DISCUSSION PAPER

THE INTERACTION BETWEEN THE RIGHT TO EQUALITY AND FREEDOM OF RELIGION IN SOUTH AFRICA

Exploring the Constitutionality of Section 6 of the Civil Union Act 17 of 2006

LRC
Legal Resources Centre

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THE INTERACTION BETWEEN THE RIGHT TO EQUALITY AND FREEDOM OF RELIGION IN SOUTH AFRICA:

Exploring the Constitutionality of Section 6 of the Civil Union Act 17 of 2006

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1. PREFACE

Over the years, Free Gender has received numerous complaints from same-sex couples who have experienced difficulties when seeking to conclude same-sex marriages at The Department of Home Affairs (DHA). This has been mostly because of the implementation of section 6 the Civil Union Act 17 of 2006 (Civil Union Act) by the DHA. This section enables designated marriage officers also employed as Home Affairs Officials to refuse to conclude same-sex unions at Home Affairs offices because the two people involved in the union are of the same sex.

Motivated by the need to ensure that the historic discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons in South Africa does not continue to marginalise and violate their constitutional rights, the Legal Resources Centre and Free Gender developed and implemented a project that focuses on addressing such discrimination. The two organisations sought to jointly utilise their expertise in ensuring that the values and rights enshrined in the Constitution are reflected in both the enacted laws and the lived realities of LGBTI persons in South Africa.

While the project may impact on other areas of discrimination against LGBTI persons, the project is predominantly focused on the Civil Union Act as the law that enables same-sex couples to marry. While the Civil Union Act poses other challenges for same-sex marriages, the two organisations focused directly on the provision that allows non-religious marriage officers to conscientiously object to solemnising such marriages because the two persons involved are same-sex couples.

Introduction to the Organisations:

a. Free Gender

Free Gender is a black, lesbian, community-based organisation in Khayelitsha, a township in Cape Town. The organisation was founded in 2008 and has since participated in various protests, political meetings, and guest talks at academic and public forums. Free Gender has also supported different stakeholders whose common objectives are relevant to its mandate. Within this context Free Gender aims to:

- Develop programmes and activities in communities that challenge stigma, exclusion and discrimination based on sexual identities and gender expressions;
- Facilitate acceptance, inclusion and representation for lesbian individuals in public forums;
- Raise awareness in order for lesbian persons to be aware of their rights, informed about tools and resources of redress, and to educate peers and the broader community;
- Build strong social networks for lesbian individuals who are evicted from their homes;

- Provide space to bridge the gap between lesbian women and their parents;
- Raise awareness around gender issues within Butch and Femme identities; and
- Develop capacities and skills around organisational management and leadership through networking and partnerships with service providers.

In its work, Free Gender hopes that communities are non-discriminatory, accepting and tolerant of all gender variants, and that there is a space for LGBTI persons to be open about their identity without fear of prejudice, stigma and violence. As human rights defenders, Free Gender is gender inclusive, as its work includes transgender and intersex persons in the community.

For more information visit: https://freegender.wordpress.com/

b. Legal Resources Centre

The Legal Resources Centre (LRC) is a public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has, since its inception, shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument for justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality; oppose all forms of unfair discrimination; and to contribute to the development of human rights jurisprudence, as well as the social and economic transformation of society.

The LRC, through its Equality and Non-Discrimination project, focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. These include using a range of strategies such as impact litigation, law reform initiatives, participation in development processes, education, and networking in and outside of South Africa. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons, including sexual minorities, women, children, refugees and sex workers, as being integral to the pursuit of social justice.

For more information on the LRC visit: www.lrc.org.za

Purpose of the Discussion Paper

This paper aims to provide guidance on the legal framework relating to the interaction between the right to equality and the right to freedom of religion in South Africa. As this is an issue that generally needs further exploration, this discussion is currently necessary, given the provisions of section 5 and section 6 of the Civil Union Act (although this paper focuses on section 6 only), the current private member bill that was introduced to the National Assembly on 15 May 2018, the Civil Union Amendment Bill, and other areas of the law where these two rights interact.

