aside it still had to prove whether this was the case.¹⁴⁹ The court highlighted that the main reason De Lange wanted to be released from the arbitration award was because she discerned bias on the part of the church.¹⁵⁰ She also alleged that because the arbitrators were members of the church, the possibility of them setting aside the rules and regulations of the church were minimal.¹⁵¹ She further alleged that the

¹⁴² *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para 5. See also Easthorpe ‘Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church*’ op cit (n137) 115-123.

¹⁴³ *De Lange v Presiding Bishop of the Methodist Church* supra (n10). See also Easthorpe ibid.

¹⁴⁴ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [7].

¹⁴⁵ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [7]. See also Easthorpe ‘Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another*’ op cit (n137).

¹⁴⁶ *De Lange v Presiding Bishop of the Methodist Church* supra (n10).

¹⁴⁷ *De Lange v Presiding Bishop of the Methodist Church* supra (n10).

¹⁴⁸ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [2].

¹⁴⁹ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at paras [36] and [37].

¹⁵⁰ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [43].

¹⁵¹ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [44]. See also Easthorpe ‘Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another*’ op cit (n137).

church was hypocritical in allowing her to stay on the grounds of the church but not accepting her decision to marry her life partner.¹⁵² Based on these submissions, the court held that arbitration is the appropriate forum to conduct discussions about striking a balance between dogma and tolerance.¹⁵³ When it came to hypocrisy and bias, the court held that it is often the norm to appoint arbitrators familiar with the church and its rules and regulations to ensure that the outcome is in line with the Laws and Disciplines of the church.¹⁵⁴ On this basis, the court held that De Lange's reasons for wanting the arbitration award to be set aside were not compelling.¹⁵⁵ The court held that the appropriate forum to deal with the above issues would be arbitration.¹⁵⁶ According to the court, the outcome of the arbitration would be "open to judicial review" and the pursuit of a timeous equality claim if need be.¹⁵⁷

In terms of the unfair discrimination claim, the court had to consider the fact that both the High Court and the Supreme Court of Appeal refused to hear the matter based on unfair discrimination. In examining this, the court noted that in a reply affidavit to the church De Lange stated that her claim of unfair discrimination was not based on sexual orientation nor unequal treatment, but instead, it was based on administrative common law and fair administrative action.¹⁵⁸ On this basis, the High Court refused to hear the matter on unfair discrimination and dismissed the application. The Supreme Court of Appeal also declined to hear the unfair discrimination claim on the same basis, finding that De Lange had unequivocally disavowed her claim to unfair discrimination.¹⁵⁹ On this basis, the court held that this amounted to a disavowal to avoid the jurisdictional challenge posed by the church, which made it unfair to revive the unfair discrimination claim in the Constitutional Court.¹⁶⁰ De Lange's refusal to take her case to the Equality Court ended up being her downfall when it came to appealing her case in the Constitutional Court.¹⁶¹

¹⁵² *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [41]. See also Easthorpe 'Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church*' op cit (n137).

¹⁵³ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [45].

¹⁵⁴ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at paras [43]-[44].

¹⁵⁵ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [45].

¹⁵⁶ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [45].

¹⁵⁷ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [45]. See also Easthorpe 'Bruised but not broken: *De Lange v Presiding Bishop of the Methodist Church*' op cit (n137) 115-123.

¹⁵⁸ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [48].

¹⁵⁹ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) supra at para [48]-[50].

¹⁶⁰ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) supra at para [52].

¹⁶¹ See the comment in *Gaum and Others v Van Rensburg* supra (n10) at para [35].

In light of the above, the Constitutional Court held that the decisions made by the High Court and the Supreme Court of Appeal would not be reversed.¹⁶² The Supreme Court of Appeal was correct in holding that the doctrine of constitutional subsidiarity requires that the unfair discrimination claim be heard by an Equality Court prior to being heard by the Supreme Court of Appeal.¹⁶³

It is submitted that the central theme running through this discussion of the *De Lange* case is complex because of the conflicting constitutional rights between equality based on sexual orientation and freedom of religion. However, it is not only about the conflicting constitutional rights but also because of the fact that she took her case to the courts before her arbitration was complete, and the fact that she disavowed her unfair discrimination claim. The injunction against same-sex marriage implemented by the Methodist Church was a religious practice that infringed on De Lange's constitutional rights of equality. The fact that her matter was unsuccessful in the High Court, Supreme Court of Appeal and the Constitutional Court, is indicative of religious freedom having more weight than equality. Perhaps, if she had adhered to constitutional subsidiarity and taken her matter to the Equality Court as the Supreme Court of Appeal recommended, the outcome would have been different.

(b) *Gaum and Others v Van Rensburg NO and Others*¹⁶⁴

The *Gaum*¹⁶⁵ case flowed from a decision that was adopted in 2015 by the General Synod of the Church and reversed by the General Synod in 2016.¹⁶⁶ The 2015 General Synod decision confirmed that (i) all people were equal irrespective of their sexual orientation; (ii) recognised civil unions between same-sex couples; (iii) permitted ministers to solemnise same-sex unions but did not place a positive duty on them to perform such unions; and (iv) removed the celibacy requirement for gay clergy and elders in the church which permitted them to be ordained as ministers or elders.¹⁶⁷

¹⁶² *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [52].

¹⁶³ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [52].

¹⁶⁴ (40819/17) [2019] ZAGPPHC 52; [2019] 2 All SA 722 (GP) (8 March 2019). This case was mentioned in Chapter 2 but will be fully discussed and analysed in this Chapter.

¹⁶⁵ *Gaum and Others v Van Rensburg NO* supra (n10) at para [2].

¹⁶⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [2].

¹⁶⁷ *Gaum and Others v Van Rensburg NO* supra (n10) at para [2].

The purpose of the 2016 General Synod was to discuss the General Synod's 2015 decision and the report of the Temporary Task Team on the *gravamina* received.¹⁶⁸ At the 2016 General Synod a decision was made to set aside the 2015 decision amidst much debate and argument.¹⁶⁹ The decision of the 2016 General Synod was to exclude same-sex marriage within the Church and to prevent any LGBTQI+ congregant from holding a leadership position within the Church.¹⁷⁰

The applicants argued that the 2016 General Synod decision was unconstitutional because it amounted to unfair discrimination based on sexual orientation and, unjustifiably infringed the rights to human dignity, freedom of religion, belief, and opinion of the Church's LGBTQI+ congregants.¹⁷¹ The 2016 General Synod decision was also procedurally irregular and fatally flawed.¹⁷²

The respondents argued that the 2016 General Synod decision prevented the LGBTQI+ community from participating in the church but did not believe that the decision violated their constitutional rights. However, in the Respondent's Heads of Argument, it was conceded that the 2016 decision did indeed constitute discrimination based on sexual orientation.¹⁷³ The respondents also denied that there were grounds on which the decision could be reviewed. Instead, the church submitted that the 2016 General Synod decision did not infringe on Gaum's right to freedom of association and that he was free to become a member of another church that interprets the Bible the way that he does.¹⁷⁴ Ultimately the respondents relied on the argument that they have a right to freedom of religion which allowed them to make the right decision for the church.¹⁷⁵

There were two issues that the court had to consider.¹⁷⁶ The first issue was whether the Church followed its own rules concerning the 2016 decision and, the second concerned the substantive constitutional issues involved in the decision.¹⁷⁷

¹⁶⁸ *Gaum and Others v Van Rensburg NO* supra (n10) at para [47].

¹⁶⁹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [2].

¹⁷⁰ *Gaum and Others v Van Rensburg NO* supra (n10) at para [76].

¹⁷¹ *Gaum and Others v Van Rensburg NO* supra (n10) at paras [45] and [62].

¹⁷² *Gaum and Others v Van Rensburg NO* supra (n10) at para [50].

¹⁷³ *Gaum and Others v Van Rensburg NO* supra (n10) at para [64].

¹⁷⁴ *Gaum and Others v Van Rensburg NO* supra (n10) at para [63].

¹⁷⁵ *Gaum and Others v Van Rensburg NO* supra (n10) at para [64].

¹⁷⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [30].

¹⁷⁷ *Gaum and Others v Van Rensburg NO* supra (n10) at para [30].

In considering the first issue, the court had to consider the procedure followed by the General Synod in overturning the 2015 General Synod decision.¹⁷⁸ In accordance with the 2015 decision, appeals and objections were received against the 2015 General Synod decision.¹⁷⁹ According to the Church Order if the objections and appeals received are accepted as correct, then the decision that is being challenged (in this case the 2015 General Synod decision) can be amended or withdrawn.¹⁸⁰ A requisite is that there must be notice confirming each revision that needs to be sent to the Temporary Task Team.¹⁸¹ The Legal Temporary Task Team then makes a recommendation, which must be adopted by the majority in order for the matter to be reopened for further discussion to either make a new decision or confirm the previous decision.¹⁸² On legal advice, the General Synod accepted that the appeals received from the Temporary Task Team and suspended the 2015 General Synod decision.¹⁸³ Further legal advice contradicted the earlier legal advice given which meant that the appeals received did not suspend the 2015 General Synod decision.¹⁸⁴ On this basis an extraordinary General Synod meeting was called to discuss the 2015 General Synod decision and the report of the Temporary Task Team.¹⁸⁵ While this process was being determined, the Appeals Commission found that the appeals received against the 2015 General Synod decision was to be upheld and set aside.¹⁸⁶ The Church disagreed with the finding of the Appeals Commission and did not set aside or rescind the 2015 decision.¹⁸⁷ The General Synod decided that the issue regarding same-sex relationships should instead be revisited on theological grounds at a later stage. This led to the 2016 General Synod decision being made.¹⁸⁸ The court's task was to determine whether this procedure was irregular.¹⁸⁹ The court held that the Appeals process was irregular and thus unlawful, therefore the appeals process did not set aside the 2015 decision making it still operative.¹⁹⁰ Consequently, when the Chairman of the General Synod set aside the 2015 decision, he was "wrong in law and fact."¹⁹¹ The court then considered the three ways in which the Church Order provides for withdrawing, amending or replacing a decision of a church

¹⁷⁸ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁷⁹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸⁰ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸¹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸² *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸³ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸⁴ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸⁵ *Gaum and Others v Van Rensburg NO* supra (n10) at para [46].

¹⁸⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [48].

¹⁸⁷ *Gaum and Others v Van Rensburg NO* supra (n10) at para [48].

¹⁸⁸ *Gaum and Others v Van Rensburg NO* supra (n10) at para [49].

¹⁸⁹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [52].

¹⁹⁰ *Gaum and Others v Van Rensburg NO* supra (n10) at para [53].

¹⁹¹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [53].

meeting.¹⁹² The first way concerns how appeals and objections are addressed when there is an appeal at various meetings.¹⁹³ This process was incorrectly followed which rendered the decision of the General Synod null and void and therefore unlawful and invalid.¹⁹⁴ The second way is by means of “revisie/hersiening” (revision).¹⁹⁵ The court held that as the 2015 General Synod decision could be reviewed it did not need to be set aside.¹⁹⁶ The third way is by means of a gravamen.¹⁹⁷ Gravamen against the 2015 General Synod decision were not received and some were converted into appeals.¹⁹⁸ According to the court, gravamen follow a different process in comparison to an appeals process.¹⁹⁹ The gravamen were considered at the General Synod, but the Church did not rely on this process in arriving at the 2016 decision. Instead, oral arguments based on Church practice were considered, which resulted in the 2016 General Synod decision replacing the 2015 General Synod decision. On this basis, the court held that, because the Church Order provides for specific methods to be followed, they must follow them.²⁰⁰ If outside processes and methods are utilised by the Church then it constitutes an irregular process.²⁰¹ According to the court, the result of the appeals process was irregular and flawed, which translated into the 2015 decision still being in effect when the 2016 decision was made.²⁰² The court stated that the 2015 decision was ‘side-stepped’ and not set aside by the Appeals Process. The consequence of this was that the 2015 decision was not revised. According to the court, procedurally, the 2016 decision must first be reviewed and then set aside to give effect to the 2015 decision.²⁰³ The consequence of this was that the procedure followed by the church was inconsistent with the church's rules.²⁰⁴ The court held that since

¹⁹² *Gaum and Others v Van Rensburg NO* supra (n10) at para [53].

¹⁹³ *Gaum and Others v Van Rensburg NO* supra (n10) at para [54].

¹⁹⁴ *Gaum and Others v Van Rensburg NO* supra (n10) at para [54].

¹⁹⁵ *Gaum and Others v Van Rensburg NO* supra (n10) at para [55].

¹⁹⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [55].

¹⁹⁷ *Gaum and Others v Van Rensburg NO* supra (n10) at para [57]. “*Gravamen* is the means by which a member of the church, or a meeting of church members can raise an objection to a decision of the General Synod based on the Church Order, Creed, or the Church’s articles of Faith”.

¹⁹⁸ *Gaum and Others v Van Rensburg NO* supra (10) at para [57].

¹⁹⁹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [57].

²⁰⁰ *Gaum and Others v Van Rensburg NO* supra (n10) at para [59].

²⁰¹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [59].

²⁰² *Gaum and Others v Van Rensburg NO* supra (n10) at para [53].

²⁰³ *Gaum and Others v Van Rensburg NO* supra (n10) at para [60].

²⁰⁴ *Gaum and Others v Van Rensburg NO* supra (n10) at para [60]. See also P de Vos ‘Why court ruled against Dutch Reformed Church in same-sex marriage case and what it may mean for other churches who discriminate against gays and lesbians’ *Constitutionally Speaking* 12 March 2019, available at <https://constitutionallyspeaking.co.za/why-court-ruled-against-dutch-reformed-church-in-same-sex-marriage-case-and-what-it-may-mean-for-other-churches-who-discriminate-against-gays-and-lesbians/> accessed on 5 May 2019.

the Church's methods were not followed, it was not convinced by the Church's argument concerning a fair procedure being followed.²⁰⁵

In considering the second issue concerning the substantive constitutional issues, the court examined section 9 of the Constitution.²⁰⁶ According to the Court, the Church has the onus of proving that the discrimination is fair but according to the court papers, that onus was not discharged.²⁰⁷ In order for the Church to justify its infringement the enquiry had to shift to section 36 of the Constitution.²⁰⁸ The Church however pleaded that it did not have any justifications.²⁰⁹ Instead, the issue of fairness was addressed by the Church as it wanted to exercise its freedom of religion.²¹⁰ The court then examined section 9 of the Constitution.²¹¹ The main question in terms of the courts analysis of section 9 was whether the LGBTQI+ community suffered previous inequality and whether they still suffer that inequality today.²¹² According to the court, the answer to that question was yes.²¹³ The court held that the 2016 General Synod decision diminished the dignity of *Gaum* because the discrimination complained about was on a specified ground in terms of section 9(3) of the Constitution.²¹⁴ The court further held that the 2016 decision allowed the LGBTQI+ community to be congregants but excluded them from marrying and having leadership positions which denied *Gaum* the full and equal enjoyment of the life of the Church.²¹⁵ In terms of section 36 of the Constitution, the court stated that the church could not justify their decision.²¹⁶

When examining both the *De Lange*²¹⁷ case and the *Gaum*²¹⁸ case, it is evident that the practice of religious liberty allows the church to govern and interpret their practices and decisions concerning their doctrinal beliefs the way that they see fit. But, in so doing, their practices and the freedom to make their own decisions and interpret scripture for itself has a negative impact on the LGBTQI+ community. This is especially so when those beliefs and practices do not

²⁰⁵ *Gaum and Others v Van Rensburg NO* supra (n10) at para [59].

²⁰⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [64].

²⁰⁷ *Gaum and Others v Van Rensburg NO* supra (n10) at para [65].

²⁰⁸ *Gaum and Others v Van Rensburg NO* supra (n10) at para [65].

²⁰⁹ *Gaum and Others v Van Rensburg NO* supra (n10) at para [65].

²¹⁰ *Gaum and Others v Van Rensburg NO* supra (n10) at para [65].

²¹¹ A full discussion will not made here since a full discussion on section 9 is made in Chapter 3.

²¹² *Gaum and Others v Van Rensburg NO* supra (n10) at para [73].

²¹³ *Gaum and Others v Van Rensburg NO* supra (n10) at para [73].

²¹⁴ *Gaum and Others v Van Rensburg NO* supra (n10) at para [73].

²¹⁵ *Gaum and Others v Van Rensburg NO* supra (n10) at para [80].

²¹⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [92].

²¹⁷ *De Lange v Presiding Bishop of the Methodist Church* supra (n10).

²¹⁸ *Gaum and Others v Van Rensburg NO* supra (n10).

embrace diversity or other constitutional rights that the LGBTQI+ community have. The way in which religious denominations run their congregations is evidence of the fact that it does not take into consideration the harmful effects that their beliefs and practices have on their LGBTQI+ congregants.

The principle of the doctrine of entanglement arose in both cases. It is submitted that the principle allows secular courts to distance themselves in a way where they, as far as possible, do not get involved in the internal disputes of religious denominations or interfere in their doctrinal beliefs.²¹⁹ The effect of the doctrine of entanglement is that courts are reluctant to interfere with religious doctrinal disputes. Since religion is perceived as a power that requires a certain amount of respect, courts generally face an ever-increasing problem concerning whether to involve themselves in matters dealing with religious associations and doctrinal beliefs.²²⁰ The courts do not want to involve themselves because evaluating beliefs is mainly subjective.²²¹ Nwauche argues that there needs to be a certain amount of expertise required by the courts to evaluate claims regarding religious freedom.²²² Moleya believes that the doctrine of entanglement is an accepted principle based on the fact that a state should be “a-religious to ensure religious freedom and equality.”²²³ As the court stated in the *De Lange*²²⁴ case:

“It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people’s private lives and personal preference. Courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association.”²²⁵

²¹⁹ See *De Lange* supra (n10) at para [79] and, *Gaum and Others v Van Rensburg NO* supra (n10) at paras [26]-[29].

²²⁰ *De Lange* supra (n10) at para [21]. See also *Christian Education South Africa v Minister of Education* supra (n38) at para [35] where Sachs J stated that “*The underlying problem in any open and democratic society based on human dignity, equality and freedom and in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.*”

²²¹ *De Lange* supra (n10) at para [21]. See also E Nwauche ‘The religious question and the South African Constitutional Court: Justice Ngcobo in *Prince* and *De Lange*’ (2017) 32(1) *South African Public Law* 4.

²²² *Ibid.*

²²³ NI Moleya ‘Equality for all religions and culture in the South African legal system’ (2018) 1 July *De Rebus* 30.

²²⁴ *De Lange v Presiding Bishop of the Methodist Church* supra (n10).

²²⁵ *De Lange v Presiding Bishop of the Methodist Church* supra (n10) at para [79].

In justifying its position, the Court referred to foreign jurisprudence to confirm its position regarding the doctrine of entanglement. The Court referred to the United States where the entanglement clause prevents courts from becoming involved in the inner workings of the Church.²²⁶ As a result, the courts in America will not entertain doctrinal disputes at all,²²⁷ and the United States Supreme Court of Appeal cautions courts against entertaining any reviews concerning religious denominations' doctrinal beliefs.²²⁸ In similar vein, courts in the United Kingdom are not amenable to challenging or correcting decisions made by religious denominations.²²⁹ In the *Shergill* case the court held:

“This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.”²³⁰

Australian courts, much the same as the courts in the USA and UK, also do not involve themselves in determining issues around doctrinal beliefs and practices.²³¹ Canadian courts follow suit where they are reluctant to interfere in matters concerning the inner workings of religious denominations.²³²

In the *Gaum*²³³ case the court reiterated the principle of the doctrine of entanglement when it referred to an article by Woolman and Zeffert who argued that:

²²⁶ *United States v Ballard* 311 US 78 (1994).

²²⁷ *Presbyterian Church v Hull Church* 393 US 440 (1969).

²²⁸ *Serbian Orthodox Diocese v Milvojevich* 426 US 696 (1976).

²²⁹ *Shergill v Khaira* [2014] UKSC 33.

²³⁰ *Shergill v Khaira* [2014] UKSC 33 para 45.

²³¹ *Attorney-General (NSW) v Grant* [1976] HCA 38.

²³² *Lakeside Colony of Hutterian Brethren v Hofer and Street v. B.C. School Sports*, 2005 BCSC 958.

²³³ *Gaum and Others v Van Rensburg NO* supra (n10) at para [27].

“[I]n a radically heterogeneous society governed by a Constitution committed to pluralism and private ordering, a polity in which both the state and members of a variety of religious communities must constantly negotiate between the sacred and the profane, courts ought to avoid enmeshment in internecine quarrels within communities regarding the content or the truth of particular beliefs.”²³⁴

In the *Gaum*²³⁵ case the court did not adhere to the doctrine of entanglement as the matter involved the acceptance of same-sex unions within a church, which it argued was a sensitive and controversial matter, therefore, a limitation of rights must be considered, which requires the court applying its scrutiny.²³⁶

Although religious liberty allows religious denominations to operate freely by practicing and believing what they believe is in line with core doctrinal beliefs, we find that in both the above cases, those core beliefs became harmful to the LGBTQI+ congregants. On this basis, religious denominations cannot hide behind their practices and beliefs in order to exclude minority groups within their congregations. Religious denominations must be able to embrace diversity not only be accepting LGBTQI+ members as leaders and congregants of the Church but, in a way in which true equality is practiced by allowing them equal enjoyment of marriage rights. Religious denominations need to recognise that they cannot be hypocritical by accepting diversity in one hand and rejecting it in the other hand.

4.5.4 Religious practices prohibited by a law of general application

At times a religious practice may seem to be unusual for many, but is a regular practice for congregants of a specific denomination. At times those regular practices may cause harm to congregants which may result in both physical and psychological harm. In cases such as this, that harm can sometimes be prevented by the law of general application. The question of religiously motivated physical or psychological harm has been considered by the courts on

²³⁴ S Woolman & D Zeffertt ‘Judging Jews: Court interrogation of rule-making and decision-taking by Jewish ecclesiastical bodies’ (2012) *South African Journal on Human Rights* 205.

²³⁵ *Gaum and Others v Van Rensburg NO* supra (n10).

²³⁶ *Gaum and Others v Van Rensburg NO* supra (n10) at para [23]. See also Nwauche op cit (n221) 4 where the author suggests that there are two types of deference: one being simple and substantial which would allow the courts to engage with issues of religious freedom and the other being exclusive or total deference which comes down to immunity from judicial scrutiny in which a court would not even engage in a rights based enquiry.

several occasions. In this section, the focus will be on what are arguably the two leading judgments, namely the *Prince*²³⁷ and the *Christian Education South Africa*²³⁸ cases.

(a) *Prince v President, Cape Law Society, and Others*²³⁹

In the *Prince*²⁴⁰ case, the applicant studied towards becoming an attorney and the only module outstanding was his community service in terms of the Attorneys Act.²⁴¹ In his application to register his community service, he disclosed that he had two previous convictions for the possession of cannabis and intended to continue using cannabis.²⁴² The Law Society declined to register his contract of community service on the basis that as long as cannabis was a prohibited substance the appellant would consistently be breaking the law by partaking in the use of cannabis.²⁴³ The statutory provisions that were being challenged concerned cannabis being listed in Part III of Schedule 2 of the Drugs Act.²⁴⁴ It was listed as such, because it was deemed an “undesirable dependence-producing substance”²⁴⁵ which use was prohibited by section 4(b) of the Drugs Act.²⁴⁶ However, according to the Drugs Act, it was possible to use cannabis for medical purposes but only in certain circumstances.²⁴⁷ Therefore, possession of cannabis for medicinal purposes was exempted under section 4(b) of the Drugs Act subject to the provisions of the Medicines Act.²⁴⁸ Prince did not dispute the fact that the “prohibition of cannabis serves a legitimate government interest in terms of the Drugs and Drug Trafficking Act.”²⁴⁹ He did however believe that the use and or possession of cannabis was inspired by his religion.²⁵⁰ This was justified by the fact that the Rastafari religion has been in existence for more than seventy years and required its followers to use cannabis.²⁵¹ This was not disputed by the court who found that “cannabis was also called incense and the use of it was a sacrament

²³⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122).

²³⁸ *Christian Education South Africa v Minister of Education* supra (n38).

²³⁹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122).

²⁴⁰ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122).

²⁴¹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [1].

²⁴² *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [2].

²⁴³ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [3].

²⁴⁴ Drugs and Drug Trafficking Act 140 of 1992.

²⁴⁵ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [22].

²⁴⁶ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [22].

²⁴⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [22].

²⁴⁸ Medicines and Related Substances Act (previously Drugs Control Act) 101 of 1965.

²⁴⁹ Drugs and Drug Trafficking Act 140 of 1992.

²⁵⁰ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [18].

²⁵¹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [15].

known as Communion.”²⁵² It was also referred to by the Rastafari religion as a holy herb.²⁵³ The appellant, according to the court, was indeed an adherent of the Rastafari religion who used cannabis as an incense, smoked it and ate it in the privacy of his home.²⁵⁴

Chaskalson CJ in his majority judgment stated that the primary issue was whether the legislation was inconsistent with the Constitution.²⁵⁵ The court turned to consider section 15²⁵⁶ and section 31²⁵⁷ of the Constitution.²⁵⁸ The court stated that the appellant relies on his individual right to use cannabis in the privacy of his home and, with regard to his right of association used that cannabis freely in appropriate occasions with other Rastafari.²⁵⁹ Chaskalson CJ agreed with Ngcobo J that the religious rights of the appellant were limited because the legislation criminalised the use and possession of cannabis²⁶⁰ but disagreed with the Ngcobo J on whether that limitation is justifiable under section 36 of the Constitution.²⁶¹ The court held that it did not believe that the state had to grant an exception to the general prohibition of cannabis in order to cater for Rastafarians religious rights.²⁶² The proportionality analysis required by section 36 and the disputed legislation places a considerable limitation on the religious practices of Rastafari.²⁶³ According to the court it must be accepted that the legislation serves a legitimate governmental purpose in preventing the abuse of drugs in society.²⁶⁴ The general prohibition in the disputed legislation is to end the drug supply to potential users.²⁶⁵ Persons in possession of a prohibited drug will be in contravention of the law thus guilty of an offence irrespective of whether they intended to use it for themselves or not.²⁶⁶ Chaskalson CJ disagreed with Ngcobo J on the point that some uses of cannabis are not

²⁵² *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [18].

²⁵³ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [18].

²⁵⁴ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [21].

²⁵⁵ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [94].

²⁵⁶ Section 15 of the Constitution provides that “everyone has the right to freedom of conscience, religion, though, belief and opinion”.

²⁵⁷ Section 31 of the Constitution provides that “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

²⁵⁸ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [101].

²⁵⁹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [110].

²⁶⁰ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [111].

²⁶¹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [111].

²⁶² *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [111].

²⁶³ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [114].

²⁶⁴ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [114].

²⁶⁵ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [116].

²⁶⁶ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [116].

harmful.²⁶⁷ The court justified this by stating that “subject to the limits of self-discipline, the use may or may not be harmful.”²⁶⁸ The court then considered foreign law²⁶⁹ to demonstrate the difficulty a litigant has to confront in seeking exemption from the provisions of a criminal law of general application based on the grounds of religion.²⁷⁰ The court stated that medical exemptions given to the use of harmful drugs are necessary for health purposes and is sanctioned by international conventions because they are controlled.²⁷¹ Furthermore, what cannot be ignored in the limitation analysis is the fact that there is an international obligation on South Africa to curtail the trade of cannabis since it is grown locally.²⁷² As freedom of religion is enjoyed by all persons, if an exemption of the use of cannabis for religious reasons were permitted, it would hinder the state from enforcing its drug legislation.²⁷³ There would be no objective way that law enforcement could monitor and distinguish the use of cannabis for religious reasons and for recreation.²⁷⁴ The challenged legislation is not only to penalise the harmful use of cannabis but it seeks to prohibit the possession of it as well.²⁷⁵ This is the most effective way in which policing the trade and use of cannabis can be monitored.²⁷⁶ According to the court, the question to consider is not whether the use of cannabis for religious reasons is harmful to its users but, rather whether giving Rastafarians permission to possess cannabis would undermine the general prohibition.²⁷⁷ The answer to that question according to the court was that it would undermine the general prohibition of cannabis.²⁷⁸ Chaskalson agreed with the Supreme Court of Appeal²⁷⁹ by stating that it is necessary to prevent the abuse of cannabis by Rastafari followers by prohibiting the use of it as it has become a pressing social issue.²⁸⁰ Furthermore, the exemption sought would be impossible to enforce when trying to determine whether the person found in possession of cannabis is a Rastafari follower or not.²⁸¹ In essence

²⁶⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [118].

²⁶⁸ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [118].

²⁶⁹ The court looked at the *Department of Human Resources of Oregon v Smith* 494 US 872 at 917 (1990).

²⁷⁰ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [129].

²⁷¹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [127].

²⁷² *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [131].

²⁷³ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [132].

²⁷⁴ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [130].

²⁷⁵ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [141].

²⁷⁶ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [141].

²⁷⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [141].

²⁷⁸ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [141].

²⁷⁹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [143].

²⁸⁰ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [30].

²⁸¹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [30].

the majority of the court accepted in principle that a religious practice could be exempted from a general law of application that prohibited the harm in question, but, in this case the majority decided not to exempt the smoking of cannabis for the reasons highlighted above.

Ngcobo J in the minority judgment stated that the court's duty was not to look at whether cannabis needed to be legalised but rather whether the prohibition of it goes too far by bringing it into the scope of the Rastafarian religion.²⁸² Ngcobo J stated that the constitutional complaint concerned the prohibition being constitutionally unsound as it was too wide.²⁸³ The court held that there must be an enquiry into whether an "exemption for the Rastafari religious use of cannabis can be granted."²⁸⁴ The purpose of the enquiry according to the court was to test "the validity of the challenged provisions by trying to determine whether Parliament could have achieved its goal by not limiting the constitutional rights to the extent that it did."²⁸⁵ The court held section 36 of the Constitution must be referred to in order to determine whether the limitation on the constitutional rights can be justifiable.²⁸⁶ In weighing up competing interests, the court held that it becomes necessary to identify the interests that are at stake.²⁸⁷ For instance whether granting a religious exemption would undermine the objectives of the particular provision.²⁸⁸ Ngcobo J stated that the limitation is extreme because it prohibits the Rastafari religion from using cannabis, which has the effect of degrading and devaluing their followers by making them criminals for using cannabis for religious purposes.²⁸⁹ However, the objective of government in prohibiting the use and possession of cannabis was because of its harmful effects which may cause physical and psychological harm.²⁹⁰ In determining whether a religious exemption can be granted without undermining the purpose of the prohibition, the court stated that the goals of government was not to put an absolute ban on the use or possession of drugs. Under supervision, cannabis for medicinal reasons or research purposes cannot be harmful.²⁹¹ In circumstances such as this, the use of cannabis is exempted because the purpose of the prohibition is not undermined.²⁹² The court held that the policy behind the provisions

²⁸² *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [4].

²⁸³ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [35].

²⁸⁴ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [36].

²⁸⁵ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [36].

²⁸⁶ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [45].

²⁸⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [47].

²⁸⁸ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [47].

²⁸⁹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [51].

²⁹⁰ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [53].

²⁹¹ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [54].

²⁹² *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [54].

that are challenged should recognise the circumstances in which cannabis is used and to what extent it is used.²⁹³ Ngcobo J stated that when Parliament needs to prohibit a substance it must consider the various ways in which that substance can be used instead of only focussing on the health issues surrounding that substance.²⁹⁴ The court stated that even though the goal of the challenged provisions was legitimate in preventing abuse and trafficking of dependence-producing drugs, it was too extensive and therefore unreasonable.²⁹⁵ In stating that, Ngcobo went on to say that the prohibition contained in the challenged provisions was constitutionally unsound because it prohibited the use of cannabis for religious use even though it did not threaten the government interest.²⁹⁶ The court held that Parliament should be left to pursue an appropriate exemption.²⁹⁷ An appropriate remedy would be to declare the challenged provisions invalid to the extent that they do not allow cannabis to be used for religious purposes by bona fide Rastafari.²⁹⁸

It is submitted that when looking at the different judgments, it becomes important to distinguish when an exemption can be granted and when it will not be granted. From the majority judgment, we have learnt that a practice will not be exempted if the law of general application prohibits a practice because of its harmful effects. If the exemption hinders the state from enforcing the legislation in a way that cannot be monitored correctly and, if the prohibition is to prevent a social ill within society, then an exemption cannot be granted. On the other hand, and from the minority judgment, we have learnt that a practice can be exempted, if the limitation is extreme in the way it affects a religious practice. If a practice is inextricably linked to a religious purpose, the law of general application creating an absolute ban on that practice must be viewed in terms of what the law actually intended. Thus, when looking at the intention of the legislature when creating the law, it is important to consider the surrounding circumstances around the creation of that law. If a religious practice can be monitored in terms of curbing any harm arising from that practice then it seems as though an exemption can be granted.

²⁹³ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [78].

²⁹⁴ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [80].

²⁹⁵ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [81].

²⁹⁶ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [82].

²⁹⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [84].

²⁹⁸ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122) at para [85].

(b) *Christian Education South Africa v Minister of Education*²⁹⁹

This case dealt with the issue of corporal punishment being prohibited by Parliament in government and independent schools. An objection to the prohibition was raised by the “parents of children in independent schools who in line with their religious convictions consented to the use of corporal punishment.”³⁰⁰ The issue was triggered by the enactment of the South African Schools Act.³⁰¹ The appellants sought an order declaring section 10³⁰² of the Schools Act unconstitutional and invalid to the extent that “it prohibits corporal punishment in independent schools where parents have consented to its application.”³⁰³ The appellants argued that the prohibition of corporal punishment violated their right to freedom of religion.³⁰⁴ They relied on scriptural verses in the Bible to convince the court that corporal punishment was in line with their religious practices.³⁰⁵ The respondents being the Minister of Education contended that corporal punishment infringed the constitutional rights of equality (section 9), dignity (section 10), freedom of security of the person (section 12) and the best interests of the child (section 28).³⁰⁶

In a unanimous judgment, the Constitutional Court (per Sachs J) held that the law of general application be upheld in terms of the appellants’ claim for a “constitutionally compelled exemption.”³⁰⁷ Court found that the prohibition on corporal punishment in schools was constitutionally valid and thus dismissed the case.³⁰⁸

²⁹⁹ *Christian Education South Africa v Minister of Education* supra (n38).

³⁰⁰ *Christian Education South Africa v Minister of Education* supra (n38).

³⁰¹ The South African Schools Act 84 of 1996.

³⁰² Section 10 of the Schools Act provided that “(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.”

³⁰³ *Christian Education South Africa v Minister of Education* supra (n38) at para [3].

³⁰⁴ *Christian Education South Africa v Minister of Education* supra (n38) at paras [3]-[5].

³⁰⁵ Supra. Scriptures referred to by the appellants were Proverbs 22: 6 ‘Train up a child in the way it should go and when he is old he will not depart from it’, Proverbs 22:15 ‘Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him’; Proverbs 19:18 ‘Chasten they son while there is hope and let not they soul spare for his crying’, Proverbs 23:13-14 ‘Do not withhold discipline from a child, if you punish with a rod he will not die. Punish him with a rod and save his soul from death’ and Deuteronomy 6:4-7 ‘Hear, O-Israel! The Lord is our God, the Lord is one! And you shall love the Lord your God with all your heart and with all your soul and with all your might. And these words which I am commanding you today, shall be on your heart; and you shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up’.

³⁰⁶ *Christian Education South Africa v Minister of Education* supra (n38) at para [8].

³⁰⁷ *Christian Education South Africa v Minister of Education* supra (n38) at para [52].

³⁰⁸ *Christian Education South Africa v Minister of Education* supra (n38) at para [52].