The paper seeks to provide some guiding and useful insights on the following:

- The practical challenges posed by section 6 of the Civil Union Act;
- The normative content and application of the right to equality and other related rights, including the right to dignity and right to be different;
- The normative content and application of freedom of religion;
- How these rights interact, and when and how they need to be balanced; and
- International and foreign laws as an informing tool for the discussion.

The information provided in this paper can be useful to any legal or non-legal persons working on the implementation of the Civil Union Act or any areas of the law where equality and religion apply. This paper is written for lawyers, advocacy persons, activists, politicians, members of parliament, and any other person who may be researching or writing on religious exemptions. Additionally, and more specifically, we seek to have this paper provide a guide to those who may be making submissions to the South African Parliament on the Civil Union Amendment Bill, which was recently introduced to the National Assembly, and which seeks to repeal section 6 of the Civil Union Act.

2. ACKNOWLEDGEMENTS

We wish to express our sincere gratitude to the couples who took time to speak to members of Free Gender and Dr Zethu Matebeni, on behalf of Free Gender, about their experiences relating to the solemnisation of their same-sex marriages. We sincerely value your commitment to challenge unfair discrimination and contribute to the fight for the realisation of the rights of LGBTI persons, specifically in seeking to conclude a marriage. We fight with you and for you, until the promise envisaged in section 9 of the Constitution is made real to you in your daily lives.

We are very grateful to the **Other Foundation** for their generous financial support. Without your support, this discussion paper and all the other work we have done in relation to the Civil Union Act would not have been possible.

We also wish to thank all those who have worked on this project as well as this paper, namely: Funeka Soldaat, members of Free Gender, and those who worked as research assistants for this project, Dr Zethu Matebeni, Charlene May, Bongiwe Gumede, Dana Blech, Dominique Herbig, Nasreen Solomons and Petra Marais.

Last but not least, we wish to thank both our organisations, Free Gender and the LRC, for the continued support in pursuing equality specifically for LGBTI persons, and ensuring that their constitutional rights are respected and realised.

3. INTRODUCTION

The Constitution of the Republic of South Africa, 1996, is founded on the core values of equality and dignity. Specifically, section 9 of the Constitution provides that no one may be discriminated against on the grounds of race, sex, sexual-orientation, marital status, and religion and culture; among other grounds. Notably, South Africa was the first country in the world to include a constitutional prohibition on sexual-orientation discrimination in pursuit of the constitutional values of equality, dignity and freedom.[1] It has been the continuous task of the legislature and courts to ensure that the laws and practices of South Africa embrace these values.

It was due to the need to pursue equality in marriage that a constitutional challenge to the Marriage Act, 25 of 1961 (Marriage Act) was brought in the case of *Minister of Home Affairs and another v Fourie and another*.[2] It was argued that the Marriage Act discriminated against same-sex couples because it only permitted heterosexual couples to get married and to enjoy the benefits attached to the institution of marriage. The Constitutional Court found that the Marriage Act indeed unfairly discriminated against same-sex couples and ordered Parliament to remedy the defect within one year in order to allow same-sex couples to enter into marriages with all the resultant status, benefits and responsibilities.[3]

Although Parliament decided against amending the Marriage Act, they did remedy the defect by enacting the Civil Union Act, 17 of 2006, which came into effect in December 2006. This marked South Africa as the fifth country in the world to allow same-sex couples to legally marry.[4] The Civil Union Act, as will be discussed in more detail below, allows both same-sex and heterosexual couples to enter into civil unions and refer to it as either a civil partnership or, if the couple so desires, a marriage.[5] On the face of it, the Civil Union Act has addressed the unfair discrimination towards same-sex couples who were previously unable to legally marry in South Africa.

However, there are challenges posed by certain provisions of the Civil Union Act, and its implementation, which continue to negatively impact on same-sex couples seeking to marry. This paper will focus on the challenge posed by section 6 of the Civil Union Act, which permits non-religious civil marriage officers to conscientiously object to solemnising same-sex marriages on the grounds of conscience, religion and belief. Ultimately, these challenges continue to perpetuate

1 Helen Kruuse 'Conscientious Objection to Performing Same-Sex Marriage in South Africa' (2014) 28 *International Journal of Law, Policy and The Family* 153.

2 2006 (3) BCLR 355 (CC).

3 Ibid para 139.

4 Clare Nullis 'Same-Sex Marriage Law Takes Effect in S. Africa' *Washington Post* 1 December 2006.

5 Section 1, Act 17 of 2006.

inequalities in marriage in South Africa. We submit that section 6 of the Civil Union Act detracts from both the pursuit of equality and dignity envisaged by the Constitution, and the quality of the protection provided to same-sex couples.[6]

Further, this discussion paper will discuss the nature of the provisions of section 6 of the Civil Union Act, the rights to religion and equality, how and when such rights should be balanced, as well as the application of conscientious objection and reasonable accommodation of religious beliefs in the context of promoting equality. These issues will be analysed with reference to both local and foreign jurisprudence. Through this analysis, it will be shown that section 6 is, in fact, arbitrary, discriminatory, and will not stand up to a constitutional challenge. We will also briefly analyse the current proposed amendment to the Civil Union Act in Parliament and conclude that the proposed amendment should be adopted in order to bring the Civil Union Act in line with the Constitution.

6 N Ntlama 'A Brief Overview of the Civil Union Act' (2010) 13 P.E.R 191.

4. THE CIVIL UNION ACT AND ITS PRACTICAL IMPLEMENTATION

As already stated, the Constitutional Court of South Africa in *Fourie* ruled that the existing common law definition of marriage was inconsistent with the Constitution, following an application by a same-sex couple seeking to be allowed to marry. The common law definition designated a marriage as a union between one man and one woman to the exclusion of all others, and it was on this basis that the Marriage Act[7] was adopted and interpreted. This was a definition which was found to discriminate unfairly against same-sex couples on the basis of their sexual orientation.[8] In the December 2005 judgment delivered by the Constitutional Court, Justice Albie Sachs wrote:

> *"The exclusion of same-sex couples from the benefits and responsibilities of marriage…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."*[9]

The Court decided to suspend the declaration of invalidity for twelve months in order to allow Parliament to correct the defect and create an option that would allow same-sex couples to enter into legal marriages, with all the benefits and responsibilities attached thereto. As such, on 30 November 2006, South Africa became the first country in Africa and the fifth country in the world to enact a law which would "confer legal protection and marriage benefits on partners in same-sex relationships"[10] in the form of the Civil Union Act.[11]

The Civil Union Act was enacted to legitimise marriages concluded between same-sex couples in South Africa, and provide them with equal recognition and benefits before the law. The objective of the Civil Union Act is to provide for the solemnisation of civil unions, by way of either a civil marriage or a civil partnership, and to regulate the legal consequences and incidental matters of such marriages or partnerships. The preamble also clarifies its purpose in noting

7 25 of 1961.

8 *Fourie* para 76.

9 Ibid para 71.

10 Op cit note 6 at 191.

11 17 of 2006.

"that the family law dispensation as it existed after the commencement of the Constitution did not allow same-sex couples to enjoy the status, rights and responsibilities that marriage accords to opposite-sex couples."[12]

While the recognition of same-sex marriages as legal marriages is remarkable, in reality the Civil Union Act has some serious limitations, most notably the conscientious objection clause in section 6. The clause allows non-religious civil marriage officers to conscientiously object to performing same-sex unions because of the sexual orientation of those seeking to marry. Section 6 does not offer any measure that must be taken when a marriage officer (as envisaged) objects to concluding a same-sex civil union. Further, there is no built-in test for establishing whether the views held are sincere or not, or whether they are actually informed by homophobic or prejudicial views on same-sex marriages and couples. This leaves same-sex couples vulnerable when seeking to conclude same-sex marriages, as will be explained in this paper.