In arriving at that decision, the court began its analysis by highlighting the “multiplicity of intersecting constitutional values” involved in the matter.³⁰⁹ The appellants relied on their constitutional rights being section 14 (privacy), section 15 (freedom of religion, belief and opinion), section 29 (education), section 30 (language and culture) and, section 31 (culture, religious and linguistic communities) of the Constitution.³¹⁰ The respondents relied on the constitutional rights in terms of section 9 (equality), section 10 (human dignity), section 12 (freedom and security of the person) and, section 28 (children).³¹¹

In order to balance these rights, the court turned to analyse the appellants’ rights against section 36 (the limitation clause) of the Constitution³¹² in order to establish whether the limitation on the rights of the appellant can be justified.³¹³ The court stated that the balancing of rights against section 36 should be “nuanced and context-sensitive.”³¹⁴ Sachs J stated that the proportionality exercise must relate to the failure to accommodate the religious beliefs and practices of the appellant in terms of the exemption, and, whether this can be accepted as “reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.”³¹⁵ Before doing the proportionality test, the court stated that there are difficulties around religious rights when contemplating a proportionality analysis.³¹⁶ The problem according to the court is that religious beliefs and practices are based on faith whereas public or private concerns are evaluated against their reasonableness.³¹⁷ Sachs J highlighted the fact that “religion is not just a question of belief or doctrine but it is part of a way of life, of people’s temper and culture.”³¹⁸ The result of this is that it is often just as difficult to disentangle religious and secular activities “from a conceptual point of view as it is to separate them in day to day practice.”³¹⁹ The court stated that it becomes difficult to categorise all practices as religious or secular because often there is an overlap between the two.³²⁰ The problem in an open and democratic society is the question as to how far democracy must extend in order for members of religious groups to

³⁰⁹ *Christian Education South Africa v Minister of Education* supra (n38) at para [15].

³¹⁰ *Christian Education South Africa v Minister of Education* supra (n38) at para [8].

³¹¹ *Christian Education South Africa v Minister of Education* supra (n38) at para [8].

³¹² *Christian Education South Africa v Minister of Education* supra (n38) at para [27].

³¹³ *Christian Education South Africa v Minister of Education* supra (n38) at para [29].

³¹⁴ *Christian Education South Africa v Minister of Education* supra (n38) at para [30].

³¹⁵ *Christian Education South Africa v Minister of Education* supra (n38) at para [32].

³¹⁶ *Christian Education South Africa v Minister of Education* supra (n38) at para [33].

³¹⁷ *Christian Education South Africa v Minister of Education* supra (n38) at para [33].

³¹⁸ *Christian Education South Africa v Minister of Education* supra (n38) at para [33].

³¹⁹ *Christian Education South Africa v Minister of Education* supra (n38) at para [34].

³²⁰ *Christian Education South Africa v Minister of Education* supra (n38) at para [34].

define for themselves which laws they will follow and which laws they will not follow.³²¹ The court stated that such a society will only be coherent when they accept that specific “norms and standards are binding.”³²²

Therefore, believers cannot expect an automatic right of exemption from the “laws of the land with regard to their beliefs” much the same as the state should, as far as possible, “seek to avoid putting believers into a position where they must choose either being true to their faith or respectful to the law.”³²³ In limiting the right to freedom of religion the court stated that the Schools Act is not depriving the right of the parents to bring up their children according to their Christian beliefs.³²⁴ The aim of the prohibition according to the court was to help diminish “public and private violence in society and to protect children from maltreatment, abuse or degradation.”³²⁵ This is in line with international treaties such as the United Nations Convention on the Rights of the Child and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on religion or Belief.³²⁶ Furthermore, courts throughout the world are showing consideration for protecting children against the harmful effects of their parents’ religious practices.³²⁷ The best interests of the child are of paramount importance.³²⁸ Therefore the parents, as far as the court was concerned, were not obliged to make a choice between their conscience and obeying the law of the land because they could do both simultaneously.³²⁹ What they are prevented from doing is authorising teachers to fulfil their religious practice in the guidance of their children.³³⁰ According to the court, the appellants’ schools are not prevented from maintaining their specific Christian ethos, they are just prevented from meting out corporal punishment to children.³³¹ The court held that upholding the generality of the law was the most important aspect in this case.³³² Thus, the appellants were not granted an exemption from the law of general application³³³ because the

³²¹ *Christian Education South Africa v Minister of Education* supra (n38) at para [35].

³²² *Christian Education South Africa v Minister of Education* supra (n38) at para [35].

³²³ *Christian Education South Africa v Minister of Education* supra (n38) at para [35].

³²⁴ *Christian Education South Africa v Minister of Education* supra (n38) at para [38].

³²⁵ *Christian Education South Africa v Minister of Education* supra (n38) at para [38].

³²⁶ *Christian Education South Africa v Minister of Education* supra (n38) at para [38].

³²⁷ *Christian Education South Africa v Minister of Education* supra (n38) at para [41].

³²⁸ *Christian Education South Africa v Minister of Education* supra (n38) at paras [40]-[41].

³²⁹ *Christian Education South Africa v Minister of Education* supra (n38) at para [39].

³³⁰ *Christian Education South Africa v Minister of Education* supra (n38) at para [51].

³³¹ *Christian Education South Africa v Minister of Education* supra (n38) at para [51].

³³² *Christian Education South Africa v Minister of Education* supra (n38) at para [52].

³³³ *Christian Education South Africa v Minister of Education* supra (n38) at para [52].

legislation in place was to protect the best interests of the child.³³⁴ On this basis the appeal was dismissed.³³⁵

This case was important in terms of highlighting the importance of religious freedom, religious doctrinal beliefs and practices based on biblical beliefs but also them having to be limited in order to preserve the right to dignity to which every person, including children, is entitled. Noteworthy is the fact that the court specifically mentioned that it was not preventing the school from maintaining its Christian ethos, it was just preventing it from acting unconstitutionally by infringing the right to dignity in the form of utilising corporal punishment. This case illustrates the fact that even though religious doctrinal beliefs and practices are important they can be limited in order to fulfil other constitutional rights in an open and democratic society based on human dignity and freedom. Also, in terms of religious liberty, religious practices cannot be discriminatory or harmful in respect to society. In other words, you cannot impose your religious practices on others to fulfil your religious doctrinal beliefs.³³⁶

It is submitted, that much like the *Prince*³³⁷ case, religious practices and not only beliefs were recognised by the court. The Court accepted that religious practices can be exempt but the exemption is not automatic. The lesson that can be learnt from the *Prince*³³⁸ case and the *Christian Education*³³⁹ case when read together is that both cases looked at the law of general

³³⁴ *Christian Education South Africa v Minister of Education* supra (n38) at para [43].

³³⁵ *Christian Education South Africa v Minister of Education* supra (n38) at para [52].

³³⁶ See also *MEC for Health, Limpopo v Rabalago and Another* supra (n130) where the court had to examine the issues around faith and religious belief. Prophet Rabalago was found guilty of assault for spraying his congregants with Doom in contravention of the Agricultural Stock Remedies Act 36 of 1947 to heal them from illness and disease. The court held at para 38 that religious leaders of various denominations cannot perform unorthodox, dangerous and risky religious practices under the guise of freedom of religion. Furthermore, the freedom of worship must be exercised reasonably and within the confines of the law and the Constitutional framework. See also *South African National Christian Forum and Others v Minister of Co-operative Government and Traditional Affairs* supra (n12), where the case was brought before the court by the applicants in terms of the Promotion of Administrative Justice Act 3 of 2000 challenging the Disaster Management Act 57 of 2002 (para 30). The issue was with respect to faith-based gatherings being prohibited during lockdown level 3 when other places such as gyms, restaurants and casinos were opened but allowed a limited number of people. The applicants asked that the regulations be set aside for being inconsistent with rights set out in the Constitution (para17). The court had to look at the Disaster Management Act and the loss of lives and livelihoods being affected by Covid-19 (para 5). Although the matter was moot because the President had lifted the prohibition by the time the case was heard, the court entertained the matter so that it is in the interests of justice (para 26). The court held that the decisions taken to prohibit gatherings was an executive one in terms of the Disaster Management Act and not the Minister herself (para 39). The court held that the regulations were no more than an expression of executive policy therefore, PAJA had no application in the matter because it did not constitute administrative action (para 40). The application was therefore dismissed (para 43). It is submitted that the crux of this matter going to court was the fact that religious leaders saw the prohibition as infringing on their religious practice of gathering in terms of giving hope to people in the time of pandemic which left many psychologically scared.

³³⁷ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122).

³³⁸ *Prince v President of the Law Society of the Cape of Good Hope* supra (n122).

³³⁹ *Christian Education South Africa v Minister of Education* supra (n38).

application prohibiting a religious practice from causing physical or psychological harm. We find that the Court will grant exemptions if it is based on reasonableness and practicalities. The Court in both these cases looked at the limitation analysis in order to determine whether an exemption from the law of general application can be justifiable and the Court found that it could not be justified. It can be deduced from both cases, that an exemption from the law of general application will not be granted if a religious practice has harmful effects attached to it. Also, if a religious denomination has no structure attached to it in like for example regular church services, the practicalities of an exemption become difficult because they cannot be monitored. The challenged provisions within the various pieces of legislation was not only to prevent the harmful and psychological effects of a religious practice but it was also in place to protect individuals and society as a whole from suffering harm attached to that specific religious practice.

4.5.5 Religious practices that infringe on other general rules

This category is a more general category concerning when a religious practice can be prohibited by a law or rule within the workplace. There are many diverse religions within a workplace which are accepted by the employer, but when a religious practice of an employee is contrary to the laws and rules of the workplace a conflict may arise between the employee and the employer.³⁴⁰ The cases of *Dlamini*³⁴¹ and *POPCRU*³⁴² were chosen because they display how a law of general application can prohibit a religious practice within the workplace if the practice is contrary to the business operations of an employer.

(a) *Dlamini v Green Four Security*³⁴³

This case dealt with a dismissal based on the fact that the applicants who were security guards refused to shave or trim their beards for religious reasons. The applicants belonged to the Baptised Nazareth Group and alleged that their religious practice did not allow them to shave or trim their beards.³⁴⁴ The applicants were given an instruction to shave their beards, but

³⁴⁰ RB Bernard 'Reasonable accommodation in the workplace: to be or not to be?' (2014) 17(6) *Potchefstroom Electronic Law Journal* 2870 -2891.

³⁴¹ *Dlamini v Green Four Security* supra (n50).

³⁴² *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n.

³⁴³ *Dlamini v Green Four Security* supra (n50).

³⁴⁴ *Dlamini v Green Four Security* supra (n50) at para [2].

refused because of their religious beliefs.³⁴⁵ The applicants were then dismissed. The applicants brought their matter to court on the basis that they were discriminated against because of their religious beliefs,³⁴⁶ and thus, automatically unfairly dismissed in terms of section 187(f) of the Labour Relations Act (LRA).³⁴⁷ The respondents highlighted the fact that the applicants were contractually bound in terms of the employment policy as security guards to be clean-shaven³⁴⁸ and that it was an inherent requirement of the job.³⁴⁹ The court had to analyse the dispute in terms of whether there was discrimination, if it could be proved, and, whether the clean-shaven rule was an inherent requirement of the job.³⁵⁰ The court held that the expert evidence of the priest of the Baptised Nazareth Group was unable to demonstrate that not shaving or trimming their beads was an essential tenet of their faith.³⁵¹ The court thus rejected his evidence.³⁵² The court found that the clean-shaven rule was indeed an inherent requirement of the job,³⁵³ as employees had to be personally clean, neat and hygienic in terms of the workplace policy.³⁵⁴ The court held that neatness is a primary requirement and must be observed in security services.³⁵⁵ Therefore, the respondent's rule is rational.³⁵⁶ In terms of the employer reasonably accommodating the religious needs of their employees, the court held that this requirement was not relevant since the applicant did not challenge this in their dismissal.³⁵⁷ In light of the examination that the court applied, it found that the applicants were not discriminated against and their dismissal was not unfair.³⁵⁸

(b) *Department of Correctional Services v POPCRU*³⁵⁹

This case, similar to the *Dlamini*³⁶⁰ case, concerned five male respondents who were dismissed by the Department of Correctional Services after they refused to obey a written instruction to

³⁴⁵ *Dlamini v Green Four Security* supra (n50).

³⁴⁶ *Dlamini v Green Four Security* supra (n50) at para [1].

³⁴⁷ Labour Relations Act 66 of 1995.

³⁴⁸ *Dlamini v Green Four Security* supra (n50) at para [7].

³⁴⁹ *Dlamini v Green Four Security* supra (n50) at para [9].

³⁵⁰ *Dlamini v Green Four Security* supra (n50) at para [13].

³⁵¹ *Dlamini v Green Four Security* supra (n50) at para [26].

³⁵² *Dlamini v Green Four Security* supra (n50) at para [26].

³⁵³ *Dlamini v Green Four Security* supra (n50) at para [67].

³⁵⁴ *Dlamini v Green Four Security* supra (n50) at para [54].

³⁵⁵ *Dlamini v Green Four Security* supra (n50) at para [62].

³⁵⁶ *Dlamini v Green Four Security* supra (n50) at para [62].

³⁵⁷ *Dlamini v Green Four Security* supra (n50) at para [70].

³⁵⁸ *Dlamini v Green Four Security* supra (n50) at para [71].

³⁵⁹ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union* supra (n342).

³⁶⁰ *Dlamini v Green Four Security* supra (n50).

cut their dreadlocks.³⁶¹ This instruction was in terms of the Corporate Identity Dress Code.³⁶² The reasons for not obeying the instruction to cut their dreadlocks was based on religious and cultural imperative.³⁶³ The respondents were adherents of Rastafarianism and Xhosa Culture.³⁶⁴ They were suspended and charged with breaching the Disciplinary Code and Procedure but refused to participate in the disciplinary hearing so were dismissed with immediate effect.³⁶⁵ The dispute was referred to the Labour Court based on the fact that they were automatically unfairly dismissed in terms of section 187(1)(f) of the Labour Relations Act.³⁶⁶ The respondents believed that their hairstyles were in observance of their sincere religious and cultural beliefs.³⁶⁷ The Commissioner testified that the policy was implemented to bring about uniformity of the dress code which was critical in order to maintain discipline and security in a prison environment.³⁶⁸ Furthermore, according to the Commissioner, dreadlocks posed a risk because they could easily be grabbed by an inmate in order to disarm an official.³⁶⁹ The court found that the respondents had failed to establish a causal link between their religious and cultural beliefs and the reasons for their dismissal.³⁷⁰ The court therefore found that there was no direct or indirect discrimination against the respondents on the ground of religion, belief and culture.³⁷¹

In both of the above cases, we can see how religious liberty can be extended and how religious practice can interfere in policies and rules implemented in the workplace.

³⁶¹ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union* supra (n342) at para [2].

³⁶² *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342).

³⁶³ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at paras [6] and [7].

³⁶⁴ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at para [11].

³⁶⁵ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at paras [8] and [9].

³⁶⁶ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at para [10].

³⁶⁷ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at para [11].

³⁶⁸ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at paras [13] and [14].

³⁶⁹ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at para [14].

³⁷⁰ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at para [15].

³⁷¹ *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* supra (n342) at para [16]. See also *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (30) ILJ 868 (EqC) where yet again the court has shown that a religious institution, as far as religious liberty is concerned, cannot impose its doctrinal beliefs and practices onto an individual/s in order to justify their stance in terms of freedom of religion by discriminating unfairly and imposing harmful effects on society.

In each of the above categories of physical and psychological harm, religious denominations believed that the practice was a religious one in that it formed a central part of their religion in which they had a firm belief. This, however, does not mean that the practice must be discriminatory or harmful in any way. It is submitted that the right to freedom of religion is currently a contentious issue especially when combined with other conflicting rights. This conversation includes many aspects most of which result in a discourse about morality and doctrinal beliefs. Ultimately, we need to find a way to balance these two rights in order to maintain the constitutional rights to equality and dignity for all.

4.6 SECTION 36 OF THE CONSTITUTION (THE LIMITATION CLAUSE)

Section 36 is the tool which courts will utilise if there are conflicting rights that need to be intricately balanced against each other.³⁷² It does this by listing a range of factors that need to be taken into account such as “the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and, less restrictive means to achieve the purpose.”³⁷³ In essence the limitation analysis requires proportionality between particular rights (whatever they may be) thus limiting the right to equality no more than is necessary in order to achieve a justifiable objective.³⁷⁴ The Bill of Rights can be limited by means of a law of general application.³⁷⁵

When conflicting rights need to be balanced against each other courts do this by assessing the purpose and importance of the infringement of the right on one hand and the effect of the infringement on the other. If a right can be justified in terms of section 36 then the infringement will not be unconstitutional.³⁷⁶ A limitation on any fundamental right must be justifiable in an open and democratic country in that it must serve a purpose, that the restriction will achieve the purpose it is meant to achieve and that there is no other way in which the purpose can be

³⁷² T Dean and R Brijmohanlall ‘The Constitutional Court’s approach to equality’ (2003) 44(2) *Codicillus* 92-100.

³⁷³ S 36 (1) ‘The rights in the Bill of Rights may be limited only in terms of law of application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose’.

³⁷⁴ Section 36(1) of the Constitution (limitation clause).

³⁷⁵ Currie and De Waal *The Bill of Rights Handbook* (2005) supra (n148).

³⁷⁶ N Sarkas ‘A not so quiet revolution’ 2013 *Responsa Meridiana* 44-63.

achieved.³⁷⁷ The application and test attached to section 36 depends on the circumstances of each case. The relevant factors in section 36(1)³⁷⁸ are indicators as to the justifiability of the limitation.

An example of the limitation test was seen in the case of *Midi Television*.³⁷⁹ This case came before the Supreme Court of Appeal on the basis of the limitation of one right against another, that being the right to freedom of expression in terms of section 16 of the Constitution and the right to a fair trial in terms of section 35 of the Constitution. Freedom of expression according to section 16 of the Constitution includes the press and other media. The fact that freedom of expression is indispensable to a democracy is unquestionable, but it does not make the right absolute. The court in the *Holomisa*³⁸⁰ case stated that ‘press exceptionalism’ is a dangerous doctrine,³⁸¹ but to diminish the freedom of the press means to diminish the rights of all citizens in having a free flow of information.³⁸² However, to limit a right such as the freedom of the press, such limitation must be permitted by the constitution “to the extent that the limitation is reasonable and justifiable taking into account the factors in section 36.”³⁸³

In analysing the limitation test the court began by saying that where one right curtails another right a court must find a way to reconcile these rights. One cannot just weigh one right against another right and then prefer the right which is more valued and ignore the other. Instead, the conflicting rights must be reconciled by recognising a limitation of the one right to the extent that it can accommodate the other right within the constraints of section 36.³⁸⁴ Nugent J pointed out that it is not the values of the competing rights that need to be weighed but rather what the benefit will be from allowing the intrusion. This is what needs to be weighed against the loss that the intrusion will have. If the loss outweighs the benefit of the right to the extent of the

³⁷⁷ Currie and De Waal *The Bill of Rights Handbook* (2005) supra (n148) 177.

³⁷⁸ Section 36(1): (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means

³⁷⁹ *Midi Television (Pty) Ltd v Director of Public Prosecutions* [2007] 3 All SA 318 (SCA).

³⁸⁰ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

³⁸¹ *Holomisa v Argus Newspapers Ltd* supra (n381) at 610E.

³⁸² *Midi Television (Pty) Ltd v Director of Public Prosecutions* supra (n379) at para [6].

³⁸³ *Midi Television (Pty) Ltd v Director of Public Prosecutions* supra (n379) at para [7].

³⁸⁴ See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at para [30] where the court held that ‘there is thus recognition of the potential that [freedom of] expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution.’ See also *S v Manamela* 2000 (3) SA 1 (CC) at para [66].

standard met by section 36, only then will the law give recognition to the validity of the intrusion.³⁸⁵

The approach adopted in *Midi Television* has been followed in subsequent cases, mostly involving a clash between freedom of expression, on the one hand, and the right to a fair trial and the rights of children, on the other hand. In the case of *Johncom Media Investments*³⁸⁶ there was a unanimous decision made by the Constitutional Court concerning how to approach the matter regarding maintaining the correct balance of competing rights in the Bill of Rights.³⁸⁷ The competing rights were the freedom of expression on the one hand and the right to privacy and dignity on the other hand.³⁸⁸ The case concerned Ms M and Mr D who married in March 1975 and had a son (PD) who was born nine months later.³⁸⁹ Twenty years later in March 1995 the marriage was dissolved by means of a decree of divorce which included the parties' settlement agreement.³⁹⁰ The settlement agreement dealt with the issue of custody of the children and the division of assets. Custody of the son (PD) was awarded to Mr D.³⁹¹ In 2001 Mr D instituted an action in the High Court against Ms M and PD on the basis that Ms M had misrepresented to Mr D the fact that PD was his biological son.³⁹² He sought damages, restoration of certain benefits paid to Ms M in accordance with the settlement agreement, partial rescission of the divorce which referred to PD as his son and, and order declaring that PD was not his biological son.³⁹³ While the action was pending, the editor of the Sunday Times (a newspaper owned by Mr D - Johncom Media Investments Ltd) came to hear about the case and wanted to publish the story which it believed would be of interest to its readers.³⁹⁴ Before publication of the story, the Sunday Times sought comments from the affected parties as a matter of ethical practice.³⁹⁵ This resulted in an urgent application for an interdict against the applicant.³⁹⁶ The application was granted on the basis that the publication would violate section

³⁸⁵ *Midi Television (Pty) Ltd v Director of Public Prosecutions* supra (n379) at para [11].

³⁸⁶ *Johncom Media Investments v M and Others* 2009 (4) SA 7 (CC). See also *Van Breda v Media 24 Ltd* [2017] (3) All SA 622 (SCA).

³⁸⁷ *Johncom Media Investments v M and Others* supra (n386) at para [15].

³⁸⁸ *Johncom Media Investments v M and Others* supra (n386) at para [15].

³⁸⁹ *Johncom Media Investments v M and Others* supra (n386) at para [3].

³⁹⁰ *Johncom Media Investments v M and Others* supra (n386) at para [4].

³⁹¹ *Johncom Media Investments v M and Others* supra (n386) at para [3].

³⁹² *Johncom Media Investments v M and Others* supra (n386) at para [4].

³⁹³ *Johncom Media Investments v M and Others* supra (n386) at para [4].

³⁹⁴ *Johncom Media Investments v M and Others* supra (n386) at para [5].

³⁹⁵ *Johncom Media Investments v M and Others* supra (n486) at para [6].

³⁹⁶ *Johncom Media Investments v M and Others* supra (n386) at para [3]-[7].

12 of the Divorce Act 70 of 1979³⁹⁷ as well as infringe the rights to privacy and dignity of Ms M and PD.³⁹⁸ A further order was granted against members of the Independent Group of Newspapers which meant that the story could not be published in any newspaper in the country.³⁹⁹ The interim order was opposed by the applicant in the High Court.⁴⁰⁰ The applicant also launched a counter-application in which it challenged the constitutional validity of section 12 of the Divorce Act on the basis that it was overbroad in its prohibition against information which fell outside of the scope of the rights it sought to protect.⁴⁰¹ The court *a quo* accepted the fact that section 12 of the Divorce Act was overbroad and therefore inconsistent with the constitutional right to freedom of expression enshrined in section 16⁴⁰² of the Constitution.⁴⁰³ The court declared the whole of section 12 invalid based on it being overbroad.⁴⁰⁴ The issue the Constitutional Court had to deal with was concerning whether section 12 was indeed unconstitutional and whether the order of the High Court was just and equitable.⁴⁰⁵ The court had to do this by weighing section 12 of the Divorce Act against section 16 of the Constitution.⁴⁰⁶ Jafta AJ held that to answer whether section 12 of the Divorce Act is invalid, it must be measured against section 16 of the Constitution.⁴⁰⁷ According to the court, section 12 of the Divorce Act means that information arising out of a divorce case cannot be published irrespective “of the nature of the information and, whether the publication will infringe the

³⁹⁷ Section 12 of the Divorce Act provides that “Limitation of publication of particulars of divorce action— (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action. (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information— (a) for the purpose of the administration of justice; (b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or (c) for the advancement of or use in a particular profession or science. (3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987. (4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

³⁹⁸ *Johncom Media Investments v M and Others* supra at para [6].

³⁹⁹ *Johncom Media Investments v M and Others* supra at para [6].

⁴⁰⁰ *Johncom Media Investments v M and Others* supra at para [7].

⁴⁰¹ *Johncom Media Investments v M and Others* supra (n386) at paras [8]-[9].

⁴⁰² Section 16 of the Constitution states that: ‘(1) Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm’.

⁴⁰³ *Johncom Media Investments v M and Others* supra (n386) at para [13].

⁴⁰⁴ *Johncom Media Investments v M and Others* supra (n386) at para [13].

⁴⁰⁵ *Johncom Media Investments v M and Others* supra (n386) at para [15].

⁴⁰⁶ *Johncom Media Investments v M and Others* supra (n386) at para [17].

⁴⁰⁷ *Johncom Media Investments v M and Others* supra (n386) at para [17].

rights of the divorcing parents and children.”⁴⁰⁸ The court held that although section 16 gives everyone the right to freedom of expression, it is not absolute and can be limited in terms of section 36 of the Constitution.⁴⁰⁹ In determining whether section 12 of the Divorce Act infringed on the right to freedom of expression the court had to apply a two-pronged approach.⁴¹⁰ The court followed the test formulated in the case of *Coetzee*⁴¹¹ even though the case was determined by the interim Constitution, but according to the court the final Constitution “is structured in the same way and requires the same approach.”⁴¹² The test was formulated as:

“The first stage is an enquiry whether the disputed legislation or other governmental action limits rights in chapter 3 of the Constitution. If so, the second stage calls for a decision whether the limitation can be justified in terms of s 33(1) of the Constitution.”⁴¹³

In terms of the first stage of the test, Jafta AJ stated that the prohibition in section 12 of the Divorce Act falls outside of the exceptions listed in section 16 of the Constitution⁴¹⁴ therefore it provides a limitation of the media’s right to publish information.⁴¹⁵

The court then went on to examine the second stage of the enquiry in order to determine whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution.⁴¹⁶ In order to do this, the balancing of competing interests is involved thus looking at a proportionality analysis.⁴¹⁷ The court referred to the case of *National Coalition for Gay and Lesbian Equality and Another*⁴¹⁸ in order to determine how the limitation exercise was defined.⁴¹⁹ It was defined as:

⁴⁰⁸ *Johncom Media Investments v M and Others* supra (n386) at para [18].

⁴⁰⁹ *Johncom Media Investments v M and Others* supra (n386) at para [19].

⁴¹⁰ *Johncom Media Investments v M and Others* supra (n386) at para [22].

⁴¹¹ *Johncom Media Investments v M and Others* supra (n386) at para [22].

⁴¹² *Johncom Media Investments v M and Others* supra (n386) at para [22].

⁴¹³ *Johncom Media Investments v M and Others* supra (n386) at para [22].

⁴¹⁴ The exceptions in section 16 of the Constitution are listed as “(a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

⁴¹⁵ *Johncom Media Investments v M and Others* supra (n386) at para [23].

⁴¹⁶ *Johncom Media Investments v M and Others* supra (n386) at para [24].

⁴¹⁷ *Johncom Media Investments v M and Others* supra (n386) at para [24].

⁴¹⁸ *Johncom Media Investments v M and Others* supra (n386). See also *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC).

⁴¹⁹ *Johncom Media Investments v M and Others* supra (n386) at para [24].

“The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.”⁴²⁰

In considering the proportionality test the court must consider balancing the competing rights properly by first identifying the infringed right as well as determining its nature and importance within its context.⁴²¹ It then becomes important to identify the purpose of the right together with the extent of the right in order that a determination can be made between the limitation of the right and the purpose that it was designed to achieve.⁴²² Once that analysis is complete, consideration must be given to whether the purpose of the right could be achieved by less restrictive means.⁴²³ The court referred to the case of *Islamic Unity Convention v Independent Broadcasting Authority and Others*⁴²⁴ in order to highlight the importance of the right to freedom of expression.⁴²⁵ In looking at section 12 of the Divorce Act, the court found that it limited the right to freedom of expression in that the prohibition did not only affect the media but it affected the public in receiving that information.⁴²⁶ The court then referred to the *Midi*⁴²⁷ case stating that to limit the freedom of the press is to limit the rights of the press as well as the rights of all citizens in receiving that information.⁴²⁸

The court went further by saying that the purpose of the limitation in section 12 of the Divorce Act is evident.⁴²⁹ Its objective was to protect the rights of privacy and dignity of the parties within divorce proceedings specifically children, but it ended up having an absolute prohibition on the media and in turn the public who would have received that information.⁴³⁰ According to the court the “purpose could be achieved by less restrictive means.”⁴³¹ Thus, the court held that

⁴²⁰ *Johncom Media Investments v M and Others* supra (n386) at para [24].

⁴²¹ *Johncom Media Investments v M and Others* supra (n386) at para [25].

⁴²² *Johncom Media Investments v M and Others* supra (n386) at para [25].

⁴²³ *Johncom Media Investments v M and Others* supra (n386) at para [25].

⁴²⁴ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC).

⁴²⁵ *Johncom Media Investments v M and Others* supra (n386) at para [27].

⁴²⁶ *Johncom Media Investments v M and Others* supra (n386) at para 2[8].

⁴²⁷ *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions* 2007 (5) SA 540 (SCA).

⁴²⁸ *Johncom Media Investments v M and Others* supra (n386) at para [28].

⁴²⁹ *Johncom Media Investments v M and Others* supra (n386) at para [29].

⁴³⁰ *Johncom Media Investments v M and Others* supra (n386) at para [29].

⁴³¹ *Johncom Media Investments v M and Others* supra (n386) at para [29].

the limitation cannot be justified⁴³² and found that section 12 of the Divorce Act was unconstitutional in its entirety.⁴³³

The above discussion pertaining to section 36 in the above cases illustrates how constitutional rights are subject to reasonable and justifiable limitation. Rights are not absolute and can be limited, but in so doing, the limitation must be for a compelling reason. It is important to note that when limiting a right, a less restrictive means to achieve the purpose of that right should be determined. By doing this the limitation of the right can be weighed and balanced in the correct manner in terms of section 36 of the Constitution.

4.7 CONCLUSION

This chapter has discussed the right to freedom of religion and how this right is implemented in relation to the context of the private sphere. Religious liberty allows religious associations to practice their beliefs in a way that respects their autonomy. It also protects the practices that arise out of those beliefs. Although religious liberty should not be hindered by the state, there are times when our secular courts need to intervene if religious liberty is used inappropriately and becomes harmful. Allowing religious denominations to undermine the rights of their congregants because of their religious liberty is a violation of our constitutional order. As this chapter has shown, a violation of religious liberty by religious denominations may be limited by the Constitution or by a law of general application. But, in limiting conflicting rights the courts need to determine the matter of whether a person's beliefs are a sincerely held religious belief.

At the core of our Constitution lies an "enterprise that has been characterised as transformative constitutionalism".⁴³⁴ The Constitution provides us with a framework for the protection and expression of rights provided for in the Bill of Rights. It requires a delicate balancing act in order to give effect to these rights in a society as diverse as ours. Limiting a right may result in prejudice to a different right. It is not just about balancing rights but instead it is about weighing those rights and ensuring that the nature, purpose and importance of the right is taken into account. It is important for a court to determine whether there are less restrictive ways in which

⁴³² *Johncom Media Investments v M and Others* supra (n386) at para [31].

⁴³³ *Johncom Media Investments v M and Others* supra (n386) at para [31].

⁴³⁴ P Langa 'Transformative constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351-360.

a right can be limited.⁴³⁵ In this way, the court is able to decide upon conflicting fundamental rights, and also resolve the dispute between the parties concerned.

Religious liberty and the freedom of association of religious denominations cannot be used in a way that infringes their congregant's rights. In the context of this study, the practice of doctrinal beliefs in the form of an injunction against same-sex marriage is a direct violation of the right to equality of LGBTQI+ congregants who want to marry within the church. A religious denomination cannot be allowed to use their religious liberty as a shield to harm their congregants.

There has always been an uneasy relationship between church and state when it comes to the interpretation of rights. From the secular point of view, it may be far easier to justify rights for all within a statutory framework than it is for religious organisations to give effect to these rights where they appear to conflict with religious rules. Koffemann⁴³⁶ argues that churches have advocated human rights within their ecumenical movements for decades, however, although 'human rights' is an important concept which is partly based on an *imago dei* anthropology, churches at times neglect human rights in their internal lives.⁴³⁷ This seems to be largely through a reluctance to recognise the importance of human rights within and outside their churches which is evidenced mostly within the Christian tradition.⁴³⁸ Koffeman further argues that the issue of human rights in the church is not only a matter of adequate legislation but that "law is more than legislation. It is a process which includes at least basic legal principles, legislation, the application of laws both written and unwritten and the administration of justice."⁴³⁹

⁴³⁵ Section 36 of the Constitution.

⁴³⁶ LJ Koffeman 'For external use only? Some thoughts on human rights and church law' (2007) 95 *Scriptura* 186-194.

⁴³⁷ Ibid. See also FM Gedicks 'Christian dignity and the overlapping consensus' (2021) 46(5) *Brigham Young University Law Review* 1245-1272.

⁴³⁸ Gedicks 'Christian dignity and the overlapping consensus' *ibid.*

⁴³⁹ Gedicks 'Christian dignity and the overlapping consensus' *ibid.*

CHAPTER FIVE: STATUTORY FRAMEWORK

5.1 INTRODUCTION

In Chapter 3, the constitutional provisions of equality and sexual orientation were examined thoroughly and the discussion continued into Chapter 4, which explored the conflict between religious freedom and sexual orientation. Although this thesis examines the conflict between religious freedom and equality rights, this statutory framework chapter focuses on the laws that could resolve this conflict. Following the principle of constitutional subsidiarity, litigants must use statutory remedies, where they exist, before relying on the Constitution.¹ In this case, members of the LGBTQI+ community have the right to marry in terms of the Civil Union Act. Furthermore, any LGBTQI+ member of the community being unfairly discriminated against may use the provisions in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).²

This chapter, therefore, shifts the focus to whether the existing statutory framework could be used to address the purported discriminatory conduct by some religious denominations in refusing to solemnise LGBTQI+ marriages specifically in terms of:

- (a) ordained ministers who want to enter into a same-sex Christian marriage within their religious denomination;
- (b) ordained ministers who enter into a same-sex civil marriage outside of their religious denomination, and
- (c) LGBTQI+ lay congregants who want to enter into a same-sex Christian marriage within their religious denomination.

¹ M Chaskalson, G Marcus and M Bishop 'Constitutional litigation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014-) ch 3. See also KG Young 'The avoidance of substance in constitutional rights' (2013) 5 *Constitutional Court Review* 233-243.

² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

5.2 THE CIVIL UNION ACT 17 of 2006

Following the judgment of the Constitutional Court in the *Fourie*³ case, the Civil Union Act was adopted in order to create a legal framework within which LGBTQI+ couples could marry.⁴

South Africa became one of the first countries worldwide to afford legal protection and marriage benefits to same-sex couples.⁵ The enactment of the Civil Union Act created an opportunity for same-sex couples for the first time in South African history to solemnise and register their relationships.⁶ A civil union is defined in section 1 of the Act as being:

“The voluntary union of two persons who are both 18 years or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all other ...”

The creation of a legal framework enabling same-sex couples to solemnise their relationships changed the face of family law in South Africa.⁷ It levelled the playing fields for the achievement of equality.⁸ Same-sex couples could now enter into marriage or marriage-like relationships⁹ and, benefit from their spouses much like their heterosexual counterparts.

Although this Act was a positive development for the LGBTQI+ community, it created a national debate within Christian religious denominations regarding whether the church should or should not solemnise same-sex marriages because it was contrary to their doctrinal beliefs.¹⁰

³ *Minister of Home Affairs and Another (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs v Fourie and Another* 2006 (1) SA 524 (CC).

⁴ N Ntlama ‘A brief overview of the Civil Union Act’ (2010) 13(1) *Potchefstroom Electronic Law Journal* 191-234. See also section 14(1) of the Equality Act.

⁵ Ibid.

⁶ Ibid. See also *Minister of Home Affairs and Another v Fourie and Another* supra (n3); P Coertzen ‘A perspective on marriages and civil unions in South Africa, Part 2 – Civil Unions’ (2015) 1 *Stellenbosch Theological Journal* 385-400.

⁷ BS Smith and JA Robinson ‘The South African Civil Union Act 17 of 2006: A good example of the dangers of rushing the legislative process’ (2008) 22 *Brigham Young University Journal of Public Law* 419. See also M Saez ‘Transforming family law through same-sex marriage: Lessons from (and to) the Western World’ (2014) 25 *Duke Journal of Comparative and International Law* 125-196.

⁸ E Bonthuys ‘Race and gender in the Civil Union Act’ (2007) 23(3) *South African Journal on Human Rights* 526-542.

⁹ Ibid.

¹⁰ J Landau ‘Marriage as integration’ in A Sullivan (ed) *Same-Sex Marriage: Pro and Con – A Reader* (1997) 323, 326.

The fact that the Act did not compel religious denominations to recognise or solemnise these unions has left the issue in the hands of individual religious denominations to determine.¹¹

5.2.1 Historical Context

Prior to 1994 and constitutional democracy, the only acceptable marriage was between two persons, a man and a woman, in terms of the Marriage Act 25 of 1961. The definition of marriage in the Marriage Act was in terms of the common law. Marriage was thus defined as the “legally recognized voluntary union of one man and one woman to the exclusion of all others while it lasts.” The implication was that LGBTQI+ persons in a same-sex relationship were prohibited from marrying under the Marriage Act.

In post-apartheid South Africa, the inclusion of sexual orientation as a ground of non-discrimination in the equality clause opened the door to the possibility of wide-ranging legal reforms in order to promote the equality rights of the LGBTQI+ community. The crime of sodomy was decriminalised in 1998 by the Constitutional Court,¹² which meant that the law no longer prohibited same-sex relationships. It was also in 1998 that the South African Law Reform Commission (SALRC) began its discussion on the possibility of legal reform relating to domestic partners and same-sex relationships. The discussion started with the preparation of Issue Paper 17, Project 118 on Domestic Partnerships. Comments and responses were called for by the 30th November 2001 to serve as a basis for the Commission’s deliberations.¹³ The Issue Paper was published in the form of a questionnaire.¹⁴ It dealt with the legal recognition and regulation of domestic partnerships of same and opposite-sex persons.¹⁵ The investigation aimed to “harmonise family law with the provisions within the Bill of Rights and the constitutional values of equality and dignity.”¹⁶ Questions drafted in the Issue Paper were set out under the following headings: (a) need for reform: why a debate now; (b) social and political context; (c) constitutional and human rights imperatives; (d) desired scope of reform;

¹¹ Section 6 of the Civil Union Act (commonly referred to as the ‘conscience clause’). Section 6 has now been repealed in its entirety.

¹² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

¹³ Issue Paper 17 (Questionnaire) (Project 118) *Domestic Partnerships* (2001).

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

(e) possible options for reform: a new family law dispensation; (f) children and maintenance; (g) the communal home and other property; and (h) succession/inheritance.¹⁷

The respondents to the Issue Paper had differing opinions concerning whether the law of marriage should be extended to include same-sex couples.¹⁸ Some respondents were in favour of the extension of the law of marriage to include same sex couples. Their argument was based on the prohibition on discrimination based on sexual orientation in the Constitution.¹⁹ Other respondents were opposed to the extension of the law of marriage to same-sex couples based on the argument that it was “unthinkable.”²⁰ Some respondents were of the opinion that the extension of the law of marriage to same-sex couples should be accommodated in the proposed law on domestic partnerships and not in the Marriage Act.²¹ And, there were other respondents who were concerned about the long-term consequences of same-sex marriage and how it would affect the family unit.²²

Once all comments and responses were considered and collated, a discussion paper (Discussion Paper 104 (Project 118)) on Domestic Partnerships was drafted by the SALRC,²³ and written comments were requested. The deadline was December 2003.²⁴ The Discussion Paper addressed the historical issues of apartheid around same-sex marriage.²⁵ It dealt with, inter alia, the “possibility of the extension of marriage rights to same-sex couples and the patrimonial consequences of such unions.”²⁶ By the closing date for submissions (December 2003), two hundred and thirty submissions had been received, and fifty workshops had been conducted.²⁷ Submissions received were diverse. On the issue concerning the extension of the common-law definition of marriage,²⁸ opponents wanted to preserve marriage as a traditional and sacred institution and objectors were also concerned that the right to religious freedom would be

¹⁷ To see the specific questions that were drafted under each heading see Issue Paper 17 (Questionnaire) (Project 118) *Domestic Partnerships*.

¹⁸ Discussion Paper 104 (Project 118) *Domestic Partnerships* 231-233.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* See also *Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae supra* (n52) at para [126].

²⁴ *Domestic Partnerships op cit* (n17).

²⁵ *Domestic Partnerships op cit* (n18). See also *Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae supra* (n3) at para [127].

²⁶ *Domestic Partnerships op cit* (n18).

²⁷ *Domestic Partnerships op cit* (n18).

²⁸ Commission Report (Project 118) *Report on Domestic Partnerships* (2006) 288.

infringed by extending the common-law definition of marriage. Respondents were who were in favour of extending the common-law definition of marriage argued that excluding same-sex couples was unjustifiable under the Constitution.²⁹ On the issue concerning the separation of civil and religious marriage³⁰ the majority of respondents were not in favour of the separation of the religious and civil aspects of marriage.³¹ They argued that it would take away the importance of the sanctity of marriage.³² On the issue concerning civil unions the majority of respondents contended that ‘a separate but parallel institution’ was unjustifiable under the Constitution since all couples needed to be treated equally under the law.³³ Other respondents contended that civil unions would pass the constitutional test for equality.³⁴

Nothing more was discussed around the discussion paper until 2006, when the Commission’s report was made available.³⁵

During the process of waiting for comments on the Discussion Paper and after the decision in the *Sodomy* case,³⁶ there were other cases involving the LGBTQI+ community that went before the courts. These dealt with issues such as immigration rights,³⁷ pension benefits,³⁸ and adoption³⁹ amongst others. These equality challenges were won in the courts and seen as significant within the LGBTQI+ community. As much as these equality cases extended the rights of LGBTQI+ persons, the right to marry was not extended to them because Parliament was still not ready to reform the existing marriage laws to include same-sex couples.⁴⁰ The success of the above equality cases and the lack of reform around the existing marriage laws gave the LGBTQI+ community an opportunity to challenge the common law definition of marriage.⁴¹

²⁹ Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28) 288-9.

³⁰ Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28) 290.

³¹ Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28) 290.

³² Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28) 290.

³³ Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28) 292.

³⁴ Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28) 292.

³⁵ Commission Report (Project 118) *Report on Domestic Partnerships* op cit (n28).

³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

³⁷ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

³⁸ *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

³⁹ *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

⁴⁰ D Bilchitz and M Judge ‘For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa’ (2007) 23(3) *South African Journal on Human Rights* 466-499.

⁴¹ *Ibid.*

The *Fourie v Minister of Home Affairs*⁴² case was the only case to challenge the common law definition of marriage. In 2002 in the Transvaal Provincial Division (TPD), Ms. Marie Adriaana Fourie and Ms. Cecelia Johanna Bonthuys, a same-sex lesbian couple from Pretoria, challenged the common law definition of marriage in terms of the exclusion of same-sex couples from marrying.⁴³ They contended that the common law definition of marriage was problematic because it required one man and one woman to marry, thus excluding same-sex couples.⁴⁴ The couple claimed that they were married even though it did not comply with the Marriage Act.⁴⁵ The remedy that the applicants sought was twofold. Firstly, they wanted a declaratory order for their marriage to be recognised as lawful and legally valid in terms of the Marriage Act 25 of 1961.⁴⁶ This was on condition that it complied with the formalities in the Marriage Act.⁴⁷ Secondly, was an order of *mandamus* against the first and second respondents to register their marriage in the Marriage Act.⁴⁸ The only constitutional issue raised by the applicants was whether the common law could be developed to recognise same-sex marriages as valid marriages in terms of the Marriages Act.⁴⁹ The court was not convinced that this was a legitimate constitutional issue referring to it as a “generous assumption.”⁵⁰ In addressing the applicants’ prayer in the declaratory order, the TPD referred to the Roman law definition of marriage.⁵¹ The court held that since Roman law times, marriage was the union of one man and one woman for lifelong mutual companionship.⁵² According to the court, the Marriage Act 25 of 1961 mirrors the image of this age-old concept.⁵³ Thus, section 30(1) of the Marriage Act is worded as a peremptory provision that must be adhered to.⁵⁴ The court further highlighted that section 11(1) of the Marriage Act states that a marriage officer may only solemnise a marriage. In light of this, the court determined that the applicants were not married as required by the law.⁵⁵ In addressing the prayer in terms of the mandamus order, the court held that it was not prepared to make such an order.⁵⁶ The application was dismissed based on the fact that the

⁴² *Fourie v Minister of Home Affairs* TPD 2002-10-18 case number 17280/02.

⁴³ *Fourie v Minister of Home Affairs* TPD supra (n42).

⁴⁴ *Fourie v Minister of Home Affairs* TPD supra (n42).

⁴⁵ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [1].

⁴⁶ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [2].

⁴⁷ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [2].

⁴⁸ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [2].

⁴⁹ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [3].

⁵⁰ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [3].

⁵¹ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [3].

⁵² *Fourie v Minister of Home Affairs* TPD supra (n42) at paras [4]-[5]. The court referred to R Sohm *Institutes of Roman Law* 3 ed (1907) 452.

⁵³ *Fourie v Minister of Home Affairs* TPD supra (n42) at paras [4]-[5].

⁵⁴ *Fourie v Minister of Home Affairs* TPD supra (n42) at paras [4]-[5].

⁵⁵ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [5].

⁵⁶ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [5].

provisions within the Marriage Act were peremptory, and the relief sought was incompatible with the Marriage Act.⁵⁷

In 2003 the case was taken on appeal to the Supreme Court of Appeal (SCA). In their founding affidavit to the SCA, the appellants requested the court develop the common law to recognise same-sex marriage.⁵⁸ The relief they requested was a declaratory order that would recognise their marriage as valid in terms of the Marriage Act 25 of 1961. They also requested that the Minister and Director-General of Home Affairs register their marriage in terms of the Marriage Act and the Identification Act 68 of 1997.⁵⁹ The court noticed that the appellants did not raise a statutory challenge questioning the marriage formula in section 30(1) of the Marriage Act.⁶⁰ However, the court did not think this would constitute an obstacle in granting the appellants some relief.⁶¹

In 2004 the SCA handed down a judgment where it reversed the decision of the High Court.⁶² The court held that the decision of the court *a quo* refusing to develop the common law did not comply with sections 8(3),⁶³ 36(1),⁶⁴ 39(2),⁶⁵ and 173⁶⁶ of the Constitution.⁶⁷ It held that same-sex couples were deprived of the right to marry because of the common law definition of marriage, which further denied them the right to certain benefits, protection, and duties.⁶⁸ In turn, it deprived them of the special nature of a marriage relationship. According to the court,

⁵⁷ *Fourie v Minister of Home Affairs* TPD supra (n42) at para [5].

⁵⁸ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [26].

⁵⁹ *Fourie v Minister of Home Affairs* supra (n49) at para [26].

⁶⁰ *Fourie v Minister of Home Affairs* supra (n49) at paras [3], [34].

⁶¹ *Fourie v Minister of Home Affairs* supra (n49) at para [35].

⁶² *Fourie v Minister of Home Affairs* supra (n49).

⁶³ Section 8(3) of the Constitution provides that “when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court (a) in order to develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)”.

⁶⁴ Section 36(1) of the Constitution provides that “the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”.

⁶⁵ Section 39(2) of the Constitution provides that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

⁶⁶ Section 173 of the Constitution provides that “the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”.

⁶⁷ *Fourie v Minister of Home Affairs* supra (n49) at paras [4]-[5].

⁶⁸ *Fourie v Minister of Home Affairs* supra (n49) at para [15].

the special nature of a marriage relationship is vital in society and central to both social life and human relationships.⁶⁹ Marriage also enhances autonomy and dignity and is central to our self-determination as humans.⁷⁰ It can be seen as honourable, enhancing legal and social recognition.⁷¹ It further offers a legal and social sanctuary to the couple for the future that they will share.⁷² According to the court, the “current common-law definition of marriage deprives same-sex couples the choice to marry and partake in the advantages of marriage.”⁷³ It suggests that same-sex couples' love and commitment are inferior, and they can never fully be part of the community of moral equals that the Constitution promises to all.⁷⁴ According to the court, this type of exclusion constitutes unfair discrimination that violates the equality provision in the Bill of Rights.⁷⁵ The court rejected the argument that the respondents advanced regarding procreation being restricted to heterosexual marriage.⁷⁶ This was because procreation is not a defining characteristic of a marriage relationship.⁷⁷

The outcome of the SCA's decision was that the common law should be developed to give effect to all the rights in the Bill of Rights.⁷⁸ According to the court, the appellants were entitled to immediate declaratory relief concerning (i) the development of the common law in terms of sections 8(3), 39(2), and 173 of the Constitution to embrace same-sex partners and (ii) a declaration that the appellants' intended marriage is capable of lawful recognition as legally valid, provided that the formalities within the Marriage Act 25 of 1961 are complied with.⁷⁹

The matter proceeded to the Constitutional Court because neither of the parties to the litigation were happy with the outcome of the SCA. In fact, according to the State, such a change should be left to Parliament to decide upon.⁸⁰ The outcome was that the State sought leave to appeal against the SCA's judgment because it went too far.⁸¹ On the other hand, the applicants were dissatisfied with the outcome of the SCA because, even though the definition of the common

⁶⁹ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [14].

⁷⁰ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [14].

⁷¹ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [14].

⁷² *Fourie and Another v Minister of Home Affairs* supra (n49) at para [14].

⁷³ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [15].

⁷⁴ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [15].

⁷⁵ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [16].

⁷⁶ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [17].

⁷⁷ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [17].

⁷⁸ *Fourie and Another v Minister of Home Affairs* supra (n49) at para [41].

⁷⁹ *Fourie and Another v Minister of Home Affairs* supra (n49) at paras [46]-[49].

⁸⁰ *Home Affairs v Fourie* supra (n3) at para [33].

⁸¹ *Home Affairs v Fourie* supra (n3).

law would include them as same-sex partners, they were still prevented from marrying in terms of the Marriage Act.⁸² This led them to support the minority judgment of the SCA in terms of updating the Marriage Act.⁸³ Simultaneously they supported the majority judgment in terms of the immediate relief granted.⁸⁴ The applicants sought leave to cross-appeal based on the fact that the SCA did not go far enough.⁸⁵ This raised substantial questions of constitutional significance and social importance; therefore, it was in the interest of justice for the appeal and cross-appeal to be granted.⁸⁶

The Constitutional Court had two issues that they had to deal with. The first is whether the fact that no provision to marry amounts to the denial of equal protection of the law and unfair discrimination by the state based on their sexual orientation. Secondly, what the appropriate remedy would be.⁸⁷

Regarding the first issue, the court held that excluding same-sex couples from the benefits and responsibilities of marriage is not a minor inconvenience.⁸⁸ Instead, it represents a harsh statement saying that same-sex couples are outsiders and their relationships are less than those of heterosexual couples. It reinforces the historical treatment of the LGBTQI+ community as not worthy of the full constitutional protection that everyone else has secured.⁸⁹ According to the court, if heterosexual couples have the option to marry, then same-sex couples should have the same opportunity to be on par with heterosexual couples.⁹⁰ The court held that to deny same-sex couples a choice to marry is tantamount to invalidating their right to self-determination in the harshest way possible.⁹¹ It also denies them the right to equal protection and benefit of the law, which is part of a legacy of severe historical prejudice against them.⁹² According to the court, the fact that same-sex couples are excluded from the provisions of the Marriage Act suggests that their unions are not equal to those of heterosexual couples.⁹³

⁸² *Home Affairs v Fourie* supra (n3).

⁸³ *Home Affairs v Fourie* supra (n3).

⁸⁴ *Home Affairs v Fourie* supra (n3).

⁸⁵ *Home Affairs v Fourie* supra (n3).

⁸⁶ *Home Affairs v Fourie* supra (n3).

⁸⁷ *Home Affairs v Fourie* supra (n3) at para [45].

⁸⁸ *Home Affairs v Fourie* supra (n3) at para [71].

⁸⁹ *Home Affairs v Fourie* supra (n3) at para [71].

⁹⁰ *Home Affairs v Fourie* supra (n3) at para [72].

⁹¹ *Home Affairs v Fourie* supra (n3) at para [71].

⁹² *Home Affairs v Fourie* supra (n3) at para [76].

⁹³ *Home Affairs v Fourie* supra (n3) at para [77].

Regarding section 9 of the Constitution, the impact of being excluded from marriage is evidence of being denied equal protection, thus being unfairly discriminated against.⁹⁴ Therefore, the common law and section 30(1) of the Marriage Act are in conflict with section 9, and the applicants are then entitled to a declaration to that effect.⁹⁵ Accordingly, the common law definition of marriage in terms of section 30(1) of the Marriage Act is unconstitutional to the extent that it does not make appropriate provisions for same-sex couples to marry the same way that it does for heterosexual couples.⁹⁶ Furthermore, the deprivation of the right to marry was discriminatory against same-sex couples and unjustifiably violated their right to equality under section 9 and dignity under section 10 of the Constitution.⁹⁷ Therefore, according to the court, “the common law and section 30(1) of the Marriage Act are inconsistent with the provisions of equality and dignity within the Constitution as it makes no provision for same-sex couples as it does for heterosexual couples.”⁹⁸ The court held that in terms of section 172(1)(a) laws must be declared inconsistent and invalid if they are not in line with the Constitution.⁹⁹ Courts must also in terms of section 172(1)(b) of the Constitution make orders that are just and equitable.¹⁰⁰

Concerning the second issue and the appropriate remedy, the court held that it was necessary to make a declaration invalidating the common law definition of marriage.¹⁰¹ This is because it was inconsistent with the Constitution and same-sex couples were denied the benefits, and responsibilities it gave to heterosexual couples.¹⁰² The court held that since this judgment connects on a deeply psychological aspect, the remedy must manifest generosity and acceptance of same-sex couples which respect their dignity.¹⁰³ The court held that it would be appropriate for Parliament to undertake any legislative changes and to be given carte blanche to work within the framework established in the judgment.¹⁰⁴ According to the court, an appropriate time frame for Parliament to work on any legislative changes would be one year.¹⁰⁵ The court held that if the defect is not cured within a one year period by Parliament, then the

⁹⁴ *Home Affairs v Fourie* supra (n3) at para [78].

⁹⁵ *Home Affairs v Fourie* supra (n3) at paras [78]-[79].

⁹⁶ *Home Affairs v Fourie* supra (n3) at para [82].

⁹⁷ *Home Affairs v Fourie* supra (n3) at para [114].

⁹⁸ *Home Affairs v Fourie* supra (n3) at para [118].

⁹⁹ *Home Affairs v Fourie* supra (n3) at para [118].

¹⁰⁰ *Home Affairs v Fourie* supra (n3) at para [118].

¹⁰¹ *Home Affairs v Fourie* supra (n3) at para [120].

¹⁰² *Home Affairs v Fourie* supra (n3) at para [120].

¹⁰³ *Home Affairs v Fourie* supra (n3) at para [153].

¹⁰⁴ *Home Affairs v Fourie* supra (n3) at para [155].

¹⁰⁵ *Home Affairs v Fourie* supra (n3) at para [156].

word “or spouse” would be read into section 30(1) of the Marriage Act¹⁰⁶ automatically. There was no individual relief granted.

After the decision of the *Fourie* case and while Parliament was correcting the defects of invalidity, the SALRC published their report in Discussion Paper 104 (Project 118) on Domestic Partnerships in March 2006.¹⁰⁷ The SALRC made particular recommendations that it thought would satisfy the equality provision in the Constitution.¹⁰⁸ It proposed as its first choice that section 30 of the Marriage Act be amended by (i) extending the definition of marriage to include both heterosexual and same-sex couples; (ii) to include a definition of the word “spouse” into the Marriage Act; and (iii) include the word “spouse” into the marriage formula in the Marriage Act.¹⁰⁹ To accommodate the moral and religious objections raised against same-sex marriage, the SALRC recommended the so-called Dual Act option as its second choice. The Dual Act option would mean enacting an Orthodox Marriage Act and a Reformed Marriage Act.¹¹⁰ The Orthodox Marriage Act would essentially be the same as the current Marriage Act, except the definition of marriage would only refer to heterosexual couples.¹¹¹ The amended Marriage Act would then be referred to as the Reformed Marriage Act, which would give all marriages recognition.¹¹²

The SALRC’s report 118 on Domestic Partnerships was then submitted to the Minister for Justice and Constitutional Affairs for consideration.¹¹³ Once the report was considered by the Minister of Justice, it was tabled in Parliament for discussion.¹¹⁴ Parliament was presented with the document at the end of August 2006 and considered the suggestions and actions of the SALRC’s proposal. The Legislature thereafter created a draft of the Civil Union Bill that “attempted to make provision for civil unions without calling these unions’ marriages”.¹¹⁵ The Bill proposed that a marriage between same-sex couples would be deemed a civil partnership,

¹⁰⁶ *Home Affairs v Fourie* supra (n3) at para [161].

¹⁰⁷ South African Law Reform Commission (2001).

¹⁰⁸ (Project 118) *Report on Domestic Partnerships* (2006) op cit (n28) at para 5.6.

¹⁰⁹ See paras 5.6.4 - 5.6.6. See also P De Vos and J Barnard ‘Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga’ (2004) 20(2) *South African Journal on Human Rights* 806.

¹¹⁰ SALRC op cit (n28) 5.6.17 and 5.6.23. See also De Vos and Barnard op cit (n109) 807.

¹¹¹ De Vos and Barnard op cit (n109).

¹¹² SALRC op cit (n28) 294 para 5.4.4 and at 312 para 5.6.2.

¹¹³ *Report on Domestic Partnerships* (2006) op cit (n28).

¹¹⁴ ‘South African Law Reform Commission Act 19 of 1973 – Reports of Commission’, section 7(1)-(3) available at https://www.justice.gov.za/salrc/docs_gen/1973_19_South%20African%20Law%20Reform%20Commission%20Act.pdf accessed on 25 October 2022.

¹¹⁵ Smith and Robinson op cit (n7) 419. See also De Vos and Barnard op cit (n109) 795-826.

a separate institution for same-sex couples in terms of the Civil Union Act. However, the legal consequences of a marriage in terms of the Marriage Act 1961 would apply to civil partnerships (clause 13(1)).¹¹⁶ A civil partnership would thus differ from the traditional form of marriage as it would “not be called a marriage” (clause 11).¹¹⁷ The right to recuse themselves from solemnising same-sex marriages would be extended to marriage officers based on religious conscience (clause 6.4).¹¹⁸ This created displeasure and unhappiness amongst activists and members of the LGBTQI+ community who argued that the Bill represented a “separate but equal” institution of marriage which was contradictory to what the Constitutional Court stated in the *Fourie* judgment.¹¹⁹ Despite the unhappiness from activists, in November 2006, the National Assembly adopted the Civil Union Bill.

The Civil Union Act came into operation on the 30th November 2006.¹²⁰ It allowed same-sex couples to choose whether or not they wanted to conclude either registration for a civil partnership or a civil marriage.¹²¹

5.2.2 The aim, purpose and key provisions of the Civil Union Act

The Civil Union Act was adopted to fulfil our Constitution's equality provisions.¹²² The Act extended marriage rights to same-sex couples and allowed them to enter into either a marriage or a civil partnership.¹²³ In other words, the aim is to legalise same-sex marriage between two people regardless of gender to form either a marriage or civil partnership.¹²⁴ The Act's purpose as set out in its preamble is to regulate the legal consequences of civil unions and provide for matters incidental to it.¹²⁵

¹¹⁶ Note, the word ‘clause’ was utilised in the first draft of the Civil Union Bill which is different to the final Civil Union Act which refers instead to ‘sections’.

¹¹⁷ Smith and Robinson op cit (n7). See also De Vos and Barnard op cit (n109) 809.

¹¹⁸ De Vos and Barnard op cit (n109) 821.

¹¹⁹ *Home Affairs v Fourie* supra (n3) at para [150] where the court stated that parliament should avoid implementing a remedy that would provide for a ‘separate but equal rights to same-sex couples which would create a new form of oppression’.

¹²⁰ Civil Union Act 17 of 2006.

¹²¹ *Home Affairs v Fourie* supra (n3) at para [150].

¹²² Specifically, section 9, section 10 and section 15 of the Constitution of the Republic of South Africa, 1996. The rights within the Civil Union Act can be limited in terms of section 36 of the Constitution.

¹²³ De Vos and Barnard op cit (n109) 795-826. See also section 2 of the Civil Union Act.

¹²⁴ Coertzen ‘A perspective on marriages and civil unions in South Africa, Part 2 – Civil Unions’ op cit (n6) 388.

¹²⁵ Section 2 of the Civil Union Act.

Three provisions within the Act are of particular relevance to this thesis. Firstly, section 13(1) provides that the legal consequences of a civil union are precisely the same (*mutatis mutandis*) as the legal consequences of traditional marriages in terms of the Marriage Act.¹²⁶ This is both in terms of the variable and invariable consequences of marriage.¹²⁷ Section 13 further provides in subsection 13(2)(a) and (b) “that with the exception of the Marriage Act and the Customary Marriages Act, any reference to husband, wife, or spouse in any other law, including the common law will include a civil union partner.”

Secondly, if designated to do so, any marriage officers may solemnise a marriage of either a heterosexual or same-sex couple. According to the Civil Union Act, the designation of religious marriage officers can be found in section 5 of the Act.¹²⁸ In terms of the Act, religious denominations may apply in writing to the Minister of Home Affairs for approval to solemnise civil unions.¹²⁹ Once approval is granted, the religious denomination will be designated as a religious institution that solemnises same-sex marriage.¹³⁰ Thereafter, a religious official from that denomination may apply to be appointed as a marriage officer¹³¹ for the purposes of marrying same-sex couples. It is submitted that a religious marriage officer may not apply for a license to marry same-sex couples independently from their religious denomination if that denomination is not a designated religious institution that solemnises same-sex marriage. Suppose the religious denomination or religious official wishes to revoke their authorisation to solemnise same-sex marriages. In that case, they may do so on request to the Minister, who will follow through on the request and publish the revocation in the Government Gazette.¹³²

Thirdly, section 14 of the Act sets out the consequences for religious denominations and religious officials that do not comply with the requirements within the Act concerning solemnising same-sex marriage. Section 14(1) of the Act states that:

¹²⁶ Marriage Act 1961.

¹²⁷ Section 13 of the Civil Union Act states that “the legal consequences of a marriage contemplated in the Marriage Act apply with such changes as may be required by the context to a civil union ...” See also N Ntlama ‘A brief overview of the Civil Union Act’ (2010) 13(1) *Potchefstroom Electronic Law Journal* 191–212; J Heaton and H Kruger *South African Family Law* 4 ed (2015) 213; E Bonthuys ‘Irrational accommodation; conscience, religion and same-sex marriage in South Africa’ (2008) 125(3) *South African Law Journal* 475; Bilchitz and Judge op cit (n40) 466-499.

¹²⁸ Designation of ministers of religion and other persons attached to religious denomination or organisation as marriage officers.

¹²⁹ Section 5(1) of the Civil Union Act.

¹³⁰ Section 5(2) of the Civil Union Act.

¹³¹ Section 5(4) of the Civil Union Act.

¹³² Section 5(3) of the Civil Union Act.

“any marriage officer who purports to solemnise a civil union which he or she is not authorised under this Act to solemnise or which to his or her knowledge is legally prohibited ... shall be guilty of an offence and liable on conviction to a fine or in default of payment, to imprisonment for a period not exceeding 12 months.”

The consequences of the validity of a marriage between a same-sex couple if the ceremony was conducted by a marriage officer who is not designated in terms of the Act to conduct same-sex marriages is void and invalid. This is because the marriage officer must have the requisite permission to conduct same-sex marriages in terms of the Act.¹³³ The Act is clear that not having the requisite permission in line with the provisions of the Act to marry same-sex couples is a criminal offence with a sanction attached to it.¹³⁴ Furthermore, the marriage officer will not have *locus standi* to conduct a same-sex marriage if he does not fulfil the requirements within the Act regarding registering as a marriage officer who can conduct same-sex marriages. However, a court may deem that the void marriage is a putative marriage¹³⁵ specifically if the couple entered into the marriage *bona fide* and adhered to all the formalities at their marriage ceremony.¹³⁶ This however does not suspend the voidness of the marriage.

Section 6 was repealed in its entirety in the Civil Union Amendment Act, 2020,¹³⁷ which came into effect in October 2020. This was seen as a progressive step toward putting same-sex and heterosexual couples on an equal footing. Before the Amendment a marriage officer in terms of section 6 (the conscience clause) could object to solemnising same-sex marriage based on conscience, religion, and belief. If they objected to solemnising same-sex marriages on these grounds, they were not compelled to solemnise them.¹³⁸ This seemed uncomplicated, however on closer inspection, this provision lent itself to being unconstitutional due to the violation of the rights of equality and dignity of same-sex couples who want to marry.

¹³³ Section 5 of the Civil Union Act.

¹³⁴ Section 14 of the Civil Union Act.

¹³⁵ A putative marriage is a void marriage that has some of the consequences of a legally valid marriage provided that certain requirements are met. See B Van Heerden et al *Family Law in South Africa* 2 ed (2021) 56.

¹³⁶ Van Heerden et al *ibid*. See also *Moola v Auselbrook NO* 1983 (1) SA 687 (N) where the court held that a marriage that has been solemnised by a marriage officer who is not competent may be a putative marriage. The court held that the common-law requirement of adherence to the prescribed formalities only means that the parties must have carried out their marriage openly and in accordance to ceremonies compatible with our law.

¹³⁷ Government Gazette 43832, 22 October, 2020.

¹³⁸ Section 6 stated that ‘a marriage officer, other than a marriage officer referred to in section 5 may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such a union.’

5.2.3 Discussion

The Civil Union Act seemingly brought equality to same-sex and opposite-sex couples. But, the fact that same-sex couples can only marry in terms of the Civil Union Act and opposite-sex couples may marry in terms of either the Marriage Act or the Civil Union Act is questionable within itself. If the consequences of marriage in the Civil Union Act are the same as within the Marriage Act then the separation of the Acts for same-sex couples and heterosexual couples is unequal. The fact that the Civil Union Act is separate but equal is a form of inequality.¹³⁹ Despite the technical difficulties which arise from the Act, it is clear that the LGBTQI+ members of the church have the right to solemnise their same-sex relationships either in the church if they are permitted to do so or in a civil ceremony outside of the church.

It is submitted that despite the Act having good intentions of creating a way for LGBTQI+ couples to marry, it instead has made these marriages difficult to conclude within a religious denomination as there are extra administrative burdens to marrying within a religious denomination.¹⁴⁰ In drafting the Act, Parliament was in essence creating a civil marriage option and downplaying the possibility of a religious marriage.¹⁴¹

However, despite the Act putting clear measures in place for religious denominations and religious officials to make applications to perform same-sex marriage, not many have taken up the opportunity because of their doctrinal beliefs.¹⁴² It is submitted that because of this, many same-sex couples have to have their marriages solemnised outside of the church, depriving them of having their unions blessed by the church. It is further submitted that this could be deemed as unfair discrimination and disadvantageous to same-sex couples who would like their marriages solemnised within the church.

¹³⁹ Ntlama op cit (n127) 191–212; Heaton and Kruger op cit (n127) 213; Bonthuys op cit (n127) 475; Bilchitz and Judge op cit (n40) 466–499.

¹⁴⁰ Section 5 of the Civil Union Act.

¹⁴¹ Bonthuys op cit (n127) 475; Bilchitz and Judge op cit (n40) 466–499; See Smith and Robinson op cit (n7); BS Smith and JA Robinson 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of The Civil Union Act 17 of 2006: In the light of prospective domestic partnerships legislation in South Africa' (2010) 13(2) *Potchefstroom Electronic Law Journal* 30.

¹⁴² See Chapter 2 for the different stances of the different denominations.

It is important to note that the Act gives same-sex couples an option to formalise their relationship as a marriage or civil partnership.¹⁴³ It seems as though the term “civil union” was used by the legislature to distinguish same-sex marriage and “traditional” marriage in terms of the Marriage Act.¹⁴⁴ This was to facilitate the introduction of same-sex marriage into South Africa and avoid confusion between the unions of same-sex couples and traditional marriage between heterosexual couples.¹⁴⁵ It is submitted that by using this terminology and approach Parliament did not envision a single marriage act and wanted to make the distinction clear. The terminology and approach by Parliament is seen as unequal in terms of same-sex couples and heterosexual couples.

It is for the above reasons that commentators have said that the Act was not thought through sufficiently as true equality was not reached.¹⁴⁶ Instead, an Act that is seen as “separate but equal” was created. The simpler way would have been to amend the Marriage Act to include true equality for same-sex couples.¹⁴⁷

5.3 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 2000 (PEPUDA)

5.3.1 Introduction

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA) was enacted as national legislation which fulfilled the Constitutional obligation in terms of section 9(4)¹⁴⁸ Constitution. PEPUDA was intended to be a legislative tool to promote and fulfil the equality rights within the Constitution.¹⁴⁹ It would do this by removing systemic barriers by prohibiting unfair discrimination and promoting equality through positive measures.¹⁵⁰

¹⁴³ According to Van Heerden et al op cit (n135) if the couple chooses the option of marriage in terms of the Act, they are referred to as married spouses. If the couple decides to enter into a civil partnership instead of a marriage in terms of the Act, they are referred to as partners in a civil partnership.

¹⁴⁴ Ibid.

¹⁴⁵ Smith and Robinson op cit (n7) 419.

¹⁴⁶ Bonthuys op cit (n127) 475; Bilchitz and Judge op cit (n40) 466-499; See Smith and Robinson op cit (n7); Smith and Robinson 'An embarrassment of riches or a profusion of confusion?' op cit (n141).

¹⁴⁷ Bonthuys op cit (n127); Bilchitz and Judge op cit (n40); Smith and Robinson op cit (n7); Smith and Robinson 'An embarrassment of riches or a profusion of confusion?' op cit (n141).

¹⁴⁸ Section 9(4) of the Constitution provides that 'national legislation must be enacted to prevent or prohibit unfair discrimination'.

¹⁴⁹ C Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001).

¹⁵⁰ Ibid.