The Civil Union Act relies on the two categories of marriage officers as originally provided for in the Marriage Act. The first category of marriage officer comprises of *ex officio* marriage officers and designated persons in service of the state as marriage officers, which includes every magistrate and every special justice of the peace, as well as those in the public service who have been so designated (also referred to as "civil marriage officers" as they are employed in a non-religious capacity, and by virtue of the office or position they hold in service of the state).[13] The second designation is for ministers of religion and persons attached to churches ("religious marriage officers").[14] Like the Civil Union Act, the Marriage Act also makes provision for a conscientious objection clause in section 31, but only as it relates to religious marriage officers. It provides that such a person may object to solemnising a marriage on the basis that it does not conform to the rites, formularies, tenets, doctrines or discipline of the religious denomination or organisation.[15] This means, for example, that a Christian marriage officer designated under section 3 of the Marriages Act will not be compelled to marry a Muslim couple. Strikingly, however, there is no possibility for a civil marriage officer to object on any grounds to solemnising a marriage in terms of the Marriage Act, no matter what beliefs they may sincerely hold.[16] As an example, this means that a Catholic magistrate or civil marriage officer would not be allowed to refuse to solemnise a marriage between a previously divorced Jewish couple and would be compelled to provide the public service of officiating the marriage.

Moving to the Civil Union Act, we see a very different picture. Once again, there are two categories of marriage officers – religious and civil marriage officers. The former being the same as those designated under section 3 and the latter being the same category of persons as designated under section 2 of the Marriage Act.[17] However, the conscientious objection provision has been applied differently. For religious marriage officers, section 5 of the Civil Union Act does not designate them as marriage officers unless they have applied to, and been approved by the Minister to be designated as such in terms of the Civil Union Act. This application requires religious marriage officers to follow a burdensome two-step process in order to be authorised to solemnise a same-sex marriage – an application by both the religious organisation and then

12 Preamble, Act 17 of 2006 .

13 Section 2, Act 25 of 1961.

14 Ibid s 3.

15 Ibid s 31.

16 Op cit note 1 at 154.

17 Section 1; 5, Act 17 of 2006.

by the individual.[18] Once this has been successful then, in contrast to the Marriage Act, the Civil Union Act does not permit a religious marriage officer to object to solemnising a civil union which does not conform to the rites, tenets or doctrines of his or her religious beliefs.[19] The Civil Union Act thus assumes by implication that the only reason that a religious marriage officer would object to solemnising a same-sex marriage would be on the basis of the sexual orientation of the couple, in which case such an officer would not apply to be designated as a religious marriage officer.[20]

At the core of this paper, of course, is section 6 of the Civil Union Act, which provides that a civil marriage officer 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 civil union".[21] The Civil Union Act thus only allows for non-religious marriage officers to object to concluding same-sex civil unions on the basis of the sexual orientation of the couple. Perhaps the thinking behind the creation of this exemption stems from the obiter dictum comments in the Fourie judgment where Sachs J said that:

> *The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating a same-sex marriage would not themselves be obliged to do so if this resulted in a violation of their conscience.*[22]

However, section 6 has no requirement of a "sincere religious objection" and instead allows any civil marriage officer to object on the grounds of conscience, religion and belief. This means that a conscientious objection could be submitted based on homophobic beliefs and the Civil Union Act would permit it.[23] The reality of section 6 is prominent when one considers the limitation it causes in the ability of same-sex couples to easily access DHA offices to solemnise their marriages at a practical level. *Mambaonline*, a newspaper that aims to report on the challenges faced by LGBTI persons in South Africa, reported that the availability of marriage officers at DHA was as following per province on 8 September 2016[24] (as provided to the newspaper by DHA):

18 Elsje Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriages in South Africa' (2008) 125 SALJ 475.

19 Henriét De Ru 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues?' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 555.

20 Op cit note 18 at 476.

21 Section 6, Act 17 of 2006.

22 Supra note 2 at par 159.

23 Op Cit note 1 at 156.

24 "Shocking! Only 28% of Home Affairs offices will marry lesbian and gay couples" (08-09-2016) *Mambaonline* http://www.mambaonline.com/2016/09/08/farce-28-home-affairs-offices-will-marry-gay-people/ [Accessed 18 June 2018].

Province	Total number of offices	Number of offices willing to conclude same sex civil unions
Gauteng	57	18
Eastern Cape	59	10
Free State	28	5
Mpumalanga	58	10
Limpopo	61	16
Western Cape	34	10
Northern Cape	22	9
KwaZulu-Natal	68	29
North West	22	10
Total	**409**	**117**

The table above indicates that as of September 2016, only 28 percent of DHA offices could provide services to solemnise same-sex civil unions. Similarly, on 5 June 2017, the Minister of Home Affairs informed Parliament that there were 1130 designated marriage officers employed by the Department and 421 of these have objected to concluding same-sex marriages.[25] This amounts to 37 percent of marriage officers objecting to concluding same-sex civil unions or marriages. Free Gender has found that some of the practical consequences of these conscientious objections include:

- Couples being sent away from certain DHA offices when they approach such offices to get married because, as they are informed, there is no one in the applicable office who can marry them (because of their sexual orientation).
- Couples are asked to return on a different day so that DHA could ensure that a marriage officer from another DHA office is brought to the specific office to marry them (because of their sexual orientation).
- Some couples were advised to approach different offices in order to get married there (because of their sexual orientation).
- Even when the union is conducted, same-sex couples express dissatisfaction in the heteronormative and non-inclusive language used to refer to their partnerships. For example, those who were able to get married, were forced to identify each other as 'husband' and 'wife' or similar terms, which is insensitive and demeaning towards same-sex couples.

25 "Question NW1090 to the Minister of Home Affairs" (05-06-2017) *Parliamentary Monitoring Group* https://pmg.org.za/committee-question/5631/ [Access on 21 March 2018].

Overall, this means that, in spite of the recognition of the rights of same-sex couples to marry, it is incredibly difficult for same-sex couples to get married. For same-sex couples, getting married means that they must also navigate the religious freedoms of marriage officers as a new challenge to their access to civic services at the DHA.

Writing for the Constitutional Court, Sachs J cautioned that:

> *"The second guiding consideration is that Parliament be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. Historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste or repudiation by those in power of the group subjected to segregation…Ignoring the context, once convenient is no longer permissible in our current constitutional democracy…our equality jurisprudence accordingly emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected… In the context of the present matter, this means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the tangibles as well as the intangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples."*[26]

While the Civil Union Act provides the means for the recognition and solemnisation of same-sex marriages, it continues to marginalise same-sex couples and has created new forms of discrimination. Section 6 specifically lists "same-sex unions" as the only reason a civil marriage officer may object, meaning that it endorses discrimination by state officials on the basis of sexual orientation.[27] Giving civil servants the right to refuse to solemnise a same-sex marriage undermines same-sex couples' right to, "*equal protection and benefit from the law*" found in the Constitution, and it limits their access to basic services that are freely available to heterosexual couples.[28]

This is a limitation that Parliament and government deemed to be an acceptable and justifiable one on same-sex couples' rights in order to cater for the competing right to freedom of religion in section 15 of the Constitution. However, the question, as will be considered below, is whether it is just and equitable to give more weight to the right to freedom of religion over the right to equality and non-discrimination in providing for conscientious objection to the conclusion of same-sex marriages. Wherever Home Affairs offices are unable to provide the basic public service of solemnising a civil union/marriage because the officials tasked with this role are unwilling to solemnise same-sex unions, same-sex couples risk being turned away and forced either to wait or to travel long distances to find an office which will accommodate them and solemnise their union.[29]

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26 *Fourie* para 150 – 152.

27 Pierre de Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 4 *Utrecht Law Review* 162.

28 Op cit note 18 at 477.

29 Op cit note 24 at 172.

The Department of Home Affairs was unable to, when presented with a Promotion of Access to Information (PAIA) request, name a list of Home Affairs offices willing to serve same-sex couples. The lack of currently available information suggests that couples are unable to anticipate and avoid officials who conscientiously object to solemnising their union. They may, therefore, be inconvenienced financially, emotionally and in respect of their time while trying to obtain a basic, legally mandated service.[30] Similarly, others have submitted two PAIA applications requesting information on the number and spread of civil servants who have written to the Minister in terms of section 6, but the Department of Home Affairs has thus far failed to respond.[31] At the time of publication, Free Gender, assisted by the LRC, also submitted a PAIA application requesting similar information but the Department did not respond – an internal appeal was also submitted, with the Department failing to respond at all to the internal appeal despite numerous follow ups.