5.3.2 Historical context

With the acknowledgment of the injustices of the past, it became imperative that legislation be enacted to correct those past injustices. The Department of Justice and the South African Human Rights Commission (SAHRC) jointly launched the project of drafting PEPUDA in May 1998.¹⁵¹ The Minister of Justice and Constitutional Affairs at the time was instrumental in driving the process of consultation to raise awareness of unlawful discrimination.¹⁵² With the Department of Justice and the SAHRC working together, the responsibility of producing a detailed framework document of the Act was left to the Equality Drafting Unit (EDU), which the SAHRC established.¹⁵³ The unit included a wide range of experts and researchers.¹⁵⁴ The Equality Drafting Unit also invited non-governmental organisations, individuals, and research institutions to submit comments and ideas as contributions towards the framework document.¹⁵⁵ To guide the work of the EDU, different stakeholders, civil society, and experts from the government formed a reference group on this project.¹⁵⁶ With the EDU running expert conferences, and public awareness workshops alongside international experts, it provided a draft framework of the proposed law in July 1999.¹⁵⁷ In late July 1999, the EDU presented a National Framework Document to a drafting team appointed by the Minister of Justice for comment. The task of the drafting team was to work on the National Framework Document and draft a bill that would be presented to Parliament and the National Council of Provinces (NCOP).¹⁵⁸

¹⁵¹ B Pityana 'Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2002) 54(1) *Codicillus* 2-9. See also Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001).

¹⁵² Dullah Omar was the Minister of Justice at the time.

¹⁵³ Albertyn et al op cit (n149). See also Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002); Pityana 'Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' op cit (n151) 2-9.

¹⁵⁴ Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* ibid; Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁵⁵ Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n153); Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁵⁶ Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n153); Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁵⁷ Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n153); Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁵⁸ Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n153); Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

Cabinet approved the draft bill in October 1999. Once approved, the draft bill was published in the Government Gazette on the 25th of October 1999.¹⁵⁹ It was then introduced in the National Assembly for comment. Once the National Assembly had completed its task with the bill, it was referred to an *ad hoc* committee which Parliament introduced for consideration.¹⁶⁰ During this process, the *ad hoc* Committee was given the responsibility of facilitating public participation by inviting the public to submit written and oral comments.¹⁶¹ The deadline of January 2000 was given to the *ad hoc* Committee to finalise the process. The bill was subjected to considerable comments during the process of public participation from a broad range of bodies such as NGOs, research institutions, and private sector bodies despite Parliament's inclusive approach.¹⁶² These comments were considered by the *ad hoc* Joint Committee and the Minister's drafting team who amended the bill by taking the comments into account and redrafting the language and the format.¹⁶³

At the end of January 2000, the bill was passed by both houses of Parliament.¹⁶⁴ Thereafter it was submitted to the President for his signature and assent.¹⁶⁵ The bill was assented to by the President on 2 February 2000.¹⁶⁶

5.3.3 The aim and purpose of PEPUDA

The preamble within PEPUDA states that although progress has been made in transforming our society, inequalities and unfair discrimination are still deeply entrenched in our society, undermining our constitutional democracy.¹⁶⁷ Thus, the Act aims to bring about diversity, guided by equality, fairness, equity, social progress, justice, human dignity, and freedom.¹⁶⁸

¹⁵⁹ The Promotion of Equality and Prevention of Unfair Discrimination Bill [B57-1999] was introduced in terms of GN 2399, GG 20572, 25 October 1999.

¹⁶⁰ Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁶¹ Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149). See also Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n153); R Mestry 'Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2002) 54(1) *Codicillus* 2-9.

¹⁶² Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁶³ SB Gutto *Equality and Non-discrimination: The Political Economy of Law and Law Making* (2001) 21.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ This was in terms of Schedule 6, item 23(1) of the Constitution (which is now repealed) which required that this type of legislation be enacted within 3 years of the date the Constitution came into effect (4 February 1997)

¹⁶⁷ Preamble of PEPUDA 2000.

¹⁶⁸ Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

The Act's objectives are set out in section 2(b), which prevents unfair discrimination and protects the human dignity of all persons who have the right to equal enjoyment of all rights and freedoms.¹⁶⁹ Other objectives include fulfilling South Africa's international obligations concerning the prohibition of unfair discrimination.¹⁷⁰

5.3.4 The key provisions of PEPUDA

The most important aspect to determine from the Act is who is bound by the Act. This is set out in section 5 of the Act, which provides that the Act binds the State and all persons.¹⁷¹ However, by virtue of section 5(3), the Act does not apply to persons covered under the Employment Equity Act.¹⁷² Chapter two of the Act applies to all employees¹⁷³ and employers¹⁷⁴ within the workplace.¹⁷⁵ In light of the definition of who an employee or employer is in terms of the Employment Equity Act, ordained ministers will not fall under this Act.

There is a two-stage test requirement in PEPUDA. Stage one is determining whether there is discrimination. Stage two is determining whether the discrimination is unfair.

In light of stage one of the test, the Act provides that any act or omission can be deemed discriminatory if it imposes burdens, and withholds benefits from any person on one or more

¹⁶⁹ Section 2(b) of PEPUDA states the objects of the Act as giving effect to the letter and spirit of the Constitution, in particular "(i) the equal enjoyment of all rights and freedoms by every person (ii) the promotion of equality (iii) the values of non-racism and non-sexism contained in section 1 of the Constitution (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution. The prohibition of hatred based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act."

¹⁷⁰ This is especially with regard to the following Conventions: Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

¹⁷¹ Section 5(1) of the Act states that "the Act bind the State and all persons". To understand who "all persons" is under the Act, section 1 defines a person as including a juristic person, a non-juristic person and, a group or a category of persons. It is submitted that the broadness of this definition may well include the church and the LGBTQI+ community, to which both are included in the prohibited grounds. The protection of the LGBTQI+ community thus derives protection from PEPUDA.

¹⁷² Section 5(3) of the Act states that "This Act does not apply to any persons to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998), applies."

¹⁷³ An employee in terms of the Act means 'any person other than in independent contractor who (a) works for another person or for the State and who received, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer ...'.

¹⁷⁴ An employer in terms of the Act means "(a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of this At; (c) a municipality as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service and (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent ...'

¹⁷⁵ Section 4 of PEPUDA.

of the prohibited grounds.¹⁷⁶ As said above, an Act or an omission may include a policy, law, practice, or rule which could be deemed discriminatory.¹⁷⁷ Discrimination can be based on a prohibited ground within the Act. The prohibited grounds under the Act's definitions are race, gender, sex, pregnancy, marital status, ethnic or social origin, *sexual orientation*, colour, age, disability, *religion*, conscience, belief, culture, language, or birth and HIV/AIDS¹⁷⁸ status.¹⁷⁹ Discrimination based on these grounds is considered unfair.¹⁸⁰

Stage two of the test is when the court determines whether the discrimination is unfair. The determination of fairness is considered in section 14(2) and section 14(3) of PEPUDA. Section 14(2) has three factors which need to be considered (i) the context; (ii) taking into account the nine factors as set out in section 14(3); and, (iii) looking at whether the discrimination reasonably and justifiably differentiates between persons. Section 14(3) refers to nine factors which the court can look at. The factors include the consideration of (i) the impairment of dignity, (ii) impact on the complainant, (iii) position of the complainant in society; (iv) nature and extent of the discrimination, (v) systemic discrimination, (vi) legitimate purpose, (vii) extent as to whether the discrimination achieves its purpose; (viii) less restrictive means, (ix) reasonable steps taken to address disadvantage and accommodation of diversity.

The first five factors of section 14(3) i.e. (s 14(3)(a)-(e)) should be assessed individually and together in order to determine the impact of the discrimination on the complainant.¹⁸¹ Section 14(3)(f)-(i) helps the court to determine the justifications and explanations of the respondent.¹⁸² The factors in section 14 have their origin in the *Harksen v Lane*¹⁸³ case. The court in the *Harksen* case stated that in order to determine fairness, human dignity should be central to the analysis in order to determine the impact the discrimination had on the complainant.¹⁸⁴

¹⁷⁶ Section 1(viii) of PEPUDA.

¹⁷⁷ Section 1(viii) of PEPUDA.

¹⁷⁸ HIV/AIDS status was included in the list of prohibited grounds following the enactment of the Judicial Matters Amendment Act 8 of 2017.

¹⁷⁹ Section 1(xxii) of PEPUDA. My own emphasis used.

¹⁸⁰ Section 14 of PEPUDA.

¹⁸¹ *Albertyn et al Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149) 43.

¹⁸² *Albertyn et al Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149) 44.

¹⁸³ *Harksen v Lane NO* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) (7 October 1997). See also A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: How to balance religious freedom and other human rights in the higher education sphere' (2017) 31(6) *South African Journal of Higher Education* 33.

¹⁸⁴ *Harksen v Lane NO* 1998 (1) SA 300 (CC) at paras [53]-[54].

The test which is set out in section 14 is informative given the various factors that need to be established.¹⁸⁵ As the list of factors is extensive, not all the factors will be applicable in every case. Courts will have to determine which of these factors are relevant for the particular case that they are looking at.¹⁸⁶ Essentially what the court is doing is attempting to balance impact against justification to determine whether the discrimination is unfair.

When the courts have completed their assessment,¹⁸⁷ an appropriate order must be made if the discrimination was found to be unjustifiable.¹⁸⁸ These remedies are extensive and include making declaratory orders,¹⁸⁹ payment of compensation,¹⁹⁰ remedial steps for persons engaged in unfair discriminatory conduct,¹⁹¹ and directing that person to issue an unconditional apology to the victim of the discriminatory conduct.¹⁹² Apart from this, the Equality Court may also order the matter to be submitted to the Director of Public Prosecutions for criminal proceedings of the common law or relevant legislation.¹⁹³

When making an appropriate order, courts must also consider any existing systemic discrimination and inequalities from past and present unfair discrimination and take measures to eliminate such discrimination and inequality.¹⁹⁴ An appropriate order could be interim or declaratory in the form of a settlement between the parties, or payment of any damages for any financial loss that can be proved or impairment of dignity.¹⁹⁵ The court could also order an

¹⁸⁵ R Henrico *Religious Discrimination in the Workplace* (unpublished LLD thesis, North West University, 2016).

¹⁸⁶ *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (Eq) at para [25].

¹⁸⁷ Section 14 of PEPUDA.

¹⁸⁸ Section 21(1)-(3) of PEPUDA.

¹⁸⁹ Section 21(2)(b) of PEPUDA.

¹⁹⁰ Section 21(2)(d)-(e) of PEPUDA. *Hyde v Hyde & Woodmansee* (1866) LR 1.

Sonke Gender Justice Network v Malema 2010 (7) BCLR 729 (EqC), [2010] ZAEQC 2; *N G Kempton v Andre van Deventer* ZAEQC Cape Town, case no 9/2013; *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (EC).

¹⁹¹ Section 21(2) (f)-(i) of PEPUDA. *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA) at para [95] where the court urged Qwelane to consider seeking rapprochement in order to prevent the divisions of the past. See also *ANC v Sparrow* [2016] ZAEQC 1 at para 20(3) where the court interdicted and restrained the respondent from publishing, propagating and advocating any hate speech as defined in section 10 of PEPUDA. *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).

¹⁹² Section 21(2)(j) of PEPUDA. *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190); *Sonke Gender Justice Network v Malema* supra (n190).

¹⁹³ Section 21(2)(n) of PEPUDA. *ANC v Sparrow* supra (n191) – propagating hate speech which was racially motivated.

¹⁹⁴ Section 4(2) of PEPUDA states that when applying the Act courts need to take into account (a) the existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy, and (b) the need to take measures at all levels to eliminate such discrimination and inequalities.

¹⁹⁵ Section 21(2)(a)-(d) of PEPUDA.

unconditional apology and order costs against any party to the proceedings.¹⁹⁶ The court could also make an order reasonably accommodating a group or class of persons.¹⁹⁷ The orders that an Equality Court makes have the effect of an order the same court would make in a civil case.¹⁹⁸ Notable is the fact that if a respondent continues with systemic unfair discrimination or failure to comply with the order/s which the court has made after an inquiry, it can refer its concerns to any relevant constitutional institution for further investigation.¹⁹⁹

In March 2021, the Government proposed an amendment to PEPUDA.²⁰⁰ Proposals to amend the Act are still at a draft stage and have not been tabled in Parliament as yet. This thesis does not deal with these proposed amendments.

5.3.5 Discussion

PEPUDA, also referred to as the Equality Act, imposes two obligations, one on the state and one on private parties. This is important in prohibiting unfair discrimination and essential within the context of this thesis. Determining whether discrimination is considered unfair is an important process. In this context, it is not only about the impact discrimination will have on the complainant²⁰¹ because they cannot marry within the church. It is also about how the church's doctrinal beliefs, policies, and rules impact the church's LGBTQI+ congregants in terms of why they cannot marry within the church.

PEPUDA is the instrument through which this process may be undertaken. As said above, PEPUDA aims to govern unfair discrimination issues as they arise in sectors other than the workplace.²⁰² As ordained ministers are not employees, the use of PEPUDA will be applicable to them. This means that PEPUDA can govern unfair discrimination issues as they arise in the church. This is because the definitions in section 1 of the Act assume the church's inclusion and the LGBTQI+ community. The church would be deemed a juristic person and the

¹⁹⁶ Section 21(2)(j) and (o) of PEPUDA.

¹⁹⁷ Section 21(2)(i) of PEPUDA.

¹⁹⁸ Section 12(3) of PEPUDA.

¹⁹⁹ Section 12(4) of PEPUDA.

²⁰⁰ Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, GN 143, GG 44402, 26 March 2021.

²⁰¹ R Henrico 'The role played by human dignity in religious-discrimination disputes' (2014) 35(1) *Obiter* 24-38.

²⁰² *Ibid.*

LGBTQI+ community a group or category of persons. A group or category of person could include same-sex couples wanting to solemnise their relationships within the church and are unable to do so because of the church's doctrinal beliefs brought about by its policies, laws, practices, and rules. Suppose a complainant alleges unfair discrimination based on the church's policies, practices, rules, and laws. In that case, according to section 14 of PEPUDA, they must prove that there was a differentiation in the treatment that imposed an undue burden that was disadvantageous.

Badul states that the factors within section 14(3) can be divided into three parts: firstly, the discrimination's effect on the complainant. This must be done by assessing whether the complainant's dignity was infringed, how the discrimination affected the complainant, and whether the complainant belongs to a group of persons who have suffered patterns of disadvantage in the form of previous discriminatory acts.²⁰³ Secondly, whether the nature and extent of the discrimination are systemic in nature and have a legitimate purpose. This must be considered in the light of whether there was a less restrictive way to avoid infringing the complainant's right to dignity and equality.²⁰⁴ And, thirdly, assessing whether the respondent took steps to address the disadvantage arising from the discriminatory Act.²⁰⁵ Badul further explains that section 14(3)(a)-(e) examines "how the discriminatory conduct adversely affected the complainant or the group that the complainant belonged to."²⁰⁶ Section 14(3)(f)-(i) involves an assessment by the court to consider any justifications that are advanced by the respondent for the conduct and whether it serves as a legitimate purpose that will deem it to be fair discrimination.²⁰⁷ Finally, section 14(3)(i)(ii) lists as a factor "reasonable steps to accommodate diversity" as a determination of fairness. This factor is essential for this study since reasonable steps to accommodate diversity would apply to churches that need to include their LGBTQI+ members within the church. Be this just as members of the church or in terms of solemnising or blessing their same-sex relationships.

The complainant must show that the discrimination suffered was based on one or more of the prohibited grounds in section 1 of the Act.²⁰⁸ Suppose the complainant could discharge the

²⁰³ Section 14(3)(a)-(c) of PEPUDA.

²⁰⁴ Section 14(3)(d)-(h) of PEPUDA.

²⁰⁵ Section 14(3)(i) of PEPUDA

²⁰⁶ C Badul *The Coerced and Forced Sterilisation of Women Living with HIV in South Africa: A Critical Review of Existing Remedies* (unpublished LLD thesis, University of KwaZulu-Natal, 2018).

²⁰⁷ Ibid.

²⁰⁸ Section 1(1)(xxiii) of PEPUDA 4 of 2000. The prohibited grounds of unfair discrimination referred to in the definition of discrimination are: (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other

onus of proof by establishing that the discrimination was on a listed ground in paragraph (a) of the definition of prohibited grounds. In that case, it is deemed to be unfair discrimination unless the respondent can prove otherwise.²⁰⁹ The onus of proving that the discrimination was fair shifts to the respondent.²¹⁰

An illustration of the application of PEPUDA can be found in the case of *MEC for Education: KwaZulu-Natal and Others v Pillay*.²¹¹ Besides looking at all the other factors listed in section 14 to determine fairness, the Constitutional Court paid particular attention to section 14(3) in terms of looking at reasonable accommodation of diversity.²¹² The court stated that to take positive measures, it sometimes requires either the State or an institution (which may include the Church) to incur additional hardships to allow the rights of everyone to be enjoyed equally.²¹³ The court referred to the case of *Christian Education South Africa v Minister of Education*,²¹⁴ where that court highlighted the fact that believers cannot automatically be exempted from the law of the land because of their beliefs.²¹⁵ “Believers” in the context of this study would include the church. The court in the *Pillay* case suggested that society must act positively to accommodate diversity, be it by requiring specific rules and regulations to be changed or regulating a general rule.²¹⁶ However, reasonable accommodation will be dependent on the nature of the case and the interests it involves.²¹⁷ The court went on to say that two factors are relevant in determining fairness when it comes to reasonable accommodation.²¹⁸ Firstly, it must be determined whether discrimination arises out of a rule or practice which is *prima facie* neutral and designed to serve a specific purpose but marginalises a sector of society. Secondly, reasonable accommodation is appropriate in localised contexts where balancing conflicting interests may be difficult.²¹⁹ However, the court cautioned that even though determining fairness requires an examination of reasonable accommodation, the other factors in section 14 must remain relevant.²²⁰ According to the court, reasonable

ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage (ii) undermines human dignity or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

²⁰⁹ Section 13(2)(a) of PEPUDA.

²¹⁰ Section 13(1)(a) and (b) of PEPUDA.

²¹¹ (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

²¹² *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [72].

²¹³ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [73].

²¹⁴ 2000 (4) SA 757 (CC) at para [36].

²¹⁵ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [73].

²¹⁶ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [75].

²¹⁷ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [78].

²¹⁸ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [78].

²¹⁹ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [78].

²²⁰ *MEC for Education: KwaZulu-Natal v Pillay* supra (n211) at para [78].

accommodation is an exercise of proportionality. This requires the court to enquire into the centrality of the policy or practice and how the practice affects the individual.²²¹ In this respect, the court held that it should not involve itself in the objectivity of the centrality of practices. It must be judged with reference only to how important the practice or belief is to the respondent.²²² By doing this, it answers the inquiry of subjectivity centrality.²²³

According to the court, the school's argument that if the applicant is not happy with the Code, she should move to another school is unacceptable.²²⁴ This, according to the court, would lead to marginalisation, which is inconsistent with the Constitution.²²⁵ Based on the School Code and the refusal of an exemption which was discriminatory,²²⁶ the court found that the respondent was unfairly discriminated against.²²⁷ The court ordered that the defect in the School Code be amended²²⁸ and adopted only after proper consultation in terms of section 8 of the Schools Act. Once adopted, processes for exemptions to be granted must be followed.²²⁹ Also, section 21(2)(i) of PEPUDA allows for an order that reasonable accommodation is made for a group or class of persons being discriminated against.²³⁰ The court held that the appeal was dismissed and that the Department of Education should pay costs.²³¹

Another illustration of the application of PEPUDA can be found in the *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*.²³² This case dealt with unfair discrimination based on sexual orientation and the right to religious freedom. Note must be taken that this case did not challenge the injunction against same-sex marriage within the church but is instead an illustration of how PEPUDA can be utilised in a matter pertaining to the conflicting rights of religious freedom and equality.

The case was brought before the Equality Court in terms of PEPUDA highlighting the issue of unfair discrimination based on sexual orientation. The complainant worked as an independent contractor in the arts academy of the church, teaching music to students.²³³ His responsibility

²²¹ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [86].

²²² *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [87].

²²³ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [88].

²²⁴ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [92].

²²⁵ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [92].

²²⁶ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [115].

²²⁷ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [112].

²²⁸ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [117].

²²⁹ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [184].

²³⁰ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [117].

²³¹ *MEC for Education: Kwazulu-Natal v Pillay* supra (n211) at para [119].

²³² 2009 (4) SA 510 (EC).

²³³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [1].

as a music teacher did not include teaching Christian doctrine.²³⁴ The complainant alleged that his contract was terminated prematurely because of his sexual orientation and the fact that he was in a same-sex relationship.²³⁵ The complainant's contract began at the beginning of 2005 and was terminated by the church six months later in July 2005²³⁶ when the church discovered that he was in an active same-sex relationship. Strydom alleged that the church had unfairly discriminated against him on the basis of his sexual orientation which is a prohibited ground in PEPUDA.²³⁷ Since the alleged discrimination by the claimant was based on a prohibited ground, the respondent bore the onus of proving that the unfair discrimination was fair in terms of section 14(2) of the PEPUDA.²³⁸ The unfair discrimination took place within the context of the church which relied "on the freedom of religion as entrenched" by the Constitution in order to "justify the unfair discrimination on the basis" of the complainants sexual orientation.²³⁹

The church counter-argued that the complainant was not only a lecturer in music at the church's school but was also seen as a spiritual leader for the school and as such was a role model.²⁴⁰ This required him to follow an "exemplary Christian lifestyle"²⁴¹ which the church argued the complainant could not do due to his homosexual lifestyle which meant he was a bad example for the students.²⁴² This, according to the church meant that homosexual persons must be celibate and cannot be involved in a same-sex relationship. Homosexuality was seen as a cardinal sin in the church's teachings based on the Bible.²⁴³ The church also argued that persons in leadership positions could not be involved in homosexual relationships because it was an inherent requirement that a spiritual leader support the church's doctrinal beliefs.²⁴⁴ Thus, the church's argument was based on the fact that the discrimination was fair which meant that the onus of proving the fairness of the discrimination rested on the church in terms of section 13(1) of PEPUDA.²⁴⁵

The court's responsibility was to analyse the test according to section 14 of PEPUDA in order to determine whether there was unfair discrimination.²⁴⁶ In order to determine fairness or

²³⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at paras [17] and [38].

²³⁵ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [6].

²³⁶ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [38].

²³⁷ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [6].

²³⁸ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [7].

²³⁹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [8].

²⁴⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [16].

²⁴¹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [16].

²⁴² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [21].

²⁴³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [12].

²⁴⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [15].

²⁴⁵ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at paras [7], [13].

²⁴⁶ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [7].

unfairness the court had to consider the factors provided in section 14(3) to determine the impact of the discrimination on the complainant.²⁴⁷ In so doing the court had to look at the effect of the discrimination on the complainant. The court found that the complainant's dignity was violated when his contract was terminated (section 14(3)(a) PEPUDA).²⁴⁸ The court also found that the impact on the complainant's life of the discrimination by the church left him suffering from depression because the publicity of the case made his unemployability more severe (section 14(3)(b) PEPUDA).²⁴⁹ Furthermore, the court also found that the extent of the discrimination could be seen in the complainant having to sell his piano and house to support himself (section 14(3)(d) PEPUDA).²⁵⁰ When the court looked at the issue of whether the unfair discrimination had a legitimate purpose it found that by the church terminating the complainant's contract the purpose was achieved (section 14(3)(g) PEPUDA).²⁵¹ According to the court the church did not take steps that were reasonable when addressing the disadvantage, nor did they accommodate the diversity of the complainant (section 14(3)(i) PEPUDA).²⁵² In fact, the court found that procedurally the church had exacerbated the situation in terms of the impact of the discrimination by offering the complainant a place in their programme called H20 (Homosexuality to Overcome) in order to begin the process of curing him from his homosexuality (section 14(3)(b) PEPUDA).²⁵³ The court on this basis found that the church had unfairly discriminated against the complainant based on his sexual orientation.²⁵⁴ The court found that the discrimination was unfair and that the onus of proving fairness was not successfully discharged.²⁵⁵

The final step that the court had to complete, concerned its assessment in terms of section 14 of PEPUDA.²⁵⁶ The court held that there was no precedent in South Africa concerning the

²⁴⁷ The factors that the court must look at and consider in section 14(3) are the following: " (a) whether the discrimination impairs or is likely to impair human dignity; (b) the impact or likely impact of the discrimination on the complainant; (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; (d) the nature and extent of the discrimination; (e) whether the discrimination is systemic in nature; (f) whether the discrimination has a legitimate purpose; (g) whether and to what extent the discrimination achieves its purpose; (h) whether there are less restrictive and less disadvantageous means to achieve the purpose and (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity".

²⁴⁸ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [33].

²⁴⁹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190).

²⁵⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [32].

²⁵¹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190).

²⁵² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190).

²⁵³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [34].

²⁵⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [26].

²⁵⁵ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [26].

²⁵⁶ Section 21(1)-(3) of PEPUDA 4 of 2000.

quantum of damages when it came to the psychological suffering of the complainant.²⁵⁷ In light of this the court decided that (i) for the psychological suffering and the violation of the complainant's dignity they would award the complainant R75 000,²⁵⁸ (ii) the respondent would pay the complainant an amount of R11 970 for loss of earnings and (iii) the respondent would extend an unconditional apology to the complainant.²⁵⁹

It is submitted that the utilisation of the Equality Court and the use of PEPUDA was the correct way in which to solve this issue.

It is argued that religious denominations and believers cannot automatically be exempt from constitutional principles as stated in the *Christian Education South Africa v Minister of Education*²⁶⁰ case. Thus, the principle of reasonable accommodation and context should be considered regarding same-sex marriage and the church's refusal to solemnise it. The refusal to solemnise a same-sex marriage could stem from a practice, policy, or rule adhered to by the church. By doing this, the church will display its respect for diversity. However, it is conceded that reasonable accommodation depends on the circumstances and nature of the case, the context, and the interests it involves. As the context is also essential in determining unfair discrimination, Albertyn believes that legal interpretation plays an integral part in understanding it because of the diverse nature of people's life experiences.²⁶¹

In assessing whether refusing to solemnise a same-sex marriage in the church is deemed discriminatory and unfair in PEPUDA, it is important to consider the impact of the applicant's other constitutional rights, such as religious freedom, equality, and dignity.²⁶²

5.4 CONCLUSION

From the above discussion, it can be seen that the current legislative framework enables LGBTQI+ couples to marry. In terms of the Civil Union Act, same-sex marriages have the

²⁵⁷ *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* supra (n190) at para [35].

²⁵⁸ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [37].

²⁵⁹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n190) at para [39].

²⁶⁰ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para [36].

²⁶¹ Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149) 41.

²⁶² *September v Subramoney and Others* supra (n191) para [116]. See also *MEC for Education: KwaZulu-Natal and Others v Pillay* supra (n211) at para [94].

same legal consequences as marriages performed under the Marriage Act.²⁶³ However, the law does not require equality within religious denominations when faced with a request to marry a same-sex couple. This is because the Civil Union Act provides that the wedding ceremony of same-sex couples must be carried out by marriage officers who have followed specific procedures in terms of the Act.²⁶⁴ The Civil Union Act also does not compel churches to marry same-sex couples.²⁶⁵ Many authors have argued that this is a form of unfair discrimination.²⁶⁶ This raises the question of inequality as LGBTQI+ Christians are currently at the mercy of their churches. Given that same-sex couples wanting to marry are treated differently from their heterosexual counterparts, the question is whether they can challenge unfair discrimination based on sexual orientation.

The legislative framework in terms of PEPUDA allows any person to challenge an unfair discrimination claim. In terms of the Act, discrimination based on sexual orientation could be declared unfair if it was found that a “policy, law, rule, practice, condition or situation directly or indirectly imposed burdens or disadvantages or withholds benefits or opportunities to any person on one or more of the prohibited grounds.”²⁶⁷ Cases involving LGBTQI+ members of religious denominations (which include ordained ministers and lay congregants) alleging unfair discrimination based on an injunction against same-sex marriage has yet to be brought before the Equality Court.²⁶⁸

It is difficult to see how the courts will preside over cases involving the conflict of constitutional rights such as the freedom of religion and the right to equality. However, it is submitted that the statutory framework discussed above could be used to address the purported discriminatory conduct by religious denominations who have implemented an injunction against same-sex marriage. As Oliver states, balancing the competing rights of church autonomy versus equality will be difficult for the courts.²⁶⁹

²⁶³ Section 13 of the Civil Union provides that the variable and invariable consequences of marriage are the same as marriages performed under the Marriage Act.

²⁶⁴ Section 5 of the Civil Union Act.

²⁶⁵ Ibid.

²⁶⁶ Bonthuys op cit (n127) 475; Bilchitz and Judge op cit (n40) 466-499; See Smith and Robinson op cit (n7); Smith and Robinson op cit (n147) 2; Ntlama op cit (n127) 191-212.

²⁶⁷ See section 1(viii) of PEPUDA.

²⁶⁸ The case of *Gaum and Others v Van Rensburg NO* supra (n10) involving LGBTQI+ members of the NG Kerk) alleging unfair discrimination based on an injunction against same-sex marriage was successfully challenged in the High Court.

²⁶⁹ ST Oliver ‘The application of anti-discrimination laws to religious institutions: The irresistible force meets the immovable object’ (1992) 12(2) *Journal of the National Association of Administrative Law Judiciary* 1.

CHAPTER SIX:

ANALYSIS

6.1 INTRODUCTION

The purpose of this thesis was to determine whether the biblical injunction against same-sex marriages, and the manner in which it has been exercised against LGBTQI+ ordained ministers and LGBTQI+ congregants infringes relevant provisions within PEPUDA.

The injunction against same-sex marriage is not exercised in a monolithic manner within South Africa. As demonstrated in Chapter 2, the biblical injunction against same-sex marriage is applied in different ways by different denominations. The different ways in which the biblical injunction is applied can be located on a sliding scale. For instance, on the one end of the scale there are Christian religious denominations that do not apply the injunction against same-sex marriage at all. At the other end of the scale, are those denominations that apply the injunction against same-sex marriage strictly. In the middle of the scale, there are Christian religious denominations who have a variety of different approaches concerning the injunction against same-sex marriage.

In Chapter 3, Chapter 4 and Chapter 5, the constitutional and statutory framework governing unfair discrimination and the right to religious freedom was discussed. These chapters also set out and analysed the relevant case law relevant within a South African context.

This chapter will critically examine the extent to which each of the three broad approaches identified in Chapter 2 complies with the provisions of PEPUDA. Each approach was tested against PEPUDA as the doctrine of constitutional subsidiarity requires that “where legislation is enacted to give effect to a constitutional right, a litigant may not by-pass the legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard”.¹ If found that the relevant provisions of PEPUDA have been infringed then a discussion around the sorts of remedies available in terms of section 21 of the Act will be analysed in order to determine which of these remedies could be granted.

¹ *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at para [160]. See also *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 (2) SA 1 (CC) at para [53].

Before turning to engage in this PEPUDA analysis, it will be helpful to discuss the different litigation strategies that could be adopted by an LGBTQI+ ordained minister or LGBTQI+ lay congregant who wants to enter into a church sanctioned same-sex marriage.

6.2 LITIGATION STRATEGIES

The conflict between some Christian religious denominations and its LGBTQI+ ordained ministers and LGBTQI+ congregants is based on the fact that the parties involved form part of a faith-based community. An important consequence of this fact is that the dispute should be resolved amicably and in a manner that not only vindicates the rights of all of the parties involved in the conflict, but also does not divide or destroy the religious community itself.

As the conflict is inherently conflictual, and will result in one party winning and the other losing, litigation is probably not the best way to achieve the goals set out above. It is perhaps for this reason that there have only been three cases in South Africa in which such a conflict has been litigated. It may also explain why the rules of some Christian religious denominations such as the Methodist Church² (and perhaps others), require alternative dispute resolution when it comes to these sorts of conflicts. Alternative dispute resolution in the context of some Christian religious denominations may take various forms. The main alternative dispute resolution option is an arbitration. Other alternative dispute resolutions may include discussions, workshops, conferences or mediation by senior elders in the church. However, it is a possibility that these alternative dispute resolution methods will not work as the opposing parties might arrive at a deadlock. In such a situation, litigation will then become the only option as seen in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*;³ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another*;⁴ and *Gaum and Others v Van Rensburg NO and Others*.⁵

Some Christian religious denominations' failure to amend their policies, rules, and practices concerning permitting same-sex marriage is a key advocacy issue. The purpose of this section of the chapter is therefore to investigate the different strategies adopted in each case to determine which strategy would be the best one to achieve equality.

² *De Lange v Presiding Bishop of the Methodist Church* supra (n1).

³ 2009 (4) SA 510 (EC)

⁴ 2016 (2) SA 1 (CC).

⁵ (40819/17) [2019] ZAGPPHC 52; [2019] 2 All SA 722 (GP) (8 March 2019).

- (i) Administrative law to compel a religious denomination to follow a fair procedure during a discrimination dispute
- (ii) Alternative dispute resolution in the form of arbitration
- (iii) A claim of unfair discrimination in terms of the Constitution
- (iv) A claim of unfair discrimination in terms of PEPUDA.

Each litigation strategy will be discussed in turn.

6.2.1 Administrative law to compel a religious denomination to follow a fair procedure during a discrimination dispute⁶

Simply put, administrative action is limited to a decision or failure to make a decision that negatively affects the rights of any person.⁷ An example would be where the executive will create a policy or make a decision that adversely affects any person.⁸ If an administrative action is taken as a result of a policy decision that adversely affects either a natural or juristic person, then it can be challenged in terms of the Promotion of Administrative Justice Act (PAJA).⁹

An attempt by the applicant to use administrative law as a strategy was highlighted in the case of *Gaum*,¹⁰ as they wanted the court to declare the 2016 General Synod decision unlawful and invalid in terms of PAJA.¹¹ The court had to consider whether PAJA was the applicable review tool to use in this case.¹² In examining whether the 2016 decision followed the correct procedures of the Church Order, the court had to consider whether the church was “exercising a public power or performing a public function” when the decision was made.¹³ The court held that the Church is not an organ of the state and that “there is no single litmus test” available in determining whether the church was “exercising a public power or performing a public function”. In light of this, the court held that courts have consistently applied “the governmental test” to determine this question.¹⁴ The court stated that based on this test, the decision that the church made was in the interest of the church and its members therefore it was “in no sense

⁶ *Gaum and Others v Van Rensburg NO and Others* supra (n5).

⁷ Promotion of Administrative and Justice Act 3 of 2000.

⁸ Ibid.

⁹ Promotion of Administrative Justice Act 3 of 2000 section 1(b).

¹⁰ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [4].

¹¹ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [4].

¹² *Gaum and Others v Van Rensburg NO and Others* supra (n5) at paras [41]-[45].

¹³ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

¹⁴ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

governmental.”¹⁵ According to the court, the decision did not entail public accountability but was instead based on an “interpretative theological decision.”¹⁶

The court held that although ordained ministers can conduct a same-sex marriage in terms of section 5(1) of the Civil Union Act,¹⁷ “this does not render the decision governmental in nature.”¹⁸ The decision not to officiate over a same-sex marriage was not based on the Act but instead it was based on a theological debate that was voted on in terms of the Church’s Order.¹⁹ The decision was made in the interest of the church and its members alone. The court held that the Civil Union Act was “solely concerned with marriage as a secular institution whereas the Church give marriage a religious dimension.”²⁰ In light of this, the court held that the decision made was not in terms of PAJA²¹ therefore the review grounds of PAJA were not available to Gaum.²²

A religious denomination has the power to make decisions of a spiritual nature. These pertain to administrative matters related to finance, i.e., tithing, times for church services, internal rules for grievance procedures, and church membership.²³ However, these decisions are not derived from statute because they are not a public body working in terms of legislation but instead a private body working in terms of internal constitutions, policies, and rules of the association.²⁴ A religious denomination or church, is not an organ of state and therefore cannot perform a public function.²⁵ The powers they perform are private, thus applying PAJA to review religious denominations' decisions may be arguable.²⁶

¹⁵ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

¹⁶ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

¹⁷ Civil Union Act 17, 2006. Section 5(1) states that any religious denomination may apply to the Minister of Home affairs to be designated as a religious organisation that may solemnise marriages in terms of the Act.