Where the law allows claims of religious obligation or belief to trespass directly upon fundamental rights and freedoms expressly contained in the Bill of Rights, it must be revised to protect these rights. Taking into account legal precedent for religious freedom and conscientious objection in South Africa and abroad, it is reasonable to argue that there is a legitimate constitutional challenge to the exemption provision in the Civil Union Act.

30 Dineo Bindele 'Gigaba meets LGBTI Community to Assess Implementation of Civil Union Act' *Eyewitness News* 7 June 2016.

31 Op cit note 1 at 163.

5. THE INTERACTION BETWEEN THE RIGHT TO EQUALITY AND THE RIGHT TO FREEDOM OF RELIGION

5.1 Introduction

In this section, we describe the informing and guiding principles of rights as entrenched in the Constitution. The first of these principles is that most rights in the Bill of Rights are entrenched for 'everyone', meaning that no person may be denied the right.[32] The use of the word 'everyone' in guaranteeing most constitutional rights (except those guaranteed for citizens) is an indication that the starting point for the Bill of Rights is that these rights must co-exist as they apply simultaneously, and to all. It also means that there is no hierarchy of rights which must be satisfied first, over others.

Secondly, the preamble of the Promotion of Equality and the Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA), the implementing legislation of section 9 of the Constitution as discussed below, provides that the prohibition of unfair discrimination and the promotion of equality requires developing special legal measures in respect of historically disadvantaged individuals and social groups who were dispossessed of their land and resources, deprived of their human dignity, and who continue to suffer from repercussions of past inequality.[33] The adoption of these kinds of measures requires the legislature to be proactive in order to achieve the objectives envisaged in PEPUDA and the Constitution.[34] The Constitutional Court supported this view in the case of *Carmichele v Minister of Safety and Security (Carmichele)* when it said:

> *"[T]here is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."*[35]

32 I Curie and J De Waal *The Bill of Rights Handbook* (2015) 34 – 35.

33 Op cit note 6 at 195-196.

34 Ibid 193-194.

35 2001 (10) BCLR 995 (CC) para 44.

As already stated, given the historical, state-endorsed homophobia and legislation, which criminalised every aspect of homosexual people's lives in South Africa[36], and the constitutional obligation in section 9 not to discriminate on the basis of sexual orientation, the Civil Union Act was adopted. The Civil Union Act, therefore, seeks to address and develop measures to protect groups and individuals who had been discriminated against in the past.[37] Its purpose is to take into account South Africa's history, the prejudice that people in same-sex relationships still experience to this day, and to embody the principles of equality and non-discrimination. It is important to note that these principles serve as the core foundation for developing the national agenda for the promotion of equal rights for all people, including couples in same-sex relationships.[38]

Thirdly, a substantive translation of the point in *Carmichele* regarding the state's obligations can be found in section 195 of the Constitution, which provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including: "*(d) [that] services must be provided impartially, fairly, equitably and without bias*". This illustrates that at a basic, constitutional level, officials in the exercise of public administration cannot act contrary to the values enshrined in the Constitution and they cannot be biased in the provision of state services. Unfortunately, this is exactly what section 6 of the Civil Union Act permits, in that officials are allowed to discriminate on the basis of sexual orientation when providing government services. Allowing state employees to offer biased and unequal services is not only unconstitutional, but also continues to perpetuate the very discrimination that the institutionalisation of same-sex unions aimed to abolish.[39] Lastly, where rights come in conflict with each other, a balancing exercise must be conducted in order to try and harmonise the two competing rights. This will be discussed in more detail below.

This section will accordingly address legal precedent in South Africa that has contributed to current understandings of the scope of the right to equality, the right to dignity and the right to be different, and how these interact with the right to religious freedom. An evaluation of this jurisprudence against the implications of section 6 demonstrates that the courts would have valid reasons to deem section 6 of the Civil Union Act to be unconstitutional. This conclusion can be drawn from the constitutional guarantee of equality, dignity and the right to be different, as well as from prior application of principles of reasonable accommodation and legal limitations to religious freedom.