¹⁸ *Gaum and Others v Van Rensburg NO and Others* supra (n5).

¹⁹ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

²⁰ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

²¹ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

²² *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [45].

²³ R Henrico ‘Administrative law and voluntary religious associations in South Africa: some reflections’ (2021) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 521-537.

²⁴ Henrico *ibid*. See also *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [42].

²⁵ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [44].

²⁶ *Gaum and Others v Van Rensburg NO and Others* supra (n5) at para [42]. See also Henrico *op cit* (n23) 521-537.

6.2.2 Alternative dispute resolution in the form of arbitration²⁷

Arbitration is a process whereby a dispute is submitted by agreement of the parties as a legitimate and constitutionally permissible form of dispute resolution.²⁸ The arbitration is heard privately at a time and place agreed upon by the parties.²⁹ There are five main characteristics of arbitration. Firstly, the parties must have agreed to the arbitration and cannot thereafter unilaterally withdraw from the arbitration process.³⁰ Secondly, the parties choose the arbitrator/s who will be arbitrating the process.³¹ The arbitrator/s must have expertise in the area of arbitration.³² Third, parties may decide on issues such as the venue, the language that must be used, and the applicable law.³³ This makes the arbitration neutral.³⁴ Fourthly, the rules of arbitration protect the confidentiality of the proceedings, for instance, any disclosures made, awards given, etc.³⁵ Fifthly, the decision of the arbitrator is final.³⁶ Arbitrations in South Africa are governed by the Arbitration Act 42 of 1965.

Within its policies, rules, and practices, a religious denomination may include a section recommending arbitration as a strategy to determine an outcome arising from an internal conflict.³⁷ It is submitted, that arbitration is the preferred manner for religious denominations to resolve disputes since they believe that spiritual matters should be discussed internally and not in the civil courts.³⁸ This is because arbitration can preserve the religious community while vindicating the rights of all parties. Legal representation for the parties may be at the

²⁷ *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa and Another*, the unreported judgment of the Western Cape High Court, Cape Town, Case No 11159/2013 (26 June 2013); *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2015 (1) SA 106 (SCA); *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 (2) SA 1 (CC).

²⁸ S McKenzie et al 'Arbitration in South Africa' 2019, available at <https://www.webberwentzel.com/Documents/arbitration-in-south-Africa.pdf> accessed on 30 May 2022.

²⁹ Ibid. See also section 14(1)(b)(i).

³⁰ Section 3 of the Arbitration Act 42 of 1965.

³¹ Section 10 of the Arbitration Act 42 of 1965.

³² *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2002 (5) SA 449 (SCA) at paras [18] and [20]; *Lakeside Colony of Hutterian Brethren v Hofer* (1992) 3 S.C.R. 165.

See also A Truter 'Arbitration in South Africa' *Polity* 5 May 2017, available at <https://www.polity.org.za/article/arbitration-in-south-africa-2017-05-05> op cit. Section 4(3) of the Arbitration Act 42 of 1965.

³³ Section 14(1)(b)(i) of the Arbitration Act 42 of 1965.

³⁴ Truter 'Arbitration in South Africa' op cit (n32).

³⁵ Truter 'Arbitration in South Africa' op cit (n32).

³⁶ Section 28 of the Arbitration Act 42 of 1965.

³⁷ *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* supra (n27); *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27); *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³⁸ *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27) at para [30].

arbitrator's discretion, depending on the content of that religious denomination's policy, rule, or practice.³⁹

Private bodies such as religious denominations may institute arbitration procedures as part of the process of an internal disciplinary investigation. Important to note is that within this study, an example could be that the jurisdiction of the arbitration would be relevant to leaders of the church, such as ordained ministers who have breached sections within the church's policies, rules, or practices⁴⁰ by wanting to marry their same-sex partners. This is despite the fact that they are aware of the injunction against same-sex marriage within the policies and rules of their religious denomination. This would then be tantamount to breaching the policies and rules of the church. Arbitration would not apply to lay congregants (such as its LGBGQI+ congregants) who are challenging the injunction against same-sex marriage within the church.

In the High Court, arbitration featured prominently in the *De Lange*⁴¹ case where the church attempted to use arbitration as their preferred way of resolving the dispute between De Lange and the Church. Even though the arbitration was not successful because De Lange did not submit herself to the entire process, the court held that when dealing with issues related to the doctrinal beliefs of the church, arbitration is the most suitable forum to deal with those issues.⁴² This is to prevent the courts from becoming entangled in a dispute which concerns the doctrinal issues of the religious denomination.⁴³

Attached to the arbitration process are advantages and disadvantages which could affect both the applicant and the respondent (religious denomination).

Prima facie and according to the Arbitration Act,⁴⁴ the advantages of arbitration for both parties could be the cost-effectiveness of the process, the fast determination of the dispute, the fact that the parties can determine the terms of reference of the arbitration, and that the parties are able to choose the arbitrator which they are both able to agree upon.⁴⁵ Confidentiality could also, *prima facie*, be deemed as an advantage to both parties because the proceedings, materials

³⁹ Ibid.

⁴⁰ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27).

⁴¹ *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27).

⁴² *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27) at para [45].

⁴³ *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27) at para [30].

⁴⁴ Arbitration Act 42 of 1965.

⁴⁵ Truter 'Arbitration in South Africa' op cit (n32).

either disclosed or created during the proceedings and the arbitration award cannot be disclosed by anyone involved in the arbitration without the parties consent.⁴⁶

However, in taking a closer look at the advantages above, it becomes clear that not all of the advantages benefit both parties. Some of the above advantages could be to the benefit of the respondent and not the applicant who is within the context of this study challenging the injunction against same-sex marriage within the church.

A private body or religious denomination having the power to determine the terms of reference of an arbitration because of its policies in place⁴⁷ may be seen as advantageous to the religious denomination but disadvantageous to the applicant. The reason is that religious denominations wield a large amount of power,⁴⁸ and this power could be used to dominate the arbitration process. Once the arbitration agreement is signed by both parties according to the laws and disciplines or policy of the church, the agreement then becomes binding on both parties who have to submit themselves to the entire process.⁴⁹ According to the Arbitration Act once the parties have agreed to the arbitration they cannot unilaterally withdraw from the process.⁵⁰ This could disadvantage the applicant especially if the process is deemed as biased towards them.⁵¹ Unilaterally withdrawing from the process before completion and looking for relief from a court is not to the applicant's advantage.⁵² The only way to get relief is for the applicant to submit themselves to the entire process and, once the award is handed down, only then would judicial review be open to them if they are unhappy with the outcome.⁵³ If a party wishes to challenge the outcome of the arbitration, they must establish *good cause*⁵⁴ within the meaning of section 3(2) of the Arbitration Act.⁵⁵

⁴⁶ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) at para [12].

⁴⁷ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27) at paras [8]-[9].

⁴⁸ D Bilchitz 'Should religious associations be allowed to discriminate' (2011) 27(2) *South African Journal on Human Rights* 219-248.

⁴⁹ *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (Case No. 11159/2013) (Western Cape High Court) at para [13].

⁵⁰ Section 4 of the Arbitration Act 42 of 1965.

⁵¹ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27) at para [14].

⁵² *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (Case No. 11159/2013) supra (n49) at para [27].

⁵³ *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (Case No. 11159/2013) supra (n49) at para [45].

⁵⁴ Own emphasis.

⁵⁵ Section 3(2) of the Arbitration Act states that 'the court may at any time on the application of any party to an arbitration agreement, on good cause shown (a) set aside the arbitration agreement; or (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred'.

However, despite this situation our courts stand by the belief that arbitration proceedings of private bodies are of a nature that exempts the courts from becoming entangled in an internal dispute of a religious denomination.⁵⁶ This is because most internal disputes arising out of religious denominations go to the heart of the sensitive nature of doctrinal beliefs.⁵⁷ For ordained ministers and other leaders in the church who have breached the policy or rules of their religious denominations, it is to their advantage to submit themselves to arbitration in order to keep the matter internal.⁵⁸ By doing this, the conflict may be resolved amicably if the ordained minister of the religious denomination commits to submitting him or herself to the complete process of arbitration.⁵⁹ This however is questionable.

The rules of arbitration protect the confidentiality of the proceedings.⁶⁰ This could be deemed as an advantage for the respondent and a disadvantage to the applicant. Third parties are prevented from being part of the arbitration process because of the confidentiality of the process. In this case, confidentiality would favour the respondent especially if they wish to keep the dispute out of the public eye. With proceedings being confidential the applicant is then unable to share their matter with the media or activists who would then further their cause. The only way to disclose information from the arbitration is to have the requisite consent from all parties, which, in this case would not be possible especially if the respondent wishes to keep the matter internal and private.

Like administrative law, arbitration applies in relatively narrow factual circumstances. Namely, when the parties agree that arbitration is the most suitable tool to resolve the dispute or, where the religious denomination's rules and orders require arbitration in instances where there is a dispute, as seen in the *De Lange*⁶¹ case.

Unlike administrative law, an alternative dispute resolution in arbitration does confront the clash between religious freedom and equality. As seen above, it is a valuable tool for resolving internal disputes within a religious denomination. However, as arbitration takes place in private, it has no precedential value. It does not help to develop our jurisprudence concerning the injunction against same-sex marriage.

⁵⁶ *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27) at para [30].

⁵⁷ *De Lange v Presiding Bishop of the Methodist Church* 2015 supra (n27) at para [30].

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Truter 'Arbitration in South Africa' op cit (n32).

⁶¹ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27).

6.2.3 A claim of unfair discrimination in terms of section 9 of the Constitution⁶²

An unfair discrimination claim can be made in terms of section 9 of the Constitution if arguing against a religious denomination's policy or practice which is inconsistent with the Constitution. A claim of unfair discrimination in terms of section 9 of the Constitution can be heard in the High Court, the Supreme Court of Appeal, or the Constitutional Court. Reliance on section 9 of the Constitution to deal with an unfair discrimination claim can be successful regarding equality issues and creates a precedent for other equality issues. The reason is that this litigation strategy is not as specific as the litigation strategies in terms of administrative justice and arbitration.

A claim of unfair discrimination in terms of section 9 of the Constitution was made in both the *De Lange*⁶³ and *Gaum*⁶⁴ cases. In the *De Lange*⁶⁵ case, her unfair discrimination claim was based on section 9 of the Constitution.⁶⁶ However, because the courts found that she had disavowed her discrimination claim, it refused to decide on her unfair discrimination claim because it had become a moot point.⁶⁷ Thus, her claim of unfair discrimination in terms of section 9 of the Constitution was unsuccessful.

*Gaum*⁶⁸ also relied on section 9 of the Constitution to deal with his unfair discrimination claim based on sexual orientation. The High Court held that it had jurisdiction to hear the matter because the unfair discrimination claim had been "properly ripened" compared to the *De Lange* case.⁶⁹ The court held that section 9 of the Constitution deals with competing rights such as equality based on sexual orientation versus religious freedom that they could competently hear.⁷⁰ In this matter, the claim of unfair discrimination based on sexual orientation was successful.⁷¹

⁶² *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27). See also *Gaum and Others v Van Rensburg NO* supra (n5).

⁶³ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 supra (n27).

⁶⁴ *Gaum and Others v Van Rensburg NO* supra (n5).

⁶⁵ *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

⁶⁶ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27).

⁶⁷ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27) at para [52].

⁶⁸ *Gaum and Others v Van Rensburg NO* supra (n5).

⁶⁹ *Gaum and Others v Van Rensburg NO* supra (n5) at para [39].

⁷⁰ *Gaum and Others v Van Rensburg NO* supra (n5) at para [65].

⁷¹ *Gaum and Others v Van Rensburg NO* supra (n5) at para [82].

The church countered the argument that the matter should have been heard in the Equality Court. In determining whether the “court has jurisdiction to entertain claims of unfair discrimination not sitting as an Equality Court”⁷² the court came to the decision that if the matter was heard by the Equality Court it would have to rule on the issues piecemeal because it would not have jurisdiction to hear the other issues involved in the case.⁷³ Parallel proceedings according to the court would not “serve justice” as it would be expensive for all parties concerned if two sets of papers had to be drafted, senior counsel having to be briefed twice, and argue twice because different courts would be hearing the matter.⁷⁴ It would also open the door to conflicting judgments.⁷⁵ Furthermore, according to the court, the matter was assigned to a Full Court because of the complexity of the matter.⁷⁶ The three judges sitting as a full court were trained as Equality judges therefore were competent to deal with the matter at hand and, had jurisdiction to “pronounce” on all of the issues.⁷⁷ On this basis, the court held that three trained equity judges were better than one Equality Court Judge because there was more chance at “judicial wisdom”.⁷⁸

In light of the above, it is possible to take a matter of unfair discrimination based on section 9 of the Constitution to a court that is not sitting as an Equality Court to be decided on.

6.2.4 A claim of unfair discrimination in terms of PEPUDA⁷⁹

PEPUDA⁸⁰ confers authority to the Equality Courts (EC) by virtue of section 16 as the primary enforcement mechanism to oversee complaints under the Act.⁸¹ Equality courts are specialised courts that “hear matters relating to unfair discrimination, hate speech, and harassment”.⁸² In terms of the Act, every magistrates’ court and every high court can sit as an equality court for

⁷² *Gaum and Others v Van Rensburg NO* supra (n5) at para [31].

⁷³ *Gaum and Others v Van Rensburg NO* supra (n5) at para [36].

⁷⁴ *Gaum and Others v Van Rensburg NO* supra (n5) at para [36].

⁷⁵ *Gaum and Others v Van Rensburg NO* supra (n5) at para [36].

⁷⁶ *Gaum and Others v Van Rensburg NO* supra (n5) at para [38].

⁷⁷ *Gaum and Others v Van Rensburg NO* supra (n5) at para [38].

⁷⁸ *Gaum and Others v Van Rensburg NO* supra (n5) at para [40].

⁷⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000. Cases that featured PEPUDA were evidenced in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (EC); *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 supra (n27); *Gaum and Others v Van Rensburg NO* supra (n5).

⁸⁰ Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000.

⁸¹ Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

⁸² Albertyn et al *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

their area of jurisdiction.⁸³ Existing judges and magistrates may preside over matters in the Equality Court only if they have been trained for the purposes of sitting as Equality judges.⁸⁴ If an Equality Court is sitting as a Magistrates' Court, it cannot make a declaration of constitutional invalidity in terms of section 170⁸⁵ of the Constitution.

According to section 5 of PEPUDA, the Act binds the state and all persons. All persons include any person who is litigating an unfair discrimination claim based on one or more of the prohibited grounds within the Act.⁸⁶ All persons include private bodies such as the church or any religious denomination, as well as LGBTQI+ congregants. PEPUDA has been created as a means by which unfair discrimination claims can be lodged.⁸⁷ Litigants can benefit from Equality courts because they are free of charge,⁸⁸ and matters are dealt with and processed expeditiously.⁸⁹

There are many advantages to following the route of the Equality Court in lodging a complaint dealing with unfair discrimination. A complainant may lodge a complaint at the Equality Court with the help of clerks of the court who have specialised training.⁹⁰ These clerks help make the process simple and straightforward by assisting complainants in filling in the necessary forms available at every Equality Court.⁹¹ To institute proceedings in the Equality Court, it is not a requirement for complainants to have legal representation.⁹² The South African Human Rights Commission, the Commission on Gender Equality, and other bodies are given specific duties in terms of PEPUDA to assist complainants in bringing a complaint to the Equality Court and conduct investigations into cases.⁹³ These bodies may also provide legal representation.⁹⁴

⁸³ PEPUDA section 16(1)(a).

⁸⁴ PEPUDA section 16(1)(b).

⁸⁵ Section 170 of the Constitution states that 'Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President'.

⁸⁶ PEPUDA section 1(1)(xviii). Prohibited grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, HIV status.

⁸⁷ Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) op cit (n149).

⁸⁸ Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) op cit (n149).

⁸⁹ Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) op cit (n149).

⁹⁰ PEPUDA section 17(1)(a).

⁹¹ 'Equality Courts' <https://legal-aid.co.za/2018/09/26/equality-courts/> (accessed 26 May 2022).

⁹² Ibid.

⁹³ PEPUDA section 20(1)(f). See also 'Equality Courts' ibid; TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1) *Agenda* 36-48.

⁹⁴ PEPUDA section 20(1)(f). See also 'Equality Courts' ibid; Powys ibid.

The Equality court sits as a formal court, but the rules and procedures of the court are more relaxed than in other courts.⁹⁵ Although standard rules apply, the presiding officers, when conducting proceedings, do not rigidly apply these rules.⁹⁶ This leads to a less intimidating environment for litigants.⁹⁷ Besides this, and by virtue of section 4(1) of PEPUDA, the adjudication of proceedings in the Equality Court need to apply the following principles:

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

This implies that there are fewer punitive measures attached to the Equality Court.⁹⁸ The wide range of remedies listed under section 21(2) of PEPUDA indicates that the court will look at the most appropriate remedy for the circumstances to achieve justice for the victims and punish the wrongful conduct while rehabilitating the perpetrator.⁹⁹ In determining the most appropriate remedy, it is hoped that the court will be able to construct remedies that vindicate the constitutional rights of the parties, while at the same time preserving the faith-based community. If complainants are displeased with the outcome of the Equality Court, they may appeal their matter to the High Court or the Supreme Court of Appeal if they believe that the presiding officer erred as a matter of law.¹⁰⁰ In fact, either party, if displeased with the case's outcome, may appeal the decision.¹⁰¹

As much as there are advantages to taking a matter to the Equality Court, there are also disadvantages attached to the Equality Court. One of the significant challenges is that not all equality courts are fully functional.¹⁰² Where they are functional they can be difficult to find because they have not been established in all Magistrates Court buildings as envisaged by

⁹⁵ ‘Equality Courts’ op cit (n93).

⁹⁶ ‘Equality Courts’ op cit (n93).

⁹⁷ ‘Equality Courts’ op cit (n93).

⁹⁸ Powys op cit (n93). See also ‘Equality Courts’ op cit (n93).

⁹⁹ A Alli *A Critical Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: To What Extent Have the Remedies Available to the Equality Court been Utilised in Achieving the Objectives of the Act* (unpublished LLM Thesis, University of KwaZulu-Natal 2019).

¹⁰⁰ J Hahn ‘Your guide to the South African Equality Courts’ 2015, available at <https://www.probono.org.za/wp-content/uploads/2015/11/Equality-Court-Handbook-2015.pdf> accessed on 14 July 2022.

¹⁰¹ Ibid.

¹⁰² Powys op cit (n93). See also D Kaersvang ‘Equality courts in South Africa: Legal access for the poor’ (2008) 15(2) *Journal of the International Institute* 4-5.

PEPUDA thus making them difficult to locate.¹⁰³ Equality courts are under-utilised because many South Africans do not know how they operate compared to ordinary courts.¹⁰⁴ Despite awareness-raising programs, equality courts remain relatively unknown to most poor litigants wanting to challenge unfair discrimination cases.¹⁰⁵ The litigation process is sometimes lengthy because of the shortage of designated personnel and lack of resources.¹⁰⁶ However, despite these challenges, the Equality Courts provide a more accessible and cost-effective way to litigate, which benefits complainants.¹⁰⁷

Claims of unfair discrimination in terms of PEPUDA featured in the *Strydom*¹⁰⁸ case. This case arose out of an employment dispute that did not fall under the Employment Equity Act¹⁰⁹ which meant that the matter had to be taken to the Equality Court. The matter was based on an unfair discrimination claim based on the grounds of sexual orientation but did not concern an injunction against same-sex marriage. In determining the matter the court held that the impact of the discrimination on the complainant was more than the impact on the church's religious freedom.¹¹⁰ The court found that the NG Kerk had unfairly discriminated against the complainant based on his sexual orientation.¹¹¹ In terms of the remedies under section 21(2) of PEPUDA, the court awarded payment for damages related to the complainant's emotional and psychological suffering and instructed the NG Kerk to make an unconditional apology to *Strydom*.¹¹² The NG Kerk was also instructed to pay the complainant's costs.¹¹³ It is submitted that the complainant was successful in the achievement of receiving the outcome that he desired concerning the unfair discrimination claim. The claim of unfair discrimination in terms of PEPUDA taken directly to the Equality Court was the appropriate litigation strategy.

PEPUDA also confronts the clash between equality and religious freedom and is heard in an open court, creating a precedent, as seen in the *Strydom*¹¹⁴ case. Utilising PEPUDA as a litigation strategy, the principle of constitutional subsidiarity is upheld. It is submitted that

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Hahn op cit (n100).

¹⁰⁸ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79).

¹⁰⁹ Employment Equity Act 55 of 1998.

¹¹⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at para [25].

¹¹¹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at para [41].

¹¹² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at para [41(4)].

¹¹³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at para [41(5)].

¹¹⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79).

PEPUDA is designed to specifically address the clash between private parties such as a religious denomination and its LGBTQI+ members.

In light of the above, it is submitted that the Equality Court and the use of PEPUDA is a highly favourable litigation route going forward. Given that this is the most appropriate litigation strategy and highly recommended, we will now turn to discuss the application of this strategy in the remainder of the chapter.

6.3 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (PEPUDA)

This section will analysis the PEPUDA two-stage inquiry concerning whether there is discrimination and if that discrimination is unfair. The principles of PEPUDA will be applied to the different approaches as identified in Chapter 2 - Table 1, namely most progressive, progressive and least progressive in order to determine if the injunction against same-sex marriage unfairly discriminates against their LGBTQI+ members.¹¹⁵ In order to concretise the analysis this section will focus on one particular denomination in each category being the Dutch Reformed Church of Southern Africa, The Methodist Church of Southern African and the Seventh Day Adventist Church.

Table 2: Categories of religious denominational Christian Churches indicating their progressiveness concerning homosexuality and same-sex marriage.

NAME OF CHURCH	STANCE OF THE CHURCH ON HOMOSEXUALITY AND SAME-SEX MARRIAGE	DIALOGUE ON HOMOSEXUALITY AND SAME-SEX MARRIAGE	CATEGORY
Dutch Reformed Church of Southern Africa (DRC)	Accepting of homosexuality and same-sex marriage. Performs same-sex marriage - <i>Gaum</i> ¹¹⁶	Ongoing	Category 1 – Most Progressive
Methodist Church of Southern Africa (MCSA)	Accepting of homosexuality but does not perform same-sex marriage	Ongoing	Category 2 - Progressive
Seventh-Day Adventist Church (SDA)	Opposes homosexuality and same-sex marriage	No dialogue	Category 3 – Least Progressive

¹¹⁵ See Table 2.

¹¹⁶ *Gaum and Others v Van Rensburg NO* supra (n5).

Table 2 indicates the categories within which each religious denomination falls in terms of their progression concerning homosexuality and same-sex marriage. From the above Table, each religious denomination falls into its specific category because of its stance concerning the theology of marriage, and how the church understands it in the context of same-sex marriage.¹¹⁷

Testing the policies, rules, and practices of the specific religious denomination chosen from each category against PEPUDA will be undertaken in terms of (i) ordained ministers who want to marry within the church and (ii) ordained ministers who marry outside of the church in a secular ceremony and (iii) LGBTQI+ lay congregants who want to marry within the church.

To determine whether there is unfair discrimination, a court must first ascertain whether the different treatment amounts to direct or indirect discrimination based on either listed or analogous grounds. This inquiry would be enhanced by the definition of discrimination provided in section 1 of PEPUDA.¹¹⁸

Secondly, if we find that the discrimination is direct or indirect, the inquiry can proceed to whether the discrimination is fair or unfair. Section 14(2) and (3) in PEPUDA includes an extensive list of factors that need to be considered when deciding on the unfairness of the discrimination. This inquiry may be more elaborate and multi-faceted than the inquiry in terms of section 9(3) of the Constitution.¹¹⁹

Once this test is established, the findings will be discussed concerning whether there is discrimination, if it is unfair, and what remedies can be put in place.

¹¹⁷ ‘Nederduitse Gereformeerde Kerk’ available at <http://ngkerk.net/dokumente/> at para 35.16 page 207 accessed on 8 June 2022; ‘Nederduitse Gereformeerde Kerk’ available at http://www.kaapkerk.co.za/wp/wp-content/uploads/2013/04/2015-10-09_DRC_General_Synod_Same-Sex_Relations_Official_Eng.pdf accessed on 8 June 2022. The Dutch Reformed Church accepts and officiates same-sex marriages see *Gaum and Others v Van Rensburg NO* supra (n5). The conversation continues concerning the theology of marriage and the acceptance of inclusivity and diversity within the church. Methodist Church of Southern Africa ‘Book of Order’ point 16(e) (Same-Sex debate) at 226 available at <https://methodist.org.za/wp-content/uploads/2017/08/Methodist-Book-of-Order.pdf> accessed on 8 June 2022. The Methodist Church are involved in ongoing conversations concerning same-sex marriage but have not reached a solution as yet about accepting or officiating same-sex marriage. Seventh-Day Adventist Church “What Adventists Believe about Marriage and the Family: Belief 23: Marriage and the Family” available at <https://www.adventist.org/marriage-and-the-family/> accessed on 8 June 2022; Seventh-Day Adventist ‘Same-sex unions’ Statement voted by the Annual Council of the General Conference Executive Committee, October 17, 2012 available at <https://www.adventist.org/documents/same-sex-unions/> accessed on 8 June 2022. The Seventh-Day Adventist Church is not in conversation about same-sex marriage and will not accept or officiate a same-sex marriage. Their stance is based purely on an understanding of a literal biblical understanding of the theology of marriage which does not include same-sex marriage.

¹¹⁸ P De Vos ‘Non-statutory imposed discrimination: The Promotion of Equality and Prevention of Unfair Discrimination Act’ in P De Vos et al *South African Constitutional Law in Context* 2 ed (2021) ch 13: 13.2.5.

¹¹⁹ Ibid.

6.3.1 Is there discrimination (Stage One)

As mentioned previously, PEPUDA defines discrimination as an act or omission, including a policy, law, rule, practice, condition, or situation that directly or indirectly imposes burdens or disadvantages or withholds benefits and opportunities from any person on one or more of the prohibited grounds.¹²⁰ In light of this definition, the policies and practices of the Dutch Reformed Church, the Methodist Church, and the Seventh-Day Adventist Church will be analysed to determine whether they are discriminatory towards their LGBTQI+ ordained ministers and congregants.

As sexual orientation is a listed ground, the policies, rules and practices of the church would be directly discriminatory because they impose a burden and withhold benefits and opportunities for LGBTQI+ ordained ministers and congregants in the form of an injunction against same-sex marriage. This is evident in the fact that although LGBTQI+ ordained ministers and congregants are able to marry in a civil ceremony outside of the church, they cannot get married in a religious ceremony within the church because of its doctrinal beliefs around the theology of marriage. As heterosexual couples are able to marry within the church and get the blessing of the church and God on their marriage union, same-sex couples are unable to do the same thing. Therefore, the burden being imposed and the loss of a benefit or opportunity is based on the fact that same-sex couples do not have true equality in marriage as heterosexual couples do.

In order to demonstrate this, we look at the following:

Within their church order, the Dutch Reformed Church (category one) holds that their foundational belief concerning the theology of marriage is that marriage is a formal agreement between two people of the opposite sex.¹²¹ At their 2015 Synod, the DRC decided that all people, irrespective of their sexual orientation, were equal, thus recognising same-sex unions.¹²² The resolution also permitted ministers of the church to officiate at same-sex unions, but no obligation was attached. The celibacy requirement attached to LGBTQI+ persons who

¹²⁰ Section 1 of PEPUDA.

¹²¹ 'Nederduitse Gereformeerde Kerk' op cit (n117) at para 35.16 page 207.

¹²² *Gaum and Others v Van Rensburg NO* supra (n5) para 2. See also 'The Decisions of the General Synod on Same-Sex Relations' available http://www.kaapkerk.co.za/wp/wp-content/uploads/2013/04/2015-10-09_DRC_General_Synod_Same-Sex_Relations_Official_Eng.pdf accessed on 8 June 2022.

wish to be ordained Ministers or elders in the church was removed.¹²³ However, in 2016 the General Synod attempted to overturn that decision and maintain its theology of marriage being between two persons of the opposite-sex.¹²⁴ The reversal of the 2015 decision was taken to court by *Gaum*.¹²⁵ The court reviewed and set aside the 2016 decision of the General Synod as unlawful and invalid.¹²⁶ This meant that the 2015 resolution of the General Synod was kept valid and enforced.¹²⁷ The judgment applies only to the Dutch Reformed Church and does not bind any other church or religious organisation outside of the Dutch Reformed Church.¹²⁸

The progressive outcome of the judgment in *Gaum*¹²⁹ indicates that the Dutch-Reformed Church does not directly or indirectly discriminate against its LGBTQI+ members in terms of it conducting same-sex marriage within the church. In light of this the Dutch Reformed Church would be determined differently since the outcome of the *Gaum* case¹³⁰ in that (i) ordained ministers who want to marry within the church will probably be allowed to do so considering the outcome of the *Gaum*¹³¹ case, (ii) ordained ministers who marry outside of the church in a civil marriage will not face any adverse consequences arising out of their actions since the outcome of the *Gaum*¹³² case. Their marriage will be recognised by the church and they would still be able to remain as an ordained minister in the church, (iii) LGBTQI+ lay congregants who want to marry within the church will be able to do so considering the outcome of the *Gaum*¹³³ case. Their marriages will be recognised by the church. Although there are still issues surrounding the fact that ministers in the church are not obliged to officiate a same-sex marriage, it is submitted that the church's strides toward recognising same-sex marriage is commendable. It is submitted that the outcome is that the Dutch Reformed Church does not discriminate against same-sex couples and the solemnisation of those marriages. Therefore, it

¹²³ *Gaum and Others v Van Rensburg NO* supra (n5) para 2. See also 'The Decisions of the General Synod on Same-Sex Relations' *ibid*.

¹²⁴ 'Nederduitse Gereformeerde Kerk' *op cit* (n117) at para 34 page 204.

¹²⁵ *Gaum and Others v Van Rensburg NO* supra (n5).

¹²⁶ *Gaum and Others v Van Rensburg NO* supra (n5) at para 96.

¹²⁷ 'The Decisions of the General Synod on Same-Sex Relations' *op cit* (n122).

¹²⁸ D Ellerbeck 'Implications of the Gaum case' FORSA 18 June 2019, available at <https://forsa.org.za/the-implications-of-the-gaum-vs-dutch-reformed-church-judgment/> accessed on 8 June 2022. See also http://www.kaapkerk.co.za/wp-content/uploads/2013/04/2015-10-09_DRC_General_Synod_Same-Sex_Relations_Official_Eng.pdf (accessed 8 June 2022).

¹²⁹ *Gaum and Others v Van Rensburg NO* supra (n5).

¹³⁰ *Gaum and Others v Van Rensburg NO* supra (n5).

¹³¹ *Gaum and Others v Van Rensburg NO* supra (n5).

¹³² *Gaum and Others v Van Rensburg NO* supra (n5).

¹³³ *Gaum and Others v Van Rensburg NO* supra (n5).

becomes unnecessary for us to move to stage two to determine any unfairness concerning an injunction against same-sex marriage in this religious denomination.

However, this progressive first step is not met by two other main religious denominations as they are not as progressive.

The Methodist Church (category two), within its laws and disciplines and policies, decisions, practices, and usages of the Methodist Church¹³⁴ contains sections that provide that the church would recognise only heterosexual marriages.¹³⁵ To reiterate this stance, the Methodist Book of Order provides that the Methodist Church of Southern Africa continues to recognise marriage as only between a man and a woman.¹³⁶ The Book of Order further states that it is not yet ready to make application for its ministers to officiate same-sex unions because they are still in conversation concerning the theology of marriage.¹³⁷ The stance of the Methodist Church concerning the theology of marriage specifically excludes same-sex couples from marrying and it does not allow its ministers to officiate over these marriages. The inclusion of the injunction against same-sex marriage within the church which is derived from its policies and practices indicates direct discrimination towards their LGBTQI+ members.

In the booklet “What Adventists Believe about Marriage and the Family”, the Seventh-Day Adventist church believes that marriage was divinely established in Eden between a man and woman who share a common faith.¹³⁸ The church's statement on same-sex unions reiterates their stance on the theology of marriage and believe that “homosexuality is a manifestation of the disturbance and brokenness in human inclinations and relations caused by the entrance of

¹³⁴ *Ecclesia De Lange v The Presiding Bishop of the Methodist* supra (n27) at para 9.

¹³⁵ Ibid which specifically refers to paragraphs 4.82 and 11.3 of the Laws and Disciplines of the Church. See also the *Methodist Book of Order* (2016) point 16(e) (Same-Sex debate) at 226 which provides ‘... MCSA continues to recognise marriage as only between a man and a woman...’ available at <https://methodist.org.za/wp-content/uploads/2017/08/Methodist-Book-of-Order.pdf> accessed on 8 June 2022.

¹³⁶ *The Methodist Book of Order* point 16(e) (Same-Sex debate) ibid.

¹³⁷ Ibid. See also the *Methodist Church Yearbook 2021*, available at <https://methodist.org.za/wp-content/uploads/2021/06/Yearbook-2021-003.pdf> accessed on 8 June 2022 point 3 page 248, which states that ‘the 2019 Conference directed, through Resolution 5, DEWCOM to develop a discussion document on MCSA position and Theology of Marriage. DEWCOM has established a sub-committee to trace a timeline and previous work that has been done on this. The elements of this include: • Historical development of Marriage and LGBTIAQ+ conversations and resolutions • Marriage and Family Life Conference in 2015 • The DEWCOM Report to Conference 2017 • DEWCOM Resolutions on Civil Unions • DEWCOM Submission to Conference 2019’. See also the proposition in Chapter 22 of the Yearbook 2021, page 272 for a Connexional LGBTIAQ Task Team.

¹³⁸ ‘What Adventists believe about marriage and the family’, Belief 23: Marriage and the Family, available at <https://www.adventist.org/marriage-and-the-family/> accessed on 8 June 2022.

sin into the world”.¹³⁹ With a stance such as this, an injunction against same-sex marriage derived from their policies and practices would be present within this church. This indicates that the discrimination directed towards their LGBTQI+ members would be direct.

The burdens and disadvantages imposed by this discriminatory conduct also withholds the benefit of a same-sex couple marrying within the church. This is evident in the Methodist and Seventh-Day Adventist Church.

In the Methodist Church, the injunction against same-sex marriage derived from their policies and practices would impose a burden and disadvantage to its LGBTQI+ members because of the fact that they are unable to marry within the church. Every couple, whether heterosexual or same-sex, should have an equal opportunity to enter the sacred institution of marriage within the church. The differential treatment between heterosexual couples and same-sex couples causes both a burden and imposition on same-sex couples. The injunction against same-sex marriage derived from their policies and practices would have the following effect: (i) ordained minister who want to marry within the church will be denied that benefit,¹⁴⁰ (ii) ordained ministers who marry outside of the church in a civil ceremony would be able to do so. However, they would probably be disciplined for having breached the Laws and Disciplines of the church concerning the theology of marriage,¹⁴¹ (iii) much the same as ordained ministers who want to marry within the church, LGBTQI+ lay congregants would be denied the benefit of marrying within the church.

The same can be said about the Seventh-Day Adventist Church. The injunction against same-sex marriage derived from their policies and practices would be disadvantageous and imposes a burden on same-sex couples in the church. Because of the church’s stance concerning homosexuality, the equality of marriage would not be available to same-sex couples in the

¹³⁹ Seventh-Day Adventist stance on same-sex unions. ‘Statement voted by the Annual Council of the General Conference Executive Committee, October 17, 2012’ available at <https://www.adventist.org/documents/same-sex-unions/> accessed on 8 June 2022.

¹⁴⁰ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27). See also *The Methodist Book of Order* op cit point 17 (Same-Sex relationships) op cit (n135) at 228. See also the *Methodist Church Yearbook 2021* op cit (n137) point 3 page 248 which states that ‘the 2019 Conference directed, through Resolution 5, DEWCOM to develop a discussion document on MCSA position and Theology of Marriage. DEWCOM has established a sub-committee to trace a timeline and previous work that has been done on this. The elements of this include: (i) Historical development of Marriage and LGBTIAQ+ conversations and resolutions; (ii) Marriage and Family Life Conference in 2015; (iii) The DEWCOM Report to Conference 2017; (iv) DEWCOM Resolutions on Civil Unions; and (v) DEWCOM Submission to Conference 2019’. See also the proposition in Chapter 22 of the Yearbook 2021, page 272 for a Connexional LGBTIAQ Task Team.

¹⁴¹ *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (Case No. 11159/2013) supra (n49) para 9. See also *The Methodist Book of Order* op cit (n135) point 17 (Same-Sex relationships) at 228. See also the *Methodist Church Yearbook 2021* op cit (n137) point 3 page 248. See also the proposition in Chapter 22 of the Yearbook 2021, page 272 for a Connexional LGBTIAQ Task Team.

church. The differential treatment between heterosexual couples and same-sex couples causes both a burden and imposition on same-sex couples. In the Seventh-Day Adventist Church, the outcome would be much the same as in the Methodist Church concerning the injunction against same-sex marriage which is derived from their policies and practices. (i) ordained ministers who want to marry in the church will be denied that benefit largely because of the stance of the church regarding homosexuality, (ii) ordained ministers who marry outside the church in a civil marriage would most probably face the same consequences as in the Methodist Church and (iii) LGBTQI+ lay congregants who want to marry within the church will be denied that benefit.

It is submitted that both the Methodist Church and the Seventh-Day Adventist Church demonstrate that a doctrinal belief translated into a policy, rule, or practice in the form of an injunction against same-sex marriage can impose a burden or disadvantage by withholding benefits to same-sex couples. LGBTQI+ congregants regardless of whether it is an ordained minister or lay congregant will not be given the opportunity to experience the equality of marriage in the church as their heterosexual counterparts would have. It is submitted that the inequality from not being able to marry within the church is likely to cause psychological harm which may have far-reaching consequences.¹⁴²

It is submitted that as said above, the policies and practices of both the Methodist Church and the Seventh-Day Adventist Church in the form of an injunction against same-sex marriage directly discriminates against its LGBTQI+ congregants.¹⁴³

We will now move on to stage two of the analysis to determine whether the discrimination is unfair.

6.3.2 Is the discrimination unfair (Stage Two)

The Act itself sets out many factors, which are set out in sections 14(2) and 14(3). But, these factors will not be addressed mechanically. Instead, these factors will focus on four key issues derived from section 14(3). Some of these factors were identified by various academics¹⁴⁴ who

¹⁴² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at paras [33]-[35]; See also *Gaum and Others v Van Rensburg NO* supra (n5) at para [74].

¹⁴³ Section 1(xxii) of PEPUDA.

¹⁴⁴ P Lenta 'The right of religious associations to discriminate' (2012) 28(2) *South African Journal on Human Rights* 231-287; S De Freitas, 'Freedom of association as a foundational right: religious association and *Strydom*

had differing academic opinions concerning whether equal importance should apply to equality and religious freedom.¹⁴⁵ This began in a series of debates between academic authors in a special edition of the *South African Journal on Human Rights*. The debates included authors such as Lenta, Bilchitz, Woolman, and De Freitas¹⁴⁶ concerning the role of religious freedom and equality within religious denominations and whether a religious denomination can discriminate. However, for purposes of this study, the main arguments forwarded by Lenta and Bilchitz will be highlighted.

As mentioned above, sections 14(2) and 14(3) of the Act have many factors but not all these factors will be referred to. For our purposes, we will focus on the following factors: (i) historical context, (ii) harm, (iii) diversity and tolerance, and (iv) centrality of belief. The first three of these factors are the same ones Lenta and Bilchitz focussed on in their stimulating debate concerning whether religious denominations should be allowed to discriminate. These specific factors were chosen because they illustrate the different weight attached to either equality or freedom of religion in terms of whether a religious denomination should discriminate or not. Each one of these factors will now be discussed in turn.

6.3.2.1. Historical context

Lenta and Bilchitz vigorously debated this factor.¹⁴⁷ Both authors acknowledge that within the context of same-sex discrimination in a religious denomination, there arises a clash between equality on the one hand, especially concerning non-discrimination, and freedom of religion on the other hand. In this context and within a private church, the question is which one of these values carries the heavier weight or has more value.

v Nederduitse Gereformeerde Gemeente, Moreleta Park’ (2012) 28(4) *South African Journal on Human Rights* 258-272; S Woolman ‘Seek justice elsewhere: an egalitarian pluralists’s reply to David Bilchitz on the distinction between differentiation and domination’ (2012) 28(2) *South African Journal on Human Rights* 273-295; D Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ (2012) 28(2) *South African Journal on Human Rights* 296-315; P Lenta ‘In defence of the right of religious association to discriminate: a reply to Bilchitz and De Freitas’ (2013) 29(2) *South African Journal on Human Rights* 429-447; Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁴⁵ Lenta ‘The right of religious associations to discriminate’ *ibid*; De Freitas *ibid*; ‘Woolman *ibid*; Bilchitz *ibid*’; Lenta ‘In defence of the right of religious association to discriminate: a reply to Bilchitz and De Freitas’ *ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48); Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ op cit (n144).

Bilchitz's main argument is that non-discrimination should always outweigh religion¹⁴⁸ except when choosing the church's leadership.¹⁴⁹ His argument is gleaned from the historical context of South Africa.¹⁵⁰ He argues that what characterised South Africa more than anything else in the apartheid era is not discrimination based on religion but primarily on race and gender.¹⁵¹ Bilchitz contends that the "South African historical context provides a strong background for the importance of prohibitions on non-discrimination".¹⁵² This is because apartheid was characterised by serious violations of equality and dignity directed toward black people and other minority groups such as women and the LGBTQI community.¹⁵³ Bilchitz believes that discrimination based on race and gender infringes on the dignity of individuals. Therefore, the new constitutional order must shift its focus to not only eliminating discrimination on the grounds of race and gender but also on all circumstances where a fundamental element of identity is used to justify prejudicial treatment that unnecessarily discriminates against an individual.¹⁵⁴ Our Constitution, according to Bilchitz, was designed to transform society.¹⁵⁵ So what our constitution is mainly aimed at is the overcoming of discrimination in all its forms.¹⁵⁶ Thus, because of our history of apartheid and inequality in South Africa, it is justifiable to recognise a stance that includes a strong presumption in favour of equality and non-discrimination.¹⁵⁷ It then makes sense to say that the historical context within which our Constitution was borne suggests that the rejection of discrimination on prohibited grounds must be central to the Constitution and the legal order in South Africa.¹⁵⁸ Therefore religious denominations should not be allowed to discriminate except when it comes to ordaining priests because they will be directly involved in the integral working of the church and its doctrinal beliefs. Bilchitz criticises Lenta for downplaying the importance of the historical context by saying that giving primacy to equality is not entirely justifiable.¹⁵⁹

¹⁴⁸ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 221.

¹⁴⁹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 246.

¹⁵⁰ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 222.

¹⁵¹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 224. See also Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 302.

¹⁵² Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 221.

¹⁵³ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 300; Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 221.

¹⁵⁴ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 225.

¹⁵⁵ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 224.

¹⁵⁶ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 226.

¹⁵⁷ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 227.

¹⁵⁸ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 226.

¹⁵⁹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 226.

Lenta's counter-argument begins by being critical of Bilchitz concerning his stance on the historical context of South Africa.¹⁶⁰ Lenta states that Bilchitz's argument is absolute and goes as far as calling him an "absolutist"¹⁶¹ because he accredits little importance to the fact that it is essential to allow religious associations to discriminate, especially in terms of their internal affairs.¹⁶² After all, no rights are absolute.¹⁶³ Lenta believes that there must be situations where religious denominations can discriminate.¹⁶⁴ He argues that in certain circumstances, religious denominations should be able to discriminate in accordance with their religious beliefs.¹⁶⁵ To enjoy religious liberty, religious denominations must be permitted to run their internal affairs as they see fit.¹⁶⁶ He furthers his argument by stating that freedom of association supports immunity from anti-discrimination legislation and law to permit religious associations to discriminate at times.¹⁶⁷ He justifies this by arguing that discrimination sometimes contributes to the well-being of the members of the religious denomination.¹⁶⁸ He contends that a right to religious exemptions frees the religious denomination from burdens that make religious conduct impossible to perform, specifically where the law unintentionally imposes a serious burden on them.¹⁶⁹ Religious exemptions, he says, are not chosen but often come with one's upbringing; therefore, it is impossible to cease having those beliefs.¹⁷⁰ On this basis, Lenta believes that religious exemptions should be accommodated.¹⁷¹ He believes that the principle of equality is essential in South Africa, but it has caused some people to think that it is more important than any other right.¹⁷² He believes this is the incorrect way to see the right to equality because it should not be seen as more important than the right to freedom of religion. Freedom of religion according to Lenta permits people to hold certain beliefs such as theological and ethical beliefs for worship and associating with like-minded people. This is why state interference, he says, is unacceptable because if the state interferes, it removes the protection of religious believers to believe and practice their beliefs in the way they want to.¹⁷³ It follows then that religious denominations should be able to discriminate on prohibited grounds,

¹⁶⁰ Lenta 'The right of religious associations to discriminate' op cit (n144) 240.

¹⁶¹ Lenta 'The right of religious associations to discriminate' op cit (n144) 235.

¹⁶² Lenta 'The right of religious associations to discriminate' op cit (n144) 232.

¹⁶³ Lenta 'The right of religious associations to discriminate' op cit (n144) 232.

¹⁶⁴ Lenta 'The right of religious associations to discriminate' op cit (n144) 232.

¹⁶⁵ Lenta 'The right of religious associations to discriminate' op cit (n144) 231.

¹⁶⁶ Lenta 'The right of religious associations to discriminate' op cit (n144) 234.

¹⁶⁷ Lenta 'The right of religious associations to discriminate' op cit (n144) 234.

¹⁶⁸ Lenta 'The right of religious associations to discriminate' op cit (n144) 235.

¹⁶⁹ Lenta 'Is there a right to religious exemptions' (2012) 129(2) *South African Law Journal* 305.

¹⁷⁰ Lenta 'Is there a right to religious exemptions' (2012) op cit (n169) 317.

¹⁷¹ Lenta 'Is there a right to religious exemptions' (2012) op cit (n169) 317.

¹⁷² Lenta 'Is there a right to religious exemptions' (2012) op cit (n169) 241.

¹⁷³ Lenta 'Is there a right to religious exemptions' (2012) op cit (n169) 241.

including sexual orientation, when choosing leaders in the church.¹⁷⁴ Bilchitz concedes this point.¹⁷⁵ The problem that Lenta has with Bilchitz is that although history and context are important, he overlooks the point, which is what the fundamental interest is that each right is trying to protect.¹⁷⁶ The key to non-discrimination is that everyone is treated in a way that respects their human dignity.¹⁷⁷ Lenta believes that you cannot say that equality outweighs religious freedom in all cases. It must be taken on a case-by-case basis.¹⁷⁸ He goes on to say that the interests protected by freedom of religion are as important as the interests protected by equality.¹⁷⁹

Taking into account these two arguments, it is submitted that Bilchitz does seem to strongly stress the role of the historical context in South Africa which is justifiably relevant. However, he does seem to rely extensively on the race argument more so than the plight of other vulnerable groups like the LGBTQI+ community during that era. Equal weight has to be given to other minority and vulnerable groups who also suffered under apartheid. Religious denominations discriminating against vulnerable groups such as their LGBTQI+ members within their confines is a reminder of the way these groups were treated in the past. Hence, we must look to our Constitution which is aimed at eliminating all forms of discrimination that were perpetuated in the past. The weight that Bilchitz puts on the presumption of equality seems feasible considering our atrocious history of discrimination and inequality.

On the other hand, Bilchitz is correct in saying that Lenta seems to downplay the history of South Africa. He seems to focus more on the interest that each right is aimed at protecting. In our new constitutional democracy, our historical context cannot be downplayed because of its relevance in terms of the objective of the Constitution, which is to eliminate discrimination and bring about a transformative society. Furthermore, since the historical context and the impact it has had on South Africans is still fresh, it cannot be downplayed for fear of perpetuating past discrimination.

It is submitted that both Bilchitz and Lenta have valid arguments concerning the historical context, even though Bilchitz over-emphasises the history and does very little to incorporate into his argument the interests that each right is aimed at protecting. Lenta, on the other hand,

¹⁷⁴ Lenta 'Is there a right to religious exemptions' (2012) op cit (n169) 248.

¹⁷⁵ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 246.

¹⁷⁶ Lenta 'The right of religious associations to discriminate' op cit (n144) 240.

¹⁷⁷ Lenta 'The right of religious associations to discriminate' op cit (n144) 240.

¹⁷⁸ Lenta 'The right of religious associations to discriminate' op cit (n144) 241.

¹⁷⁹ Lenta 'The right of religious associations to discriminate' op cit (n144) 241.

over-emphasises the interests that each right is aimed at protecting and downplays the historical context relevant to our South African society.

It must be reiterated that considering the historical context in determining unfair discrimination is essential.¹⁸⁰ When a court looks at the context of an alleged unfair discrimination claim, it must be able to position the complainants within society to determine whether the alleged discrimination is linked to past patterns of disadvantage.¹⁸¹ The more vulnerable the group, the more disadvantaged they may be.¹⁸² Historically vulnerable groups such as the LGBTIQ+ community were disadvantaged and unfairly discriminated against.¹⁸³ The historical context within which our Constitution was born suggests that rejecting discrimination on prohibited grounds must be central to the Constitution and the legal order in South Africa.¹⁸⁴ Context also assists the courts in understanding how the complainant has experienced the impact of the alleged discrimination. Irrespective of the criticisms that may arise from Bilchitz's argument, it is submitted that his argument is more feasible. Discrimination based on any of the prohibited grounds must be eliminated so that a strong presumption in favour of equality can ascend to its rightful place within society. In this case, the presumption in favour of equality must weigh heavier than religious freedom.

6.3.2.2 Harm

The impact of the discrimination, according to Albertyn, is the determining factor concerning the discrimination being unfair.¹⁸⁵ Thus, courts will always look at the effect of the discrimination on the complainant (especially in previously disadvantaged groups) more so than the justifications of the respondents.¹⁸⁶ One of the key factors, if not the most important, is the harm suffered by unfair discrimination. In religious discrimination, it becomes evident that there is a clash between the values of equality and religious freedom, especially within the

¹⁸⁰ Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁸¹ See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

¹⁸² See Chapter 3 for a historical discussion on the LGBTIQ+ community. See *NCGLE v Minister of Justice* supra (n181); *NCGLE v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC).

¹⁸³ P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' (1996) 12 *South African Journal on Human Rights* 265-290.

¹⁸⁴ De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' op cit (n183) at 226.

¹⁸⁵ Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* op cit (n149).

¹⁸⁶ Ibid.

context of this study. This clash, in turn, causes harm not only to the complainant but also to the religious denomination. The injunction against same-sex marriage will be harmful to both the LGBTQI+ community within the church as well as the religious denomination itself. This injunction will lead to one evaluating the weight of the constitutional values of equality and religious freedom. It is then prudent to discuss this issue to determine how much weight can be put on equality and how much is put on religious freedom. The notion of harm in itself is complex and, for purposes of this study, will be divided into four categories, namely (i) the nature of the harm suffered by the complainant; (ii) the nature of the harm suffered by the religious body; (iii) the nature of the harm suffered by the public versus the private realm (harm to the constitutional order) and, (iv) previous patterns of disadvantage.

(i) The nature of the harm against the complainant (same-sex couple)

Bilchitz talks extensively about the nature of the harm against the complainant.¹⁸⁷ He looks at the kind of harm that the complainant can suffer. He says that complainants do not only suffer physical harm, but they suffer the effects of psychological harm as well.¹⁸⁸ Bilchitz refers to *Strydom*,¹⁸⁹ who suffered not only patrimonial loss due to his selling his piano and house but also emotional and psychological suffering.¹⁹⁰ He also endured harm done to the impairment of his dignity and depression due to his dismissal.¹⁹¹ Using *Strydom*¹⁹² as an example, Bilchitz believes that psychological harm is severe harm with long-term effects that are just as bad as physical harm.¹⁹³ He says that when one considers what *Strydom*¹⁹⁴ had to endure concerning the harm done to him by the church, you cannot say that physical harm is more severe than psychological harm.¹⁹⁵ The distinction between physical and psychological harm should not be so clear-cut because both these kinds of harm have long-lasting effects.¹⁹⁶ In fact, other types

¹⁸⁷ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 305-308.

¹⁸⁸ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

¹⁸⁹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n144).

¹⁹⁰ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

¹⁹¹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at paras [33]-[36].

¹⁹² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) at paras [33]-[36].

¹⁹³ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

¹⁹⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79).

¹⁹⁵ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

¹⁹⁶ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

of harm that attach to psychological harm, i.e., prejudice in terms of an injunction against same-sex marriage, can be just as severe and carry a large amount of weight.¹⁹⁷ According to Bilchitz this harm cannot be ignored. The more serious the harm, the more weight can be attached to it because of its devastating impact on an individual.¹⁹⁸ The violation of the right to equality and dignity and the harm attached to it as a result of unfair discrimination is directly linked to the history of South Africa.¹⁹⁹ Thus, it is argued that religious denominations should not be allowed to discriminate on prohibited grounds because of the harm suffered by individuals who are discriminated against.²⁰⁰ Bilchitz argues that harm caused by discrimination cannot be evaluated fully without recognising the pattern of previous disadvantage against a group such as the LGBTQI+ community that is being discriminated against.²⁰¹ Bilchitz says that if religious liberty and the exercise thereof cause harm to individuals, it is reasonable and justifiable to limit that liberty.²⁰²

Lenta is diametrically opposed to Bilchitz's stance. He believes that psychological harm is a lesser form of harm.²⁰³ Lenta says that physical harm resulting from physical violence is always worse than psychological harm.²⁰⁴ Lenta concedes that serious harm can occur due to discrimination, but the severity of the burden placed on the religious denomination must also be considered.²⁰⁵ This is because denying an exemption for the religious denomination from relevant anti-discrimination legislation also severely impacts it, especially if an issue is closely connected to the core of its religious doctrinal beliefs.²⁰⁶ Lenta argues that we need to weigh the harm done to the individual against the impact and harm done to members of the religious denomination and the denomination itself.²⁰⁷ According to Lenta, the distinction between

¹⁹⁷ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 307.

¹⁹⁸ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 307.

¹⁹⁹ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 301.

²⁰⁰ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 232. See also *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para [187] where Ngcobo J held that 'discrimination conveys to the person who is discriminated against that the person is not of equal worth'.

²⁰¹ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

²⁰² Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' (2012) op cit (n144) 305.

²⁰³ Lenta 'In defence of the right of religious associations to discriminate' op cit (n144) 437. See also Lenta 'The right of religious associations to discriminate' op cit (n144) 250-251.

²⁰⁴ Lenta 'In defence of the right of religious associations to discriminate' *ibid*.

²⁰⁵ See also Lenta 'Is there a right to religious exemptions' op cit (n169) 233 and 251.

²⁰⁶ Lenta 'Is there a right to religious exemptions' op cit (n169) 233 and 251.

²⁰⁷ Lenta 'The right of religious associations to discriminate' op cit (n144) 251.

physical harm and other harms is very important because, generally, other harms are weighted less.²⁰⁸ He does concede that individuals discriminated against by their religious denominations suffer harm and injury to their dignity, but the harm suffered is not as severe as the harm done to the religious denomination itself.²⁰⁹

It is submitted that Bilchitz seems to have a more convincing and stronger argument. Besides the *Strydom*²¹⁰ case that Bilchitz refers to, emotional and psychological harm suffered, and the severity of it can be evidenced in the *De Lange*²¹¹ and *Gaum*²¹² cases. De Lange lost her position as a minister within the church, was barred from exercising any ministerial functions, and lost an income derived from her ministry.²¹³ Gaum's dignity was inherently diminished by the General Synod overturning the 2015 General Synod decision in their 2016 General Synod.²¹⁴ Apart from these cases, the case of *NCGLE v Minister of Justice*²¹⁵ encapsulates the impact of the harm done by unfair discrimination. The effect suffered can be manifested in terms of stigmatisation, societal prejudice, loss of confidence and self-esteem, and loss of personhood and dignity.²¹⁶ Our legal system has recognised and realised that psychological harm could be just as serious, if not more severe than physical harm. This is because of the lasting effect it has on the individual discriminated against. This is especially in light of the LGBTQI+ community, who have been previously discriminated against and disadvantaged within society and within religious denominations.²¹⁷ The weight of the harm suffered by the complainant seems to be more severe especially since it has long-lasting effects.

For this reason, it is submitted that the weight of the harm suffered by the complainant must carry more weight than the harm that Lenta points out is suffered by the church. Although the harm that religious denominations and their members suffer is directly connected to its core belief, that harm does not weigh heavier than the emotional and psychological harm suffered by the complainants. It is submitted that Lenta's stance is less convincing, and his argument is weaker on this point.

²⁰⁸ Lenta 'The right of religious associations to discriminate' op cit (n144) 251.

²⁰⁹ Lenta 'The right of religious associations to discriminate' op cit (n144) 250.

²¹⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79).

²¹¹ *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27).

²¹² *Gaum and Others v Van Rensburg NO* supra (n5).

²¹³ *De Lange v Presiding Bishop of the Methodist Church* supra (n27) at para [7].

²¹⁴ *Gaum and Others v Van Rensburg NO* supra (n5) at para [74].

²¹⁵ *NCGLE v Minister of Justice* supra (n181).

²¹⁶ *NCGLE v Minister of Justice* supra (n181) at paras [23]-[26].

²¹⁷ See *NCGLE v Minister of Home Affairs* supra (n182) at para [42] where Ackermann J brought to attention the effect of discrimination and the harm it causes against LGBTQI+ members.

(ii) The nature of the harm against the religious denomination

Bilchitz begins his argument by saying that he believes that both religious denominations and believers suffer harm because of the state's prohibition against unfair discrimination.²¹⁸ But, the harm caused by the state's prohibition against unfair discrimination cannot be compared to the harm suffered by the victims of discrimination perpetuated by their religious denominations.²¹⁹ Bilchitz states that the harm caused to believers stems from their beliefs that promote negative attitudes that disrespect an individual or a group because of a central feature of their identity.²²⁰ He says that religious denominations and believers want the harm they suffer to be recognised but give little recognition to the harm suffered by victims of discrimination.²²¹ He says a clear distinction is key when it comes to the harm suffered by the religious denomination compared to the harm suffered by the victim.²²²

Lenta argues that every religious denomination has a goal they want to authentically achieve.²²³ His main argument is that the harm caused to religious denominations by refusing to allow them to discriminate causes the loss of religious authenticity in terms of their moral and religious commitments.²²⁴ Religious denominations and believers are harmed because they cannot live by their core beliefs, which affects how they live their lives.²²⁵ It impairs the ability of the religious denomination and the believers to speak their truth concerning their core beliefs and to put those truths into practice.²²⁶ Lenta believes this is a direct assault against the religious denomination and its members who want to maintain their religious ethos and identity.²²⁷ He argues that the core belief of a religious denomination is the essence of who they are, so when religious believers are prevented from discriminating, their identity is undermined, and serious harm occurs.²²⁸ Therefore, the infliction of lesser harms by religious denominations should be

²¹⁸ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 308.

²¹⁹ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) at 309.

²²⁰ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 309.

²²¹ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 309.

²²² Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 309, 311.

²²³ Lenta 'The right of religious associations to discriminate' op cit (n144) 250.

²²⁴ Lenta 'The right of religious associations to discriminate?' op cit (n144) 250.

²²⁵ Lenta 'The right of religious associations to discriminate?' op cit (n144) 250.

²²⁶ Lenta 'The right of religious associations to discriminate?' op cit (n144) 251.

²²⁷ Lenta 'The right of religious associations to discriminate?' op cit (n144) 251.

²²⁸ Lenta 'In defence of the right of religious associations to discriminate?' (2013) 29(2) *South African Journal on Human Rights* 441.

tolerated, especially if that harm protects the denomination's core beliefs.²²⁹ Lenta argues that those who do not accept the church's beliefs have the option of joining other associations or forming a break-away group to practice their own beliefs.²³⁰ The harm attached to not being able to practice those core beliefs undermines their integrity.²³¹ Therefore the harm to the church must weigh heavier than the occasional harm to the victim.²³²

It is submitted that the above arguments are on different sides of the spectrum. Bilchitz does not discuss or put much weight on the harm caused to the religious denomination. He seems to minimise the extent and the nature of the harm. Lenta, on the other hand, looks at the authenticity of the religious denomination as an exclusive association. He looks at their moral standing concerning their core beliefs being undermined and the integrity of the denomination being violated if they are not allowed to discriminate. The weight of the harm on the religious denomination is much heavier than the harm caused to the victim of discrimination.

However, it is submitted that every religious denomination has a goal and rules attached to that goal which creates the core beliefs and practices of the denomination. This is what makes them authentic to themselves. If they are forced to compromise their position, it removes their authenticity and the essence of who they are. It is conceded that the harm caused in these situations may be serious. Members who do not follow those core beliefs should be excluded but only if it is for a legitimate reason. However, regarding the injunction against same-sex marriage, complainants should not be asked to leave the church or open up a breakaway church that accommodates what they want. The church in which they belong has become a religious home of safety and security for them. Expecting LGBTQI+ members of these churches to leave because they wish to marry within the church is not only forcing them to leave their religious home and become separated from their religious community but it also takes away the right to equality that they have. The right to equality should allow them to remain where they are and be treated equally despite the church's stance on same-sex marriage and homosexuality. The church, irrespective of how fundamental their core religious belief is around the theology of marriage, should be able to extend itself to accepting diversity and inclusivity because the Bible in which they base their core doctrinal beliefs on also preaches love and tolerance. Apart from this, since our Constitution is meant to be transformative, the non-acceptance of diversity and inclusivity of LGBTQI+ members within a religious denomination is contrary to what the

²²⁹ Lenta 'In defence of the right of religious associations to discriminate?' op cit (n144) at 436.

²³⁰ Lenta 'The right of religious associations to discriminate?' op cit (n144) at 246.

²³¹ Lenta 'In defence of the right of religious associations to discriminate?' op cit (n144) at 441.

²³² Lenta 'In defence of the right of religious associations to discriminate?' op cit (n144) at 441.

Constitution envisaged society to be. One can perhaps argue that in a utopian world our transformative constitution would work but, the fact of the matter is that our Constitution is inclusive. Although religious denominations will be harmed by contemplating a change to their beliefs and practices, the harm suffered by LGBTQI+ members not being able to have their unions blessed by the church, causes them to see their relationships as less important than heterosexual relationships, resulting in psychological and physical harm that is long-lasting.

Perhaps putting remedies in place that will not be seen as forcing religious denominations to remove that injunction but instead initiating thought processes that remove discriminatory practices will lessen the harm to the church and the victim. The remedy is not one that necessarily means that religious denominations should change their beliefs and practices around the injunction against same-sex marriage immediately. Conservative religious denominations such as the Seventh-Day Adventist Church cannot say that they are unwilling to change at all because the laws that they follow are directly from God. The acknowledgement of diversity and inclusivity and equal treatment is the beginning of change. The unwillingness to change is unacceptable because conservative churches cannot be allowed to discriminate by hiding behind their core doctrinal beliefs. However, even though this may be contradictory to what is said above, it is conceded that if a conservative religious denomination is steadfast about not wanting to change and continue their discriminatory behaviour then perhaps their LGBTQI+ members should leave in order to preserve their dignity. This is because remaining in a situation where change is impossible will be harmful and damaging to one's psyche. Remedies will be discussed later in this chapter.

(iii) The nature of the harm suffered by the public versus the private realm (harm to the constitutional order)

Bilchitz argues that when we delve into the history of religion, we find that the church, as a private power, wielded a large amount of power.²³³ This was regarding the church (specifically the Dutch Reformed Church) legitimating the apartheid system.²³⁴ Their theology was used to justify apartheid legislation.²³⁵ And many congregations practiced discrimination as part of their internal affairs.²³⁶ However, he does point out that even though some religious

²³³ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 237.

²³⁴ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 237.

²³⁵ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 237.

²³⁶ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 237.

denominations did not support apartheid, they did not speak out against this, i.e., the Catholic Church.²³⁷

On the other hand, there were religious denominations that strongly opposed apartheid.²³⁸ Bilchitz argues that religious denominations cannot exclude themselves from the political realm and the power and influence that they have in these situations. Even though religious denominations are exclusive private bodies, their daily impact is evident in their interactions with individuals in and out of the church.²³⁹ Conservative religious denominations, according to Bilchitz, can impact society through their negative attitudes to difference.²⁴⁰ This was evident, according to Bilchitz, in terms of the Catholic Church opposing same-sex marriage and imposing its doctrines on other religious groups who believed otherwise.²⁴¹ He believes that religious denominations' discriminatory attitudes do not remain an internal affair and can affect the wider community.²⁴² Members of those religious denominations may mirror the discriminatory attitudes within their communities.²⁴³ This type of attitude influenced by religious denominations undermines our constitutional democracy.²⁴⁴ Our Constitution plays a vital role in creating the kind of society which upholds non-discrimination.²⁴⁵ South Africa's aim should be to maintain that role by not permitting religious denominations to discriminate and preventing society from perpetuating past injustices.²⁴⁶ Bilchitz argues for a strong presumption in favour of equality and against allowing religious denominations to discriminate. The presumption of equality, according to Bilchitz, will weigh more heavily than other values in the balance if our constitutional order is to be followed.²⁴⁷

Lenta, on the other hand, argues that many religious denominations are situated within the private sphere. Therefore they should be able to make their own internal decisions without the state's interference and constitutionalism.²⁴⁸ In other words, religious denominations should be

²³⁷ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 238.

²³⁸ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 238.

²³⁹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 239.

²⁴⁰ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 240.

²⁴¹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 241.

²⁴² Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 241. See also Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 310.

²⁴³ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 242.

²⁴⁴ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 242.

²⁴⁵ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 244. See also Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 311.

²⁴⁶ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 311.

²⁴⁷ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' (2012) op cit (n144) 302.

²⁴⁸ Lenta 'The right of religious associations to discriminate' op cit (n144) 235.

left to discriminate even if they damage societies' interests.²⁴⁹ Religious denominations, because they are in the private sphere, should be able to revise their theology and ethical beliefs to express their views on matters that interest them.²⁵⁰ Religious denominations' ethical beliefs protect their members' privacy and autonomy; therefore, they should not be coerced by the state to adjust their theology.²⁵¹ They should be able to meet and associate with people that have a similar view to what they believe in.²⁵² If the discrimination is upholding their theological beliefs and practices, the court should uphold this discrimination because religious denominations are autonomous bodies.²⁵³ Furthermore, Lenta states that the harm caused by discrimination by public institutions such as government and commercial institutions is more extensive than religious denominations' discrimination in their private sphere.²⁵⁴ Lenta agrees with Bilchitz that discriminatory beliefs and attitudes may motivate people toward violence against vulnerable groups but doubts that the state forcing religious denominations to refrain from discriminating will make religious believers more tolerant.²⁵⁵

It is submitted that when you examine these two arguments, Bilchitz's argument seems more likely and persuasive. Lenta does not delve very much into the repercussions of religious denominations' discriminatory attitude and how it influences society. It is submitted that religious denominations have been powerful and influential since apartheid and even before then. Their power and influence extends into society and the public realm. In *Minister of Home Affairs v Fourie*²⁵⁶ the court stated that:

“Religious organisations constitute important sectors of notional life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied”²⁵⁷

As the influence and power of the church is pervasive, it spreads into the public realm and most times influences society negatively if their belief is contrary to constitutional principles. This, in turn, threatens the Constitution's goals which aim to have an inclusive society and one which is non-discriminatory. Although religious denominations are autonomous and run their internal

²⁴⁹ Lenta 'The right of religious associations to discriminate' op cit (n144) 235.

²⁵⁰ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 241.

²⁵¹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 241.

²⁵² Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 241.

²⁵³ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 246.

²⁵⁴ Lenta 'In defence of the right of religious associations to discriminate' op cit (n144) 439.

²⁵⁵ Lenta 'In defence of the right of religious associations to discriminate' op cit (n144) 439.

²⁵⁶ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

²⁵⁷ *Minister of Home Affairs v Fourie* supra (n256) at para [90].

affairs in a private sphere, they cannot ignore constitutional principles which aim to have a cohesive society devoid of discriminatory conduct. The influence and power of religious denominations are widespread, and they should be aware that their impact will affect society. Whether society advances positive moves in line with constitutional principles depends on religious denominations and how they adjust their attitudes concerning discriminatory behaviour.

(iv) Previous patterns of disadvantage

Bilchitz believes that past patterns of disadvantage against certain groups existed strongly in relation to race, sex, and sexual orientation.²⁵⁸ One of the most fundamental aspects of apartheid was discrimination on the grounds of race and gender.²⁵⁹ He refers to the *National Coalition for Gay and Lesbian Equality*²⁶⁰ case where Ackerman J referred to how the LGBTQI+ group was previously disadvantaged by having to endure patterns of disadvantage.²⁶¹ Bilchitz says that this type of discrimination was so egregious that prohibiting discrimination that is that harmful is justified.²⁶² He says it is for this reason that the law should in general prohibit granting exemptions to religious denominations who wish to perpetuate past discrimination.²⁶³ Bilchitz goes on to highlight the fact that during the apartheid era, even though there were religious denominations that perpetuated apartheid policies, there were also religious denominations and religious leaders who opposed apartheid.²⁶⁴ The role of religion was important during apartheid; therefore, you cannot ignore the role that religious denominations played in reinforcing discrimination.²⁶⁵ Negative social attitudes by conservative religious denominations played a role in advancing discrimination toward the LGBTQI+ community,²⁶⁶ influencing the state to create criminal sanctions against homosexuality.²⁶⁷ Prohibiting homosexuality and enforcing criminal sanctions reduced the

²⁵⁸ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306.

²⁵⁹ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 225.

²⁶⁰ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para [42].

²⁶¹ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 306-307.

²⁶² Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 225.

²⁶³ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 307.

²⁶⁴ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 237-240.

²⁶⁵ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 239.

²⁶⁶ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 239.

²⁶⁷ Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 240.

LGBTQI+ community to “unapprehended felons,” further stigmatising them and encouraging discrimination in all aspects of their lives.²⁶⁸

For this reason, religious denominations should be challenged to transform themselves “towards a future that is not conditioned by the moral failures of the past”.²⁶⁹ However, Bilchitz highlights that we must recognise those religious denominations were also affected deeply in their internal organisations by discriminatory attitudes perpetuated by apartheid.²⁷⁰ Religious communities and their leaders were also affected by a long history of prejudice and oppression.²⁷¹ According to Bilchitz, if we want to move forward, past discriminatory patterns must be addressed to prevent religious denominations from advancing discrimination toward previously disadvantaged groups.²⁷²

Lenta concedes that discrimination based on gender and sexual orientation was widespread in South Africa during the apartheid era.²⁷³ But, there is no evidence to show that this type of discrimination was any more shocking than in other liberal democracies.²⁷⁴ For this reason, he does not see it necessary to prioritise equality over religious freedom.²⁷⁵ Lenta argues that discrimination directed toward the LGBTQI+ community perpetuated by religious denominations is less harmful than discrimination perpetuated by systematic political, commercial and public discrimination.²⁷⁶ Lenta argues that certain groups who supported discrimination during apartheid provided a good reason to insist on the separation of church and state.²⁷⁷ He believes that the interests protected by the rights to religious freedom in post-apartheid South Africa should not be diminished because religious denominations and believers are acting according to their beliefs.²⁷⁸ Lenta argues that Bilchitz puts a lot of weight on historical context and past discrimination because he does not want religious freedom to be considered as important as the right to equality.