5.2 Equality Clause in South Africa

Section 9 of the Constitution defines equality as: "*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.*" Further, discrimination is defined and expressly prohibited:

36 David Bilchitz and Melanie Judge 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' (2007) 23 *SAJHR* 468.

37 Op cit note 6 at 194.

38 Ibid 194-195.

39 Bruce McDougall, Elsje Bonthuys, Kenneth McK. Norrie & Marjolein van den Brink 'Conscientious objection to creating same-sex unions: an international analysis' (2012) 1 *CJHR* 128.

> *"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."*

Sections 9(4) and 9(5) go on to indicate that if individuals discriminate against one another on any of these grounds, there should be legal provisions to prohibit acting upon such discrimination unless it can be demonstrated that the discrimination is "fair."

The preamble and sections 2, 3 and 4 of PEPUDA set out the general principles that must guide the interpretation and application of the equality provisions. Specifically, section 2(b) of PEPUDA states the objects of the Act as the following:

> *to give 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-racialism and nonsexism 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."*

Guided by these provisions, it can be argued that section 6 of the Civil Union Act is a targeted and unjustifiable authorisation of discrimination against same-sex couples by the state. The scope of the discrimination, in the way it is outlined in the conscientious objection clause, is limited to same-sex marriages. As the Constitutional Court stated, the, *"impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection".*[40]

The discrimination faced by same-sex couples seeking to marry in terms of the Civil Union Act is based on a specified ground – sexual orientation. As explained above, the impact of this discrimination is severe, and is targeted towards same-sex couples because of their identity, personhood and sexual orientation. Section 6 of the Civil Union Act, therefore, creates an opportunity to continue this discrimination and marginalisation of same-sex couples. The provisions in section 6 have no other purpose than to ensure that marriage officers' rights, opinions and feelings are put ahead of the rights of same-sex couples, without even bothering to test their sincerity, as explained below. As a result, the discrimination is unfair and we inevitably conclude that section 6 is contrary to the Constitution of South Africa and PEPUDA.

Given that the exemption is only available to civil marriage officers when solemnising same-sex marriages, it is unlikely to be a justifiable limitation. This is because section 6 fails to provide any steps to ensure that the right to equality of

40 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 25.

same-sex couples is guaranteed while exclusively guaranteeing the freedom of religion of civil marriage officers. As already explained, same-sex couples continue to be marginalised in seeking to solemnise their marriages and are not enjoying the same status as those in civil marriages who are able to seek and access solemnisation services at the DHA without dealing with the same challenges created by section 6 of the Civil Union Act. It is clear that this constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution. As already stated, the rights of dignity and equality are closely related. The limitation posed by section 6 of the Civil Union Act manifestly affects their dignity as members of society.

In conclusion and in light of the above, a civil marriage officer who claims a faith-based objection to any other aspect of a couple's application for a civil union – whether race, religion, or national origin – would still be compelled to solemnise the union regardless of their beliefs. However, if the same officer objects, because of the sexual orientation of the couple, then section 6 will allow such an officer to be exempted from concluding the same-sex marriage. Given the value and nature of equality in South Africa, it appears highly unlikely that such a conscientious objection clause in section 6 of the Civil Union Act – pertaining to a protected identity and group – would be permitted to continue to operate in legislation and in practice. In other words, homosexual people continue to be the only individuals against whom religiously-grounded discrimination is officially sanctioned in the realm of marriage. This is undoubtedly unconstitutional.

5.3 Right to Dignity

The right to dignity is a central and informing value to the Constitution of South Africa. Our courts have found that, "*it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society*"[41]. As already stated, section 6 allows marriage officers to conscientiously object only to concluding same-sex marriages because of the sexual orientation of the couples. In so doing, it marginalises same-sex couples and places them in an inferior position to heterosexual couples. Its symbolic effect is to position same-sex couples as being inferior beings not worthy of the same protection of the law. The stigma and violence attached to this effect is profound and demeaning. As the Constitutional Court emphasised in *Fourie:*

> "*The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.*"[42]

41 Currie & De Waal *The Bill of Rights Handbook* (2015) 251.

42 *Fourie*, para 54.