From the above two arguments, it is submitted that Bilchitz is correct in pointing out that the LGBTQI+ community was previously disadvantaged and discriminated against by the state

²⁶⁸ Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48) 240.

²⁶⁹ Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48) 239.

²⁷⁰ Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48) 239.

²⁷¹ Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48) 239.

²⁷² Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48) 240.

²⁷³ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 432.

²⁷⁴ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 432.

²⁷⁵ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 432.

²⁷⁶ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 432.

²⁷⁷ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 432.

²⁷⁸ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 432.

and religious denominations who were proponents of apartheid. It is necessary for us within this context to be reminded that the aim of the Constitution was to correct the wrongs of the past to create social justice and a cohesive society. Extensive case law depicts the impact of unfair discrimination on the LGBTQI+ community.²⁷⁹ The harm suffered violates both the right to equality and dignity. The case of *NCGLE v Minister of Justice*²⁸⁰ encapsulates the impact of the harm done by unfair discrimination. The effect suffered can be manifested in terms of stigmatisation, societal prejudice, loss of confidence and self-esteem, and loss of personhood and dignity.²⁸¹ In the *Vriend v Alberta*²⁸² case, the court stated that

“the potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination”²⁸³

For this reason, it is difficult to acknowledge the accuracy of Lenta’s argument when he says that there is no evidence that the harm done to the LGBTQI+ community during apartheid differed from other liberal democracies. Neither author speaks much about the discrimination suffered by religious denominations. This could indicate that if looking at past discrimination, the future of equality in post-apartheid South Africa must weigh heavier than religious freedom.

6.3.2.3 Diversity and tolerance

Bilchitz argues that if religious denominations wish to be exempted from discrimination by doing as they want in their internal affairs, they must provide public reasons as to why their diversity needs to be accommodated.²⁸⁴ Although, he finds it difficult to comprehend why the state should fulfill the wish of the religious denomination to discriminate and show respect for their diversity when they disrespect the diversity of the group they want to discriminate against.²⁸⁵ With the influence and power that religious denominations have within the private

²⁷⁹ See *NCGLE v Minister of Justice* supra (n181); *NCGLE v Minister of Home Affairs* supra (n182), *Minister of Home Affairs v Fourie*; *De Lange v Presiding Bishop of the Methodist Church* supra (n27); *Gaum and Others v Van Rensburg NO* supra (n5); *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79) to name but a few.

²⁸⁰ *NCGLE v Minister of Justice* supra (n181).

²⁸¹ *NCGLE v Minister of Justice* supra (n181) at paras [23]-[26].

²⁸² *Vriend v Alberta* (1998) 1 S.C.R. 493 at para [102].

²⁸³ Supra.

²⁸⁴ Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ op cit (n144) 304.

²⁸⁵ Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ op cit (n144) 305.

and public spheres, if left to discriminate, the harm to vulnerable groups within society could be far-reaching.²⁸⁶ Respecting their diversity is disrespecting the diversity of vulnerable groups within that religious denomination.²⁸⁷

Lenta argues that the protection of diversity requires that the state not prohibit religious denominations from discriminating, especially when there is a clash between equality and religious freedom.²⁸⁸ As far as possible, the state should not interfere with the internal affairs of the church because interfering shows a lack of respect for diversity.²⁸⁹ It is taking away from religious denominations the ability to carry on their internal affairs in a way that respects their religious beliefs, convictions, and practices.²⁹⁰ Religious denominations should be permitted to hold their own beliefs and run their internal affairs as they wish, even if those beliefs and doctrines are discriminatory.²⁹¹ Religious denominations have a right to discriminate because it retains the identity of both the religious denomination and its members – it “fosters pluralism”.²⁹² He agrees with Bilchitz in that the state is strongly interested in promoting diversity amongst individuals.²⁹³ However, Lenta believes that a society inclusive of different diverse groups is preferable to one where there is no diversity of groups.²⁹⁴ Accordingly, this is the correct way to look at diversity because it offers a compromise between individual diversity and equality on the one hand and the diversity of groups on the other.²⁹⁵ He argues that allowing religious groups to sometimes discriminate is advisable because it protects individual diversity in the public sphere and allows religious denominations to maintain their identity and core beliefs.²⁹⁶ According to Lenta, anti-discrimination legislation should not be outlawed; when religious denominations discriminate, they should be tolerated.²⁹⁷

Lenta’s argument is perplexing because it is difficult to comprehend how one must tolerate harmful, discriminatory acts by a religious denomination to show support for diversity.

²⁸⁶ Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ op cit (n144) 313.

²⁸⁷ Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ op cit (n144) 313.

²⁸⁸ Lenta ‘Taking diversity seriously: religious associations and work-related discrimination’ (2009) 126 *South African Law Journal* 833.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 435.

²⁹³ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 435.

²⁹⁴ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 435.

²⁹⁵ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) 436.

²⁹⁶ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) at 436.

²⁹⁷ Lenta ‘In defence of the right of religious associations to discriminate’ op cit (n144) at 436.

Religious denominations should not be able to discriminate under the guise of diversity. Hiding behind their religious doctrinal beliefs as an excuse is unacceptable. If the objective of the Constitution is to create a cohesive society, the state cannot tolerate unfair discrimination that will undo the cohesiveness and objectiveness of constitutional transformation. Religious denominations cannot request tolerance for their diversity when they will not tolerate the diversity of other groups. Constitutional principles are in place for a reason: to respect the diversity of society. Discrimination under the guise of a doctrinal belief is unacceptable in many ways because of the harm it causes both within the private and public spheres.

6.3.2.4 Centrality of the belief

The centrality of the belief of religious denominations is important because it forms the essence of who they are. But, as much as their core beliefs need to be respected, those core beliefs cannot be used to discriminate against vulnerable groups within its confines. This was the central argument made by Bilchitz.²⁹⁸ He acknowledges and respects the core beliefs of religious denominations but argues that the core beliefs of religious denominations cannot be used as an excuse to discriminate and violate constitutional principles.²⁹⁹ If they want their diversity in terms of their core beliefs to be respected, they must, in turn, respect their members' diversity.³⁰⁰ Lenta's argument is centered around the core belief of religious denominations and allowing those denominations to discriminate if it is necessary to do so without the interference of the state forcing them to apply and adhere to existing legislation.³⁰¹ He believes that religious denominations' core beliefs are the essence and centrality of who they are.³⁰² If those core beliefs are not respected, or religious denominations are forced to change, what becomes of the church as a whole?³⁰³ They cease to be their authentic selves.³⁰⁴

²⁹⁸ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 298; Bilchitz 'Should religious associations be allowed to discriminate?' op cit (n48) 219-248.

²⁹⁹ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 313.

³⁰⁰ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144).

³⁰¹ Lenta 'In defence of the right of religious associations to discriminate' op cit (n144); Lenta 'The right of religious associations to discriminate' op cit (n144); Lenta 'Taking diversity seriously: religious associations and work-related discrimination' op cit (n288) 833.

³⁰² Lenta 'In defence of the right of religious associations to discriminate' op cit (n144); Lenta 'The right of religious associations to discriminate' op cit (n44); Lenta 'Taking diversity seriously' op cit (n288) 833.

³⁰³ Lenta 'In defence of the right of religious associations to discriminate' op cit (n144); Lenta 'The right of religious associations to discriminate' op cit (n144); Lenta 'Taking diversity seriously' op cit (n288) 833.

³⁰⁴ Lenta 'In defence of the right of religious associations to discriminate' op cit (n144); Lenta 'The right of religious associations to discriminate' op cit (n144); Lenta 'Taking diversity seriously' op cit (n288) 833.

Both Bilchitz and Lenta agree that discriminating on the grounds of sexual orientation, gender, and race must be condemned.³⁰⁵ It is submitted that both authors are correct, and, on that basis Bilchitz has a stronger argument if viewed from the context of an injunction against same-sex marriage. Core doctrinal beliefs do need to be respected, but a religious denomination cannot hide behind that core belief to unfairly discriminate against its LGBTQI+ members. Neither can religious denominations be exempt from constitutional principles because of their core doctrinal beliefs even if they are conservative religious denominations that are not progressive at all. It is unacceptable to believe that conservative religious denominations such as the Seventh-Day Adventist church can be left to unfairly discriminate. Even though their core doctrinal beliefs form the basis of who they are, the harm perpetuated by them towards their LGBTQI+ members outweighs the harm that they will suffer if asked to accommodate diversity and inclusivity. It is submitted that their core doctrinal beliefs will not be drastically affected if they acknowledge diversity and inclusivity.

6.4 DISCUSSION

The above discussion examined the specific factors relevant to this study and the weight that equality and religious freedom carry. This section will now discuss these factors in order to determine whether each category of church is justified in implementing an injunction against same-sex marriage.

The Dutch Reformed Church being a category one church, is currently the most progressive of the churches chosen for this study when it pertains to the acceptance of homosexuality and the solemnisation of same-sex marriage within the church.³⁰⁶ They do not have an injunction against same-sex marriage since the outcome of the *Gaum*³⁰⁷ case. They fulfil the constitutional principle of equality and do not directly or indirectly discriminate against their LGBTQI+ congregants. They have embraced diversity within the LGBTQI+ community in spite of their core doctrinal belief that marriage is between a man and a woman. The Dutch Reformed Church has progressed exponentially considering that through the history of the church and religion in

³⁰⁵ Bilchitz 'Why courts should not sanction unfair discrimination in the private sphere: a reply' op cit (n144) 298; Lenta 'The right of religious associations to discriminate' op cit (n144) 237.

³⁰⁶ *Gaum and Others v Van Rensburg NO* supra (n5).

³⁰⁷ *Gaum and Others v Van Rensburg NO* supra (n5).

South Africa, this religious denomination was said to have the most influence when it came to church and state relations.³⁰⁸

The Methodist Church respects its LGBTQI+ congregants but is not so accepting of same-sex marriage³⁰⁹ because it recognises marriage as only between a man and a woman.³¹⁰ Its recognition of marriage being between a man and a woman has advanced the implementation of an injunction against same-sex marriage. It must be noted, that currently the Church is actively involved in discussing the acceptance of same-sex marriage.³¹¹ However, this discussion has been ongoing for over a decade with no solution reached.³¹² It is submitted that the delay in deciding on same-sex marriage is a continuous discriminatory act directed towards same-sex couples who want to solemnise their relationships within the church. The discrimination linked to the injunction against same-sex marriage is a reminder of the discrimination suffered in the past by the LGBTQI+ community. It can be assumed that marriage equality for same-sex couples in the church is not a prerogative. The church's doctrinal belief around the theology of marriage supports religious freedom, which is weighted heavier than equality.

In light of this: (i) ordained ministers who wish to enter into a same-sex Christian marriage in the church will not be given that opportunity; (ii) ordained ministers who wish to enter into a same-sex civil marriage outside of the church will not be prevented from doing so, however, as seen in the *De Lange*³¹³ case, they may face disciplinary action for violating the rules and disciplines of the church, and (iii) LGBTQI+ congregants who wish to enter into a same-sex Christian marriage within the church will be prevented from doing so.

Our Constitutional objective is to transform society. Therefore, our historical context provides that a presumption in favour of equality and non-discrimination should be adhered to. Past patterns of disadvantage must be addressed in order to prevent religious denominations from furthering discrimination, and for social cohesion and equality to be advanced.³¹⁴ The

³⁰⁸ T Kuperus 'Resisting or embracing reform? South Africa's democratic transition and NGK-State relations' (1996) 38(4) *Journal of Church and State* 841-872.

³⁰⁹ *De Lange v Presiding Bishop of the Methodist Church* supra (n27). See Table 2.

³¹⁰ *The Methodist Book of Order* point 16(e) (Same-Sex debate) at 226 available at <https://methodist.org.za/wp-content/uploads/2017/08/Methodist-Book-of-Order.pdf> accessed on 8 June 2022.

³¹¹ W Bentley 'A decade of the same-sex debate in the Methodist Church of Southern Africa (2001-2011)' available at https://www.researchgate.net/publication/239526527_A_decade_of_the_same-sex_debate_in_the_Methodist_Church_of_Souther_Africa_2001-2011 accessed on 28 August 2022. See also *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³¹² Bentley op cit (n311). See also *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³¹³ *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³¹⁴ *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

injunction against same-sex marriage should be seen as unacceptable if we consider our historical context.

As far as the injunction against same-sex marriage is concerned, the Methodist Church and the Seventh-Day Adventist church differ in their approaches concerning whether same-sex marriage is a central or core belief.

In the Methodist Church the impact of the harm suffered by the complainant can be felt in the following ways: (a) ordained ministers who wish to enter into a same-sex Christian marriage in the church will not be given that opportunity; therefore, the only assumed option is to marry outside of the church in a civil ceremony or to leave the church which is their spiritual home and family;³¹⁵ (b) ordained ministers who wish to enter into a same-sex civil marriage outside of the church cannot be prevented from doing so. However, as seen in the *De Lange*³¹⁶ case, they may be disciplined for violating the rules and disciplines of the church and removed from being an ordained minister. Marrying your life partner in a civil ceremony may put the church in a position where they may have to ask you to leave the religious organisation to become a member of another religious denomination that will accommodate your beliefs.³¹⁷ This could impact negatively on the complainant since part of the psychological trauma suffered is leaving behind your spiritual home and your calling as a minister, and (c) LGBTQI+ congregants who wish to enter into a same-sex Christian marriage in the church will not be given that benefit and opportunity. The church will not prevent the same-sex couple from entering a civil marriage, but the church's blessing will not be given to them.

The impact suffered by the complainants can manifest in stigmatisation and loss of self-esteem, confidence, personhood, and dignity.³¹⁸ It is submitted that this could have a long-lasting psychological effect on the parties inducing feelings of rejection and unworthiness.³¹⁹ It is submitted that the severity of the harm attached to this type of psychological trauma has long-lasting effects.³²⁰ The harm caused by the injunction against same-sex marriage must be recognised against the past patterns of disadvantage suffered by the LGBTQI+ community.

³¹⁵ *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³¹⁶ *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³¹⁷ *Gaum and Others v Van Rensburg NO* supra (n5) at para [63] and para [82].

³¹⁸ See *NCGLE v Minister of Home Affairs* supra (n182) at para [42].

³¹⁹ See *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79); *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27); *Gaum and Others v Van Rensburg NO* supra (n5).

³²⁰ See *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79); *De Lange v Presiding Bishop of the Methodist Church* 2016 supra (n27); *Gaum and Others v Van Rensburg NO* supra (n5).

Consideration must also be given to religious denominations who have also suffered harm in the form of having to compromise itself, its autonomy and integrity by reconsidering their doctrinal beliefs in order to accommodate homosexuality and same-sex marriage. The burden placed on the denomination in order to keep its doctrinal core beliefs and practices in place and, to keep their members secure could be onerous.

The Methodist Church's core doctrinal beliefs around the theology of marriage are currently being discussed within the church.³²¹ The diverse opinions arising out of this discussion around same-sex marriage must be onerous on the church.³²² But, the fact that they are willing to continue their dialogue is evidence of the fact that they may be considering changing their stance in the future with regard to the injunction against same-sex marriage. This is especially so since the Methodist Church has been contemplating accepting and acknowledging same-sex marriage for over a decade³²³. In the *Gaum*³²⁴ case the court took into consideration the fact that the Church itself was in discussion about same-sex marriage and homosexuality since 2004³²⁵ and revisited the topic on theological grounds numerous times.³²⁶ Therefore, although the church will suffer harm by removing the injunction against same-sex marriage by going against its belief concerning the theology of marriage, it is submitted that the effect will not be as detrimental for them since they have been in discussion around the acceptance of same-sex marriage for more than a decade.

The Seventh-Day Adventist Church on the other hand is not accepting of homosexuality or same-sex marriage.³²⁷ It is submitted that the Seventh-Day Adventist Church is seen as a conservative religious denomination that interprets scripture in a manner that does not support homosexuality or same-sex marriage. Within our historical context, conservative religions played an influential role in advancing discrimination toward the LGBTQI+ community.³²⁸ The Seventh-Day Adventist Church has continued that discriminatory behaviour in the form of an injunction against same-sex marriage. Historically, the LGBTQI+ community have had to fight for equality and is currently still fighting for equality. This is despite the fact that our Constitution was created to correct past wrongs and prevent any further moral failures that

³²¹ See Table 2.

³²² See Table 2.

³²³ Bentley op cit (n311).

³²⁴ *Gaum and Others v Van Rensburg NO* supra (n5).

³²⁵ *Gaum* supra (n5) at para [53].

³²⁶ *Gaum* supra (n5) at para [49].

³²⁷ See Table 2.

³²⁸ The NG Kerk being one of those conservative denominations in the apartheid era.

could be linked to past patterns of disadvantage. The injunction against same-sex marriage is a reminder of past discrimination.³²⁹ Despite the fight for equality, the needs of the LGBTQI+ community within this religious denomination will not be a priority. The church believes as part of its core doctrinal beliefs that “homosexuality is a manifestation of the disturbance and brokenness in human inclinations and relations caused by the entrance of sin into the world”.³³⁰

In light of this: (i) ordained ministers who wish to enter into a same-sex Christian marriage will not be able to do so within this religious denomination; (ii) ordained ministers who wish to enter into a same-sex civil marriage will not be prevented from doing so but, in light of the stance that the church takes, will probably be removed from their leadership position, and, (iii) LGBTQI+ congregants who wish to enter into a same-sex Christian marriage within the church will be prevented from doing so.

The Seventh-Day Adventist Church will make every effort to ensure that its core doctrinal beliefs around homosexuality and same-sex marriage will remain firm. Compromising its core doctrinal beliefs around homosexuality and same-sex marriage would have a much larger detrimental effect on them as a conservative church which has not entertained a discussion around the acceptance of same-sex marriage and homosexuality in comparison to the Methodist Church. Requesting this denomination to compromise on its beliefs to accept or consider accepting homosexuality and same-sex marriage would be, as Lenta says, “a direct assault against who they are”.³³¹ Not allowing this conservative denomination to discriminate would affect their religious ethos and identity. As Lenta argues, members who do not accept the church's doctrinal beliefs should consider joining other religious denominations where they can practice their own beliefs.³³² Compromising those beliefs would be destroying the essence of who they are. It is submitted that although this is the situation in the Seventh-Day Adventist Church, they cannot be left to unfairly discriminate simply because they are steadfast in their conservative doctrinal beliefs. They cannot use their doctrinal beliefs as a shield in order not to adhere to constitutional principles of equality.

³²⁹ Bilchitz ‘Should religious associations be allowed to discriminate?’ op cit (n48) 240.

³³⁰ Seventh-Day Adventist Church ‘Same-sex unions’. Statement voted by the Annual Council of the General Conference Executive Committee, October 17, 2012, available at <https://www.adventist.org/documents/same-sex-unions/> accessed on 8 June 2022.

³³¹ Lenta ‘The right of religious associations to discriminate’ op cit (n144) 251.

³³² Lenta ‘The right of religious associations to discriminate’ op cit (n144) 246.

The question to consider is whether the harm suffered by the Methodist Church and the Seventh-Day Adventist Church by requesting them to remove their injunction against same-sex marriage would outweigh the harm suffered by their LGBTQI+ members.

The Methodist Church will most likely believe that the removal of the injunction against same-sex marriage outweighs the harm suffered by their LGBTQI+ members. This however is debatable considering that the Methodist Church has been in conversation about the theology of marriage for more than a decade. It is submitted that it will not be so devastating to advance from their conversation to action considering that they already accept ordained ministers who are part of the LGBTQI+ members as leaders within the church.³³³ The only obstacle left is for the church to remove the injunction against same-sex marriage. The injunction against same-sex marriage ignores same-sex couples who are involved in a deeply committed and loving relationship with their partners who want to marry. Ignoring these couples sends a message that they are inferior to their heterosexual counterparts who will be given the opportunity to marry if they are in committed and loving relationships. Engaging in conversation with stakeholders without arriving at a solution is causing harm to its LGBTQI+ members who have to put their lives on hold waiting for the church to arrive at a decision concerning the removal of the injunction against same-sex marriage. It is submitted that the harm suffered by the LGBTQI+ members of the church far outweighs the harm that will be done to the church by removing the injunction against same-sex marriage.

The Seventh-Day Adventist Church's situation will be different to the Methodist Church. It is possible that the harm suffered by the church may outweigh the harm that its LGBTQI+ members will suffer. This is because the church has not entered into conversation around the acceptance of same-sex marriage with stakeholders. They hold fast to their core doctrinal beliefs which have their roots in biblical scripture. The church has followed these beliefs for decades, and requesting them to compromise on these beliefs will most probably affect the essence of who they are because of their conservative beliefs. Part of that belief is that marriage is between a man and a woman and that homosexuality is an indication of the brokenness of society. This belief is however debatable considering that an individual's sexual orientation is not a choice but inherent in the uniqueness of that person.³³⁴ It is therefore no surprise that the

³³³ *De Lange v Presiding Bishop of the Methodist Church* supra (n27).

³³⁴ Royal College of Psychiatrists, 'Psychiatry and LGB People' available at <https://web.archive.org/web/20140218210240/http://www.rcpsych.ac.uk/workinpsychiatry/specialinterestgroups/gaylesbian/submissiontothecofe/psychiatryandlgbpeople.aspx> accessed on 18 August 2023.

injunction against same-sex marriage will be implemented and not removed. However, this does not justify the harm felt by LGBTQI+ members within the church. It is conceded that if a church is as conservative as the Seventh-Day Adventist Church then it may be to the advantage of its LGBTQI+ members to leave in order to preserve their dignity. In saying this, the fact that the LGBTQI+ members of this religious denomination must leave to preserve their dignity is in itself discriminatory. Irrespective of this religious denomination's conservative ways it is unacceptable to unfairly discriminate against its LGBTQI+ members. Although this religious denomination is relatively small in comparison to the Methodist Church, the influence of the church cannot be denied. The church's negative attitude towards its LGBTQI+ members may influence the outside community as a whole who may take that negative message and use it as a weapon against the LGBTQI+ community in the form of homophobic behaviour.

As said above, even conservative religious denominations cannot be exempt from constitutional principles. They cannot use their conservative doctrinal beliefs as a shield to unfairly discriminate against its LGBTQI+ members. It is submitted that requesting this religious denomination to respect and acknowledge diversity and inclusivity is not taking away from their core doctrinal beliefs. It is not requesting them to remove their injunction against same-sex marriage but instead it is allowing them to adhere to some constitutional principles. By respecting their LGBTQI+ members by acknowledging diversity and inclusivity, it may lead the church to soften its stance around difference. Even though the Catholic Church (which is also a conservative church) does not marry same-sex couples or bless same-sex marriages, the Vatican has called upon all Catholics "to welcome with respect and sensitivity persons with homosexual inclinations."³³⁵ If the Catholic Church is able to extend their tolerance towards the LGBTQI+ community, there is no reason why the Seventh-Day Adventist Church cannot do the same.

Across race, colour, and creed, the LGBTQI+ community suffered previous patterns of disadvantage that violated their right to equality and dignity.³³⁶ They were historically vulnerable and felt the harmful effects of being unfairly discriminated against³³⁷ by having to

³³⁵ B Chappell 'Vatican says Catholic Church cannot bless same-sex marriages' *NPR* 15 March 2021, available at <https://www.npr.org/2021/03/15/977415222/illicit-for-catholic-church-to-bless-same-sex-marriages-vatican-says> accessed on 20 December 2022.

³³⁶ See *NCGLE v Minister of Justice* supra (n181), *NCGLE v Minister of Home Affairs* supra (n182), *Minister of Home Affairs v Fourie* supra (n256) to name but a few.

³³⁷ P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' (1996) 12 *South African Journal on Human Rights* 265-290.

endure the prohibition of homosexuality and being called “unapprehended felons”.³³⁸ Their struggle to overcome being oppressed and discriminated against was a journey that was taken up and led by human rights advocates³³⁹ and coalitions such as the NCGLE,³⁴⁰ amongst others. Their struggle for human rights and the liberation of the oppressed led to the prohibition of discrimination based on sexual orientation within the equality clause (section 9) of the Constitution.³⁴¹ The Methodist Church and Seventh-Day Adventist Church’s implementation of an injunction against same-sex marriage is a reminder of past discrimination suffered by the LGBTQI+ community who were deprived of equality and oppressed within society. The South African historical context provides a strong background in favour of the presumption of equality and non-discrimination. It is only by looking back to the devastating effects of past patterns of discrimination directed toward the LGBTQI+ community, that we can appreciate the fact that our Constitution was aimed at overcoming discrimination and transforming society.³⁴² To advance as a country that aims at social cohesion, it is imperative that discrimination based on sexual orientation be addressed within religious denominations. It is unacceptable that these two religious denominations are left to discriminate by repeating past discriminatory conduct against previously disadvantaged and vulnerable groups in the form of an injunction against same-sex marriage. It is important that past patterns of disadvantage are addressed in denominations such as these, where discrimination is being advanced despite our constitutional order. The injunction against same-sex marriage disseminates a message that same-sex marriages are not part of God’s plan therefore they are seen as less than heterosexual marriages which are seen as God’s plan for families and raising children.

As evidenced from the above and in terms of both category two and category three religious denominations, both place greater emphasis on the right to freedom of religion over the right to equality.³⁴³ This is evidenced in their policies, practices, and rules, which discriminate against their LGBTQI+ congregants concerning homosexuality and same-sex marriage. As

³³⁸ M Gevisser ‘A different fight for freedom: A history of South African Gay and Lesbian Organization from the 1950s to 1990s’ in M Gevisser and E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (1995) 14-86.

³³⁹ E Cameron ‘Sexual orientation and the constitution: a test case for human rights’ (1993) 110 *South African Law Journal* 450–472.

³⁴⁰ See Chapter 3.

³⁴¹ EC Christiansen ‘Ending the apartheid from the closet: Sexual orientation in the South African constitutional process’ (1997) 32 *International Law and Politics* 1032.

³⁴² Bilchitz ‘Why courts should not sanction unfair discrimination in the private sphere: a reply’ op cit (n144) 296-315.

³⁴³ Lenta would agree with this view considering that he believes that religious denominations should be able to discriminate in accordance with settled religious beliefs - Lenta ‘The right of religious associations to discriminate’ op cit (n144) 234.

much as freedom of religion is an important constitutional right and a high-priority right for religious denominations, religious denominations need to be aware that their religious liberty cannot unjustifiably infringe on the rights of their members. Because of our history of past discrimination, a presumption of equality should be strongly favoured. For this reason, it is found that both category two and category three religious denominations unfairly discriminate against their LGBTQI+ congregants by having an injunction against same-sex marriage.

As Botha states, we can only wait to see if modern Christianity will be politically correct, follow the human rights route on homosexuality, or decide to follow Christian biblical scripture and denounce homosexual conduct.³⁴⁴

Finally, it is submitted that the test provided for in PEPUDA is sufficient to determine any allegations of unfair discrimination. Further, the church cannot be exempt from following legal principles favouring its doctrinal beliefs. It is unjustifiable for the church to believe that it can use its doctrinal beliefs as a shield to cause harm.³⁴⁵ The church should not use religious liberty as a shield to hide behind to discriminate against its LGBTQI+ congregants unfairly.³⁴⁶

A solution to this issue is for our Equality Courts to put in place remedies that do not force a change in the doctrinal beliefs of category two and category three denominations. Instead, remedies put in place should highlight the fact that their policies, practices, and rules need to be reassessed to accommodate diversity and promote the presumption of equality. It is then prudent to suggest remedies that can be put in place. Effecting remedies sensitive to this issue will perhaps motivate these two religious denominations to contemplate changing their outlook on their stance regarding homosexuality and the injunction against same-sex marriage. This change need not be immediate but will motivate the church to move forward.

When evaluating the above, it becomes necessary for courts to intervene in a way that is not perceived as coercive, which would have the opposite effect to what is required concerning religious denominations embracing diversity. Instituting a remedy must impart a message to religious denominations that unfair discrimination is unacceptable, even if it is based on doctrinal beliefs. A balance, however, must be struck between the court implementing a remedy that will not interfere with the church's doctrinal beliefs and the church accepting that it needs

³⁴⁴ PH Botha 'Christianity and homosexuals – homosexuals and Christianity' (2006) 46(398) *Word and Action* 7-10.

³⁴⁵ *MEC for Health, Limpopo v Rabalago and Another* 2018 (4) SA 270 (LP).

³⁴⁶ R Audi 'Religious liberty conceived as a human right' in R Cruft, S Matthew Liao, M Renzo (eds) *Philosophical Foundations of Human Rights* 407-422.

to accommodate and address diversity. Equality courts are empowered to give judges and magistrates the ability to hand down transformative and corrective solutions. In light of this, the Equality Court, in the context of this study, can hand down corrective and transformative solutions such as (i) implementing a time frame for the church to advance from its conversation around same-sex marriage to a solution; (ii) an order directing religious denominations to review their policies, practices, and rules which result in discriminatory practices; (iii) a directive which requires the church to make regular progress reports to the court concerning steps being taken concerning reviewing their policies, rules or practices; (iv) an unconditional apology to be made to the complainants and; (v) payment of any damages in respect of the impairment of dignity, pain, and suffering or emotional or psychological suffering.

Implementing remedies such as the above gives religious denominations time to review their policies, rules, and practices, which may motivate change. It also sends a message to religious denominations that their doctrinal beliefs, policies, rules, and practice cannot be used as an excuse to discriminate against LGBTQI+ members unfairly.

6.5 CONCLUSION

This chapter firstly analysed possible litigation strategies that could be used if a complainant wants to challenge the injunction against same-sex marriage within their religious denomination and, secondly, how PEPUDA could be utilised in determining an unfair discrimination case based on sexual orientation.

To date, only the *Gaum*³⁴⁷ case has successfully been litigated in terms of a religious denomination being challenged on a policy decision concerning an injunction against same-sex marriage. The case was taken based on the litigation strategy concerning the claim of unfair discrimination in terms of section 9 of the Constitution.³⁴⁸ The court found that the Church did unfairly discriminate against its LGBTQI+ congregants³⁴⁹ by attempting to reverse the decision of the 2015 General Synod in its 2016 General Synod meeting.³⁵⁰ Note must be taken of the fact that the respondent considered PEPUDA in their heads of argument specifically in light of section 14(2) and section 14(3).³⁵¹ Although the court decided the case in terms of the

³⁴⁷ *Gaum and Others v Van Rensburg NO* supra (n5).

³⁴⁸ *Gaum and Others v Van Rensburg NO* supra (n5) at paras [62]-[82].

³⁴⁹ *Gaum and Others v Van Rensburg NO* supra (n5) at para [82].

³⁵⁰ *Gaum and Others v Van Rensburg NO* supra (n5) at paras [76], [80].

³⁵¹ *Gaum and Others v Van Rensburg NO* supra (n5) at paras [76], [82].

Constitution, it decided to look at section 14(2) and section 14(3) of PEPUDA stating that even if PEPUDA had been considered the Church would still not have proven that the discrimination is fair.³⁵²

The litigation strategy in terms of a claim of unfair discrimination in terms of PEPUDA was relied upon in the case of *Strydom*³⁵³ but this case did not deal with an injunction against same-sex marriage but arose out of an employment dispute. The matter dealt with an unfair discrimination claim based on the grounds of sexual orientation.³⁵⁴

The above indicates that both the Constitution in terms of section 9 and PEPUDA are litigation strategies that can be considered when challenging a case of unfair discrimination arising from a religious denomination.

The second issue that this chapter analysed was the use of PEPUDA in determining a case alleging unfair discrimination based on an injunction against same-sex marriage. In determining whether there is discrimination present in a claim alleging unfair discrimination, it was reasonably uncomplicated to meet the threshold for determining discrimination. The challenge arose when determining whether that discrimination was unfair. This was because there are differing opinions with regard to the weighting of equality and religious freedom that needed to be attached to the various factors that were highlighted. From the various factors, it appears that a key factor is religious denominations' justifications that are advanced in terms of whether they have begun considering potential reform in light of taking diversity seriously. This could be evident in whether they have begun discussions around same-sex marriage and the removal of the injunction against same-sex marriage. Discussions around this issue could be seen as a start to embracing diversity within their congregations. For instance, the Methodist Church is currently in discussion around same-sex marriage and the theology of marriage, but it has not come to a solution as to whether they are willing to accept same-sex marriage within the church. Because of this, courts are reluctant to intervene in the process since the issue is integrally linked to the internal doctrinal beliefs of the church and the discussion is still ongoing. But, consideration must be had of the fact that the church has been in this discussion for more than a decade. At some stage, the church must be able to show convincingly that they

³⁵² *Gaum and Others v Van Rensburg NO* supra (n5) at paras [76], [82].

³⁵³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79).

³⁵⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* supra (n79).

are willing to embrace diversity in terms of same-sex marriage. Currently, even though the church is accepting of homosexuality,³⁵⁵ it is submitted, that their stance with regard to fully embracing diversity is not evident as long as they are not willing to accept same-sex marriage. The same can be said about the Seventh-Day Adventist Church. As long as they are not in a discussion around the issue of same-sex marriage, it cannot be said that they are in a process of potential reform. As they are a conservative religious denomination, our courts will yet again be reluctant to intervene since the issue will be around the internal doctrinal beliefs of the church. It is submitted, that the primary reason for these two religious denominations being reluctant to embrace diversity in the form of same-sex marriage is that their core religious belief around marriage is the union of a man to a woman.³⁵⁶ As stated in the *Christian Education* case, religious groups “may seek to use the right to freedom of religion as a shield with which to fend off constitutionally offensive practices”.³⁵⁷ This is relevant in terms of the implementation of the injunction against same-sex marriage. Perhaps the remedies within the PEPUDA will be able to address this issue where other courts will rely on the doctrine of entanglement. Having said that, it seems as though both the Methodist Church and the Seventh-Day Adventist Church weigh religious freedom as more important than equality because of religious liberty which gives them the freedom to follow their own beliefs and practices irrespective of the fact that it may be discriminatory or unfair.³⁵⁸ It submitted that as our Constitution is aimed at having a society that is equal, a strong presumption in favour of equality must be considered.

Equality is being considered in a recent development concerning same-sex marriage within the Church of England. On the 17th January 2023, the Church proposed a recommendation regarding its position on sexuality and same-sex marriage.³⁵⁹ The proposal concerned blessing same-sex couples within the church who have married in a civil ceremony outside of the church. This comes after the Church debated the issue of same-sex marriage over a period of six years.³⁶⁰ Between the 6th and 9th of February 2023, the Synod will debate this issue.

³⁵⁵ See Table 1 and Table 2.

³⁵⁶ See Chapter 2.

³⁵⁷ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para [29]. See also Chapter 4.

³⁵⁸ See Chapter 4.

³⁵⁹ B Pocklington ‘The Church of England and same-sex relationships’ *Law and Religion* 20 January 2023, available at <https://lawandreligionuk.com/2023/01/20/the-church-of-england-and-same-sex-relationships-update/> accessed 21 January 2023.

³⁶⁰ Pocklington op cit (n358).

However, under the proposals, same-sex couples will still have to face an injunction against marriage within the Church. This arises out of the formal teaching of the Church of England as set out within their canons that marriage is between one man and one woman for life. The teachings concerning holy matrimony according to the Church of England will not change.³⁶¹ The Church of England will also issue a letter of apology to the LGBTQI+ community for the way in which they have been excluded by the Church. The proposal to be debated by Synod is intended to settle nearly forty years of division that has often ended in arguments over the issue of sexuality.³⁶² Members of Parliament have issued statements saying that if Synod does not make progress concerning this issue, there is a possibility that Parliament would take the matter very seriously.³⁶³ The leader of the Commons (Penny Mordaunt) has been requested by Members of Parliament to “allow time for legislation” to be created in order to force the Church of England to do away with the injunction against same-sex marriage.³⁶⁴ In the meantime, LGBTQI+ activists have shown their disapproval regarding the Church of England not proposing a vote on same-sex marriage holding that the fight for equal marriage rights within the Church will continue³⁶⁵.

This is a progressive move by the Church of England even though LGBTQI+ activists are dissatisfied that the injunction against same-sex marriage continues. This study has argued that the removal of the injunction against same-sex marriage is the ideal however, any progress towards the acceptance of same-sex marriage within religious denominations would indicate progress towards marriage equality. Although merely blessing a same-sex married couple is a compromise, it will give more legitimacy to their marriage. Hopefully, this progressive move by the Church of England will influence the Anglican Church within South Africa. It will be interesting to see whether the development of legislation called for by MPs within the United Kingdom will have the effect of coercing the Church to remove the injunction against same-sex marriage. If legislation is passed, it will have far-reaching consequences in terms of the theology of marriage and equal marriage rights within religious denominations. The presumption in favour of equality will be adhered to in light of the removal of the injunction against same-sex marriage.

³⁶¹ Pocklington op cit (n358).

³⁶² H Sherwood ‘Same-sex marriage row looms over Church of England synod’ *The Guardian*, 5 February 2023, available at <https://www.theguardian.com/world/2023/feb/05/same-sex-marriage-row-looms-over-church-of-england-synod> accessed 7 February 2023.

³⁶³ Sherwood op cit (n361).

³⁶⁴ Sherwood op cit (n361).

³⁶⁵ Sherwood op cit (n361).

As Ellison states, justice requires a de-centering of heterosexual marriage and an extension of the theological acceptance of same-sex relationships.³⁶⁶ He argues further that marriage and family are the foundations of society and thus should be regulated by the concept of justice instead of scriptural prohibition.³⁶⁷ Masango argues that “true justice reflects God’s character and is therefore eternal and not subject to cultural redefinition”.³⁶⁸ Pepler states that it will be “theologically inconsistent for the church to reject homosexuality when it is called to share the grace and mercy of God”.³⁶⁹

³⁶⁶ MM Ellison *Same Sex Marriage: A Christian Ethical Analysis* (2004).

³⁶⁷ Ibid. See also M Masango ‘Homosexuality: A challenge to African churches’ (2002) 58(3) *HTS: Theological Studies* 956-972; FM Gedicks ‘Christian dignity and the overlapping consensus’ (2021) 46 *Brigham Young University Law Review* 1245-1272.

³⁶⁸ Masango *ibid.*

³⁶⁹ C Pepler ‘Same-sex marriage: A current South African Christian perspective’ 2006 (2) *Conspectus: Journal of the South African Theological Seminary* 39-55.

CHAPTER SEVEN:

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

This chapter discusses the findings, conclusions and recommendations on the injunction against same-sex marriage and the refusal of some Christian religious denominations to solemnise these marriages.

The implementation of the injunction against same-sex marriage and the churches' refusal to solemnise these marriages by some Christian religious denominations may result in this practice being challenged within our courts. The challenge could take the form of an unfair discrimination claim by (i) ordained ministers who want to enter into a same-sex Christian marriage¹ within their religious denomination; (ii) ordained ministers who want to enter into a same-sex civil marriage² outside of their religious denomination; and (iii) LGBTQI+ lay congregants who want to enter into a same-sex Christian marriage within their religious denomination.

South Africa has a progressive Constitution, which provides for the protection of fundamental rights and freedoms. It is against this background that the aims of this study and the research question were developed. The aims of the study were to:

- (i) investigate whether the biblical injunction against same-sex marriage by some Christian religious denominations is deemed unfair discrimination based on sexual orientation in terms of: (i) ordained ministers who want to enter into a same-sex Christian marriage³ within their religious denomination, (ii) ordained ministers who want to enter into a same-sex civil marriage⁴ outside of their religious denomination, and (iii) LGBTQI+ lay congregants who want to enter into a same-sex Christian marriage within their religious denomination;

¹ A same-sex Christian marriage is a marriage that takes place in the church ie the ceremony and the blessing of the couple by an ordained minister of a religious denomination.

² A same-sex civil marriage is a marriage that takes place outside of the church therefore there is no church blessing or church ceremony.

³ A same-sex Christian marriage is a marriage that takes place in the church ie the ceremony and the blessing of the couple by an ordained minister of a religious denomination.

⁴ A same-sex civil marriage is a marriage that takes place outside of the church therefore there is no church blessing or church ceremony.

- (ii) to critically examine whether it is justifiable for a Christian religious denomination to unfairly discriminate against its LGBTQI+ members which include ordained ministers and lay congregants on the ground that they have a right to religious freedom; and
- (iii) to analyse which litigation strategy is the most suitable for bringing a claim of unfair discrimination to our courts.

The research question in this study is: Are Christian religious denominations justified in having an injunction against same-sex marriage which is contrary to constitutional principles?

7.2 LIMITATIONS

- (i) The limitation of this study is that only certain Christian religious denominations in South Africa were referred to in terms of examining their official position regarding same-sex marriage and homosexuality. This was as a result of the unavailability of all the detailed text documents which pertain to the injunction against same-sex marriage of all religious denominations mentioned in Table 1.

A general approach was taken because the chosen religious denominations were examined as a group. Detailed text documents are kept with the various religious denominations.

- (ii) Only Christian religious denominations within South Africa were referred to since 86% of South Africans believe in God and are Christians;⁵
- (iii) A comparative study with foreign jurisprudence was not undertaken as this study was specifically analysed from a South African perspective taking into consideration the history of South Africa. Other jurisdictions such as the United States, the United Kingdom, Australia and Canada were referred to in terms of the doctrine of entanglement but did not advance the argument within this study since South Africa has the same perspective with regard to the doctrine of entanglement. There is no other

⁵ Statistics South Africa ‘General Household Survey 2015’ available at <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> accessed on 20 November 2022. The data found in this survey was the latest data highlighting the percentage distribution of religious affiliations by province. Religious affiliations were not recorded in the General Household Surveys from 2016-2022. See Chapter 4.

foreign jurisprudence that advances the argument within this study regarding the injunction against same-sex marriage from a South African perspective.

7.3 FINDINGS

(a) In the past twenty eight years of democracy there has been extensive legal and social change in South Africa. One of the areas in which there have been fundamental changes is in relation to the protection of sexual minorities. Arising out of section 9 of the Constitution is the prohibition of unfair discrimination on the grounds of sexual orientation, which led to many law reforms. An important law reform arose out of the case of *Minister of Home Affairs v Fourie*⁶ which dealt with the extension of marriage rights to same-sex couples. The culmination of this case was the adoption of the Civil Union Act.

(i) South Africa's history of apartheid criminalised homosexuality

Marriage rights were not extended to the LGBTQI+ community, as only heteronormative relationships were recognised. Criminal sanctions were attached as a consequence for a single offence by gay men and lesbian women by the Immorality Amendment Act, 1969.

(ii) The enactment of the Constitution created equality rights which included the protection of sexual orientation resulting in extensive legal reform which culminated into the adoption of the Civil Union Act.

With the recognition of full equality rights extended to the LGBTQI+ community by the Constitution, legal reform resulted in amongst others the Civil Union Act being passed.⁷ With equality occupying an important place in the South African legal order, the Civil Union Act extended marriage rights to same-sex couples. South Africa became the first country worldwide to afford marriage benefits to same-sex couples. The Civil Union Act changed the face of family law in South Africa.⁸

⁶ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

⁷ *Supra*.

⁸ BS Smith and JA Robinson 'The South African Civil Union Act 17 of 2006: A good example of the dangers of rushing the legislative process' (2008) 22 *Brigham Young University Journal of Public Law* 419. See also M

- (iii) Christian religious denominations are not compelled by the Civil Union Act to solemnise a same-sex marriage.

Although the Civil Union Act was created to extend marriage rights to same-sex couples, it does not compel Christian religious denominations to marry these couples. In terms of section 5 of the Act there are specific administrative requirements that religious denominations have to fulfil in order to be recognised as a religious denomination that solemnises same-sex marriages.

(b) The social and legal changes relating to sexual orientation affected Christian religious denominations who have had to face challenges related to their core doctrinal beliefs around the area concerning the theology of marriage and same-sex marriage. In order to determine this issue religious denominations have had to consider whether there are less restrictive means to achieve their purpose with regard to the injunction against same-sex marriage.

- (i) The legal and social changes regarding sexual orientation and same-sex marriage have impacted Christian religious denominations in South Africa

A key issue of conflict was around whether Christian religious denominations' implementation of an injunction against same-sex marriage and the refusal to marry these couples resulted in unfairly discriminating against them on the grounds of sexual orientation. The consideration around whether there are less restrictive means to achieve their purpose led to religious denominations taking the standpoint that if their LGBTQI+ members are not able to adhere to their doctrinal beliefs and practices then they should leave the church and find another church which will accommodate their beliefs.⁹

- (ii) Some Christian religious denominations consider homosexuality a sin therefore by association same-sex marriage is considered in the same way.

Some Christian religious denominations who do not allow same-sex marriages justify their position by arguing that they have a right to religious freedom and religious liberty which allows them to practice their religion as they see fit, and, that the Bible is their true north in

Saez 'Transforming family law through same-sex marriage: Lessons from (and to) the Western World' (2014) 25 *Duke Journal of Comparative and International Law* 125-196.

⁹ *Gaum and Others v Van Rensburg NO and Others* [2019] 2 All SA 722 (GP).

terms of their doctrinal beliefs which are in accordance with biblical texts. According to their arguments, the Bible defines marriage in Genesis 2:24 as “a union between one man and one woman” which is a heteronormative institution excluding same-sex couples. Biblical texts which are often cited by Christian religious denominations condemning homosexuality are Leviticus 18:22, Leviticus 20:13, 1 Corinthians 6:9-10, 1 Timothy 1:10 and Romans 1:26-27.¹⁰ These biblical scriptures have no express reference to same-sex marriage, instead, it is implied that since homosexuality is a sin and an abomination in the eyes of God, same-sex marriage would fall into the same category.

With Christian religious denominations facing this issue, churches have responded in different ways creating a spectrum of different approaches concerning same-sex marriage. The spectrum of approaches ranges from acceptance of same-sex marriage in category one churches to outright rejection by category three churches, while category two churches are in the process of change.¹¹ Alternative churches such as the Reforming Church, the Hope and Unity Metropolitan Community Church, the Gay Christian Community, and the Deo Gloria Family Church to name but a few, focus on the LGBTQI+ community and their religious needs so are accepting of same-sex marriage. The spectrum of approaches are argued on the basis of different biblical scriptures dependent on whether you are accepting of same-sex marriage and homosexuality or are against same-sex marriage and homosexuality. As there is no solution to this issue through advocacy, litigation seems to be the most appropriate way in which to resolve this issue as the legal issues are at times complex. For instance, the doctrine of entanglement allows secular courts to distance themselves where they do not have to involve themselves in the internal disputes of religious denominations or interfere in their doctrinal beliefs. The effect of this is that courts are reluctant to interfere in disputes around the internal doctrinal beliefs of the religious denominations since evaluating doctrinal beliefs is mainly subjective.¹²

- (iii) Some Christian religious denominations are accepting of homosexuality and same-sex marriage.

Some Christian religious denominations that are accepting of same-sex marriage argue for equality on the basis of sexual orientation and justify their position by relying on biblical scriptures of love and acceptance (referred to in legal terms as dignity and worth). There are

¹⁰ See Chapter 2.

¹¹ See Table 1 in Chapter 2 and Table 2 in Chapter 6.

¹² See *De Lange v Presiding Bishop of the Methodist Church of Southern Africa and Another* 2016 (2) SA 1 (CC) at para [79] and, *Gaum and Others v Van Rensburg NO* supra (n9) at paras [26]-[29].

many biblical texts affirming God's love for LGBTQI+ people which include amongst others Genesis 1:26-27, Galatians 3:28, Psalm 139:13-14, Isaiah 56:4-5, Isaiah 43:1, Matthew 22:37-40 and 1 John 4:7-8. These biblical scriptures speak to inclusivity of the LGBTQI+ community.

(c) As a result of the problem relating to the theology of marriage and same-sex marriage, there has been some change resulting from this new context within Christian religious denominations. Some religious denominations (category one) have accepted same-sex marriage and are seen as the most progressive churches.¹³ Category two religious denominations are deemed progressive since they are fully accepting of their LGBTQI+ members but they do not perform same-sex marriage.¹⁴ Category three religious denominations are deemed the least progressive since their LGBTQI+ members are not fully accepted into the church and, they do not accept or perform same-sex marriage.

(i) Different biblical scriptures have led to debates and activism around the injunction against same-sex marriage and the refusal of some Christian religious denominations marrying these couples.

The difference in the understanding of different biblical scriptures relating to texts against homosexuality and texts about love have led to legal conflicts relating to whether LGBTQI+ members of Christian religious denomination may marry in the church or not.

(ii) Currently Christian religious denominations have a spectrum of approaches concerning same-sex marriage.

The study found that Christian religious denominations in South Africa¹⁵ are at different stages of grappling with these issues. In terms of the approach of these churches, this study has divided them into three categories being: category 1 – most progressive in terms of the acceptance of same sex marriage (an example is the Dutch Reformed Church); category 2 – progressive in terms of the acceptance of same-sex marriage in that they are accepting of homosexuality but unaccepting of same-sex marriage (an example is the Methodist Church) and; category 3 – least

¹³ *Gaum and Others v Van Rensburg NO* supra (n9).

¹⁴ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* supra (n12).

¹⁵ See Table 1 in Chapter 1.

progressive in terms of the acceptance of same-sex marriage in that they are unaccepting of homosexuality and same-sex marriage (an example is the Seventh-Day Adventist Church).

(d) If litigation has to be resorted to there is a range of potential litigation strategies

- (i) There are different litigation strategies available for complainants who wish to take their unfair discrimination matters to the courts.

Despite various forms of litigation against Christian religious denominations, to date, only the *Gaum*¹⁶ case has been successfully litigated in terms of a religious denomination being challenged on a policy decision concerning an injunction against same-sex marriage. As the *Gaum* case fell under the auspices of a category 1 religious denomination, the courts have indicated that if a church has reneged on a decision it has already made, the “decision does not entail public accountability but a decision based on an interpretative theological decision.”¹⁷ Therefore, it is not an administrative action in terms of PAJA but it is in terms of a theological debate concerning the Church’s order.¹⁸ Instead the court indicated that the substantive grounds in terms of section 9 of the Constitution was the “necessary enquiry when there is an averred infringement of section 9.”¹⁹

Category 2 religious denominations may use alternative dispute resolution because it is a way of resolving the issue privately between the parties but its limitation is that it is available only to ordained ministers who have breached the rules and policies of the church.²⁰ However, it is a way in which religious denominations can resolve the issue privately and without splitting the church community. It is also a less formal way of dealing with the issues at hand. Arbitration may very well work, however, it may not always work considering that arbitration obliges the complainant to submit themselves to the entire process which means that you are bound to the process until completion even if the process is deemed biased. Alternate dispute resolution may also take too long to resolve the issues at hand. Consideration also has to be had of the fact that religious denominations will have the power to determine the terms of reference of an arbitration²¹ which may be seen as advantageous to the religious denomination

¹⁶ *Gaum and Others v Van Rensburg NO* supra (n9).

¹⁷ *Gaum and Others v Van Rensburg NO* supra (n9) at para [44].

¹⁸ *Gaum and Others v Van Rensburg NO* supra (n9) at para [44].

¹⁹ *Gaum and Others v Van Rensburg NO* supra (n9) at para [44].

²⁰ *De Lange v Presiding Bishop of the Methodist Church* supra (n12).

²¹ *De Lange v Presiding Bishop of the Methodist Church* supra (n12) at paras [8]-[9].

but disadvantageous to the applicant. The reason is that religious denominations wield a large amount of power²² and this power could be used to dominate the arbitration process. Another way to resolve the dispute internally will be through other alternative resolutions such as having discussions with affected parties or prayer meetings. This however may not work or solve the problem considering that some religious denominations have been in discussion around the theology of marriage for many years with no solution in sight.²³

If this is the case, then litigating in court may be the only other alternative. Going this route at some point may result in adversarialism, with one party being vindicated and the other not. If the church loses its case by not discharging its onus of proof, the decision of the court may split the congregation. Litigating the matter in terms of PEPUDA in the Equality Court will not prevent adversarialism between the parties, but following this route will be adhering to the doctrine of constitutional subsidiarity.²⁴ The Equality Court is also seen as a less formal court and is not as intimidating for litigants.²⁵ Furthermore, PEPUDA is specifically designed to address the clash between private parties when determining a case of unfair discrimination based on sexual orientation. However, complainants need to consider the fact that the doctrine of entanglement allows secular courts to distance themselves where they do not have to involve themselves in the internal disputes of religious denominations or interfere in their doctrinal beliefs. The effect of this is that courts are reluctant to interfere in disputes around the internal doctrinal beliefs of the religious denominations since evaluating doctrinal beliefs is mainly subjective.²⁶

(ii) Factors the court will consider in an unfairness assessment in terms of PEPUDA.

In cases brought by ordained ministers or congregants, the Equality Court will look at factors such as (i) historical context; (ii) harm in terms of whether the discrimination impairs or is

²² D Bilchitz 'Should religious associations be allowed to discriminate' (2011) 27(2) *South African Journal on Human Rights* 219-248.

²³ *De Lange v Presiding Bishop of the Methodist Church* supra (n12).

²⁴ The doctrine of constitutional subsidiarity and the adherence of it was mentioned in both the *De Lange* and *Gaum* cases.

²⁵ 'Equality Courts' *Legal Aid South Africa* [n.d.], available at <https://legal-aid.co.za/2018/09/26/equality-courts/> accessed on 26 May 2022.

²⁶ See *De Lange v Presiding Bishop of the Methodist Church* supra (n12) at para [79] and, *Gaum and Others v Van Rensburg NO* supra (n9) at paras [26]-[29].

likely to impair human dignity; (iii) the impact of the of the discrimination on the complainant; and (iv) centrality of belief.²⁷

As ordained ministers (in this context belonging to the LGBTQI+ community within the Church) are not employees, they have a unique relationship with the church (*sui generis*) as their positions within the church is a calling from God. This calling from God translates into a relationship between them, the church and God. Their positions within the church are intimately interwoven, meaning that they are bound by the church's rules and disciplines which they cannot contravene as they must follow these rules and disciplines within their congregations.²⁸ Contravening these rules and disciplines may result in an internal disciplinary procedure which is stipulated within their constitutions or Book of Orders.²⁹ An alternative dispute resolution in the form of an arbitration stipulated by the rules and policies of religious denominations will be then followed. If the ordained minister has submitted him/herself to the entire process of arbitration and is found guilty they may then take their matter to the courts to be reviewed. The process of review may be covered by PEPUDA which offers protection against unfair discrimination directed towards them by the church. As arbitration is only open to ordained ministers of the religious denomination, LGBTQI+ lay congregants will not have this option available to them but will have to rely on litigation.

The Equality court will also consider the justifications that the religious denomination will advance such as (i) the legitimacy of the discrimination and (ii) the extent to which reasonable steps were taken by the church in the circumstances.

(iii) The likely remedies that the court will apply in accordance with PEPUDA.

In terms of PEPUDA, the remedies are remedial and transformative which can allow religious denominations time to review their policies, rules and practices around the issue of same-sex marriage, which may motivate change. Remedies in terms of PEPUDA in a situation such as an injunction against same-sex marriage and the refusal to marry same-sex couples will not interfere with the core doctrinal beliefs of the church but will send a message that diversity and

²⁷ See Chapter 6.

²⁸ *De Lange v Presiding Bishop of the Methodist Church* supra (n12); *Gaum and Others v Van Rensburg NO* supra (n9).

²⁹ *De Lange v Presiding Bishop of the Methodist Church* supra (n12). It is submitted that in most cases private bodies may institute arbitration procedures as part of the process of a disciplinary procedure or any dispute which deals with the internal doctrinal beliefs of the church.

inclusivity needs to be considered in this issue. Remedies without criminal sanctions attached to them would be more acceptable to religious denominations as criminal sanctions may interfere with the core doctrinal beliefs of the church.

Therefore, the Equality Court is the most appropriate forum for resolving disputes between religious denominations and their LGBTQI+ congregants.

(iii) Courts have narrowed the scope of the right to religious freedom and religious liberty.

Freedom of religion is a constitutional right which is guaranteed within our Constitution and features prominently in our Bill of rights although not as extensively as the right to equality. The importance of the right to religious freedom in South Africa is because the country is predominantly a Christian country with 86% of South Africans identifying as being believers in God.³⁰ Section 9 of the Constitution protects the freedom of religion by prohibiting unfair discrimination based on religious grounds. Religious denominations consider freedom of religion as an important concept in the way they function. Freedom of religion means that a religious denomination can confess its beliefs in terms of it being part of the image of the kingdom of God, which allows it to pastor, lead and teach its congregations in a way that imparts the message that God gives through his word to the church.³¹

An injunction against same-sex marriage and the refusal to marry same-sex couples is decided upon by Christian religious denominations in line with their core doctrinal beliefs around the theology of marriage. Religious freedom allows religious denominations to believe and practice what they think is right for them and their community of believers. Religious liberty therefore allows the church to govern and interpret their practices and decisions concerning their doctrinal beliefs the way that they see fit. In so doing, their practices and beliefs cannot be such that they violate the rights of their LGBTQI+ members. Courts have however narrowed the scope of religious freedom and liberty.³² The Court has accepted that religious practices can be exempt but the exemption is not automatic. Exemptions will be granted if based on

³⁰ Statistics South Africa 'General Household Survey 2015' available at <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> accessed on 20 November 2022. The data found in this survey was the latest data highlighting the percentage distribution of religious affiliations by province. Religious affiliations were not recorded in the General Household Surveys from 2016-2022.

³¹ J Witte *Religion and the American Constitutional Experiment. Essential Rights and Liberties* (1999).

³² *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Dlamini v Green Four Security* 2006 (27) ILJ 2098 (LC); *Department of Correctional Services & Another v Police and Prisons Civil Rights Union (POPCRU) and Others* (SCA) Supra (n342).

reasonableness and practicalities. Exemptions will not be granted if there is evidence that a religious practice has harmful effects attached to it. In cases where religious denominations refuse to marry same-sex couples the court will need to balance the right to equality and the right to religious freedom proportionately in order to limit the right that is harmful. Beliefs and practices such as the refusal to marry same-sex couples can be limited if the Court finds evidential proof that those practices are harmful to LGBTQI+ members who wish to marry within the church. An exemption will not be granted if the practice is harmful and will be deemed to be unfair discrimination based on sexual orientation. As much as there is harm to religious denominations when their right to religious freedom and religious liberty is limited, the Church cannot be allowed to unfairly discriminate by hiding behind the shield of religious beliefs. This is despite the fact that they may justify their harmful behaviour in terms of it having a legitimate purpose in terms of their core doctrinal beliefs.

(v) Equality is a fundamental right in South Africa.

The importance of equality is evidenced by the fact that there is a constitutional and legislative framework in place that prohibits unfair discrimination based on any of the listed prohibited grounds. For constitutional democracy to work optimally, the Constitution recognises that inequality needs to be addressed. Section 9 of the Constitution recognises that equality is a fundamental component for transformative constitutionalism, which eliminates past historical barriers in order that all in society have equal rights.³³ Equality is a justiciable right and a foundational value which supports constitutional democracy. It is against this background, that courts must proportionally balance the competing rights of equality and freedom of religion within the context of an injunction against same-sex marriage and the refusal of some Christian religious denominations to marry same-sex couples. Although equality is a fundamental right within South Africa, it will not necessarily trump other rights. For purposes of this thesis it is argued that a strong presumption in favour of equality needs to be considered as South Africa's history of apartheid was based on inequality and discrimination which was felt throughout society³⁴ especially amongst the LGBTQI+ community.³⁵

³³ S Jagwanth 'Expanding equality' 2005 *Acta Juridica* 131-148.

³⁴ I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) at 212.

³⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (9 October 1998). See also E Cameron 'Unapprehended felons: Gays and lesbians and the law in South Africa' in M Gevisser and E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (1995) 91 citing *S v V* 1967 (2) SA 17 (E) (holding masturbation between men was still a crime). Sodomy prosecutions and convictions increased dramatically for

This thesis finds:

- (i) A constitutional challenge may not be successful considering the reliance of secular courts on the doctrine of entanglement when the matter concerns the inner workings of the church.³⁶
- (ii) If a religious denomination reneges on a decision that they have already made regarding same-sex marriage, the court will not look at the procedural issues in terms of PAJA because the decision does not entail public accountability but instead on an interpretative theological decision.³⁷
- (iii) As category two religious denominations are already in discussion around the theology of marriage and same-sex marriage, a complainant may be successful using PEPUDA and the Equality Court.
- (iv) Category three religious denominations, being conservative churches, may have a low prospect of success regardless of the forum in which the matter is heard.
- (v) Depending on their *sui generis* agreement with the church, ordained ministers may have to use alternative dispute resolution in the form of arbitration first before litigating their matter in a court.
- (vi) If complainants are relying on PEPUDA, the key factors that the Equality court will look at in terms of section 14 of the Act would be (i) historical context, (ii) harm in terms of whether the discrimination impairs or is likely to impair human dignity, (iii) the impact of the of the discrimination on the complainant, and (iv) centrality of belief. The Equality Court will also look at the impact that the religious denomination will suffer if they are forced to change their doctrinal beliefs. The court will consider key factors in terms of the religious denomination's justification in terms of (i) the legitimacy of the discrimination and (ii) the extent to which reasonable steps were taken by the church in the circumstances.
- (vi) As litigation seems to be the only option open since advocacy is not a solution, the possible outcomes of a matter such as this is dependent on how the court will resolve

example in 1992 there were 428 prosecutions and 283 convictions and "unnatural sexual offences" also increased for example in 1992 there were 26 prosecutions and 24 convictions. See K Botha and E Cameron 'Sexual privacy and the law' (1993) 4 *South African Human Rights Yearbook* 219, 224.

³⁶ *De Lange v Presiding Bishop of the Methodist Church* supra (n12).

³⁷ *Gaum and Others v Van Rensburg NO* supra (n9).

the complexity of the legal issues which will include considering the various factors listed in section 14 of the Act for both the complainant and the respondent. The Equality court will also have to consider the justifications of the respondent in terms of whether the discrimination is legitimate, and, what steps were taken to remedy the problem. Consideration will also have to be given to whether the respondent's right to religious freedom and religious liberty are infringing the constitutional rights of its congregants and causing harm to its LGBTQI+ members. On this basis, the Equality court will have to consider whether the harm felt by the LGBTQI+ members of the church is weighted heavier than the harm felt by the respondent. In assessing the above, the Equality court will also have to consider equality which is a fundamental component for transformative constitutionalism. This however does not mean that equality will always trump another right. Equality will have to be weighed against religious freedom in order to determine which right weighs more. Once the above assessment is completed the Equality court considers remedies that are remedial and transformative in order to preserve the autonomy of the church in terms of its core doctrinal beliefs.

Conclusion

On the basis of the findings above, this study concludes that:

- (i) Christian religious denominations' implementation of an injunction against same-sex marriage and the refusal to marry same-sex couples could be found to be a form of unfair discrimination and contrary to constitutional principles.**

The majority of Christian religious denominations hold the view that the implementation of an injunction against same-sex marriage and the refusal to solemnise these marriages is acceptable. The outcome of this decision could negatively affect LGBTQI+ members either psychologically or physically because their equality rights are being ignored in favour of religious liberty and freedom of religion. If religious liberty extends to the point where it is harmful to congregants in any way it can be limited. Any challenges arising out of this situation will see courts having to proportionally balance the competing rights of equality and freedom of religion of the private parties. Courts will have to consider whether limiting religious liberty because of its harmful effects is reasonable and justifiable, taking into account the Christian religious denomination's doctrinal beliefs and religious freedom. In situations such as this, the

refusal to marry same-sex couples could be found to be unfair discrimination based on sexual orientation as the right to religious freedom is weighing heavier than the right to equality. Furthermore, if the practice of religious liberty is violating the fundamental rights of LGBTQI+ members of religious denominations and causing harm, the court will limit that practice to prevent any further negative implications. Thus, Christian religious denominations need to be aware that they cannot unfairly discriminate by using their beliefs and practices as a shield. In saying that, the injunction against same-sex marriage and the refusal to marry these couples by some Christian religious denominations cannot be justified as it is violating the fundamental right of equality and causing harm. The possibility of the courts exempting these religious denominations from unfairly discriminating against their LGBTQI+ members is slim.

(ii) The Equality Court is the appropriate forum in which to bring a claim of unfair discrimination based on an injunction against same-sex marriage.

This thesis finds that PEPUDA is the most appropriate way in which to take this issue further. The justification for this is that PEPUDA is able to determine unfair discrimination issues as they arise within religious denominations as it allows any person to challenge an unfair discrimination claim. The two-stage process is sufficient in order to determine whether there is discrimination and whether that discrimination is unfair. This is taking into consideration the fact that it is reasonably uncomplicated to determine whether the discrimination is unfair. It is submitted that PEPUDA is an effective tool in addressing religious unfair discrimination.

7.4 RECOMMENDATIONS

Based on the findings and conclusions above, the following is proposed:

(i) Litigants should consider using the Promotion of Equality and Prevention of Unfair discrimination Act (PEPUDA) in addressing religious unfair discrimination rather than challenging the matter in terms of section 9 of the Constitution.

Claims concerning alleged unfair discrimination against Christian religious denominations should be heard in terms of PEPUDA. The Equality Courts can be used in this instance as a

tool to achieve impact litigation by initiating advocacy and lobbying.³⁸ It can also deal with matters holistically by promoting equality and eradicating unfair discrimination. The remedies in terms of PEPUDA are not punitive but remedial, which will be more acceptable to Christian religious denominations. Corrective remedies will still respect the doctrinal beliefs and autonomy of the church since the aim is not to change doctrinal beliefs. It will also give Christian religious denominations an opportunity to revisit their policies and practices regarding their stance on the acceptance of diversity and inclusivity.

7.5 CONCLUSION

Historically, religion has been important in South Africa and has influenced many aspects of South African history. From apartheid to the prohibition of same-sex relationships, religion has always featured prominently in our past. Heteronormative family life has historically been viewed as the cornerstone within society. With South Africa's history of apartheid, the enactment of our Constitution focussed on equality for all, which became an important factor in the lives of South Africans.

South Africa developed a well-established legal framework that deals with the prohibition of unfair discrimination. Well-developed procedures and remedies are in place to deal with unfair discrimination and inequality by limiting conflicting rights proportionally and balancing them so that justice is done.

Since equality is vital in South Africa, religious denominations' doctrinal beliefs in the form of policies, practices, and rules must be balanced against the constitutional rights within these legal frameworks. This is so that parties involved in any disputes are not further discriminated against so that the Church's autonomy takes precedence over everything else. Religious denominations must adhere to constitutional provisions. We have reached a place in our democracy where religious denominations can no longer hide behind their doctrinal beliefs to perpetuate behaviour that unfairly discriminates against their LGBTQI+ congregants.

Sex and sexuality combined with religion have always been a sensitive issue. The church worldwide is facing the same complex issues concerning same-sex marriage. If Christian

³⁸ TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1) *Agenda* 36-48.

religious denominations genuinely believe that human rights are important, their actions must display this by actively participating in the conversation between themselves and affected stakeholders around the theology of marriage. This will give the church an opportunity to review their policies, practices, and rules. True equality will be observed when heteronormativity and homosexuality are dealt with in a way that shows that all are equal. The LGBTQI+ congregants within Christian religious denominations cannot be partially recognised and refused the right to marry their same-sex partners by the implementation of an injunction against same-sex marriage. As discussed in this thesis, the biblical injunction against same-sex marriage by some Christian religious denominations is unacceptable and deemed unfair discrimination as it infringes the constitutional rights of its LGBTQI+ members.

Christian religious denominations need to actively observe constitutional principles by accepting diversity and treating their LGBTQI+ congregants the same way they do their heterosexual congregants. Christian religious denominations can no longer be part of constituting further discrimination by holding that heteronormativity is acceptable by marginalising and othering those who do not conform.

Unless category two and category three religious denominations change their stance on the injunction against same-sex marriage and the refusal to marry these couples, discrimination will continue because they are unwilling to accommodate or accept diversity. It is up to our judicial system to determine whether matters that come before it concerning this issue are dealt with sensitively and appropriately. When a religious denomination loses sight of the diversity of family and people, it loses sight of its priority to care on a pastoral level. A strong presumption in favour of equality needs to be considered when faced with a complex issue concerning the conflicting rights of equality and religious freedom.

The hypothesis of this thesis has established that the right not to be discriminated against unfairly on the prohibited ground of sexual orientation does outweigh the right to religious freedom. This was evidenced by the fact that an injunction against same-sex marriage violates the right to equality which LGBTQI+ congregants have a right to. Our Constitution has recognised that equality is essential in addressing the imbalances of the past thus, religious denominations advancing inequality by enforcing an injunction against same-sex marriage is contrary to our constitutional order. A strong presumption in favour of equality must therefore be considered because of South Africa's history of apartheid which was based on inequality and discrimination which was felt throughout society and especially amongst the LGBTQI+

community. This thesis further established that in examining these conflicting rights our courts need to approach the issue sensitively by considering transformative remedies without criminal sanctions. The Equality court was thus deemed the most appropriate forum for resolving disputes between religious denominations and their LGBTQI+ congregants. The transformative remedies which the court will consider are potentially available in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Transformative remedies are in principle more acceptable to religious denominations as they refrain from interfering with the core doctrinal beliefs of the church but also allow these religious denominations the time to review their policies and motivate for change.

Finally, in the words of Scanzoni

“I suggest that, as people of faith, we approach the question of gay rights and same-sex marriage from the vantage point of these three principles: justice, loving kindness and humility”.³⁹

³⁹ LD Scanzoni ‘There is more than one view on homosexuality’ *Christian Feminism Today* 2013, available at <https://eewc.com/one-christian-view-homosexuality/> accessed on 19 May 2022.

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s 36(1)

s 37

s 39(1)

s 39(1)(a)

s 39(2)

s 170

s 172(1)(a)

s 172(1)(b)

s 173

ch 2

National Discussion Papers and Reports

South African Law Reform Commission *Discussion Paper 104 (Project 118) 2003 Domestic Partnerships* (2003).

South African Law Reform Commission *Report on Domestic Partnerships* (Project 118) (2006).

South African Law Reform Commission 'Issue Paper 17 (Questionnaire)' (Project 118) *Domestic Partnerships* (2001).

Conventions

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

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Convention on the Rights of the Child (CRC)

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

International Covenant on Civil and Political Rights (ICCPR) 1976

Universal Declaration of Human Rights (UDHR) of 1948

International Papers Given at Conferences

Pityana, B 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000'. Joan Church lecture, Unisa Faculty of Law, 15 October 2002.

Other

South African Charter of Religious Rights and Freedoms As amended 6 August 2009 and signed 21 October 210 at the University of Johannesburg.

Ms Juanita Anne Easthorpe (201502506)
School Of Law
Pietermaritzburg

Dear Ms Juanita Anne Easthorpe,

Protocol reference number: 00013868

Project title: Religion and the law: Exploring the boundaries between the right to equality based on sexual orientation and religious freedom

Exemption from Ethics Review

In response to your application received on 9 September 2021, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>