Similarly, in *Fourie* the Constitutional Court found that the failure to provide same-sex couples with the opportunity to marry, as done for heterosexual couples, was an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution.[43] The Court stated that the exclusion to which same-sex couples are subjected, "*manifestly affects their dignity as members of South African society*".[44] In coming to this conclusion, the Court specifically found that the "*sting of the past and continuing discrimination against both gays and lesbians' lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they 'do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This 'denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity' namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be.*"[45]

5.4 The Right to be Different

In providing some normative content for the right to be different, we emphasise the Constitutional Court's position when it was stated that:

> "*As was said by this Court in Christian Education there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different". In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in Christian Education that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. For present purposes it needs to be added that acknowledgement of the diversity that flows from different forms of sexual orientation will provide an extra and distinctive thread to the national tapestry. The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals.*"[46]

43 Ibid, para 114.

44 Ibid.

45 *Fourie*, para 15.

46 Ibid, para 61.

The Constitutional Court further emphasised that there are four unequivocal features that must always be borne in mind when analysing the prohibition of unfair discrimination on the basis of sexual orientation, namely:

- Diversity of family – South Africa has a multitude of family formations that continue to develop, and it is therefore inapt to legally accept only one;
- The imperative constitutional need to acknowledge the long history of marginalisation and persecution of LGBTI persons in South Africa and abroad;
- The lack of comprehensive family rights for LGBTI persons. Furthermore, our Constitution represents a radical rupture with a past based on intolerance and exclusion; and
- The need to develop a society based on equality and respect by all for all. [47]

Within this context, the Court emphasised that a democratic, universalistic, caring and aspirational equal society embraces everyone and accepts people for who they are.[48] To treat people differently because of who they are is profoundly disrespectful to the human personality and violates the right to equality. The Court went on to state that, "*respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but* ***an acknowledgement and acceptance of difference.*** *At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.*"[49] (Own emphasis)

Understood in this context, the Court found that the Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different and celebrates the diversity of the nation. Section 6 of the Civil Union Act, on the other hand, limits this acknowledgement and acceptance of difference and diversity of identities. Informed by the view that some religions or opinions are not inclusive and do not embrace homosexuality, section 6 of the Civil Union Act chooses to subject same-sex couples to the religious views that are harmful and limiting towards diversity. In pursuing equality and the right to be different, the laws and people of South Africa must be more tolerant and mutually respectful of individual rights to self-determination, bodily autonomy, equality and dignity, among others. As the Constitutional Court emphasised, "*what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.*"[50]

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47 *Fourie*, para 59.

48 Ibid, para 60.

49 Ibid.

50 Ibid.

5.5 Freedom of Religion

Three clauses within the South African Bill of Rights address religious freedom. Section 15(1) states that, "*[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.*" Section 15(2) goes on to recognise that state institutions may conduct religious observances under certain circumstances. Furthermore, section 31 establishes the rights of cultural, religious and linguistic communities in that:

> *"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, practice their religion and use their language; and*
>
> *(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."*

Lastly, section 9(3), the right to equality, prohibits unfair discrimination on the basis of, *inter alia*, religion, conscience, belief or culture.

Throughout its jurisprudence, the Constitutional Court and other courts in South Africa have taken opportunities to interpret the right to religious freedom. These interpretations have established distinct parameters for the accommodations to which individuals are entitled when fulfilling religious obligations, as well as limitations to the right to practice when such obligations place burdens on the rest of the community.

5.5.1. *Nkosi v. Bührmann* 2002 (1) SA 372 (SCA)

This case raised a "*sensitive and emotionally contentious question involving, on the one hand, the right to religious freedom, and particularly the right to practise one's religion, and, on the other hand, the right not to be deprived of one's land except by law*"[51]. In *Nkosi*, the Court held that a burial could not take place on the owner's land without his consent, even though the family held that the proposed gravesite was an official ancestral home in keeping with its spiritual beliefs. The court explained that it is relevant that while section 31(1) of the Constitution allows persons belonging to a religious community to practise their religion, section 31(2) requires that the exercise of that right not be inconsistent with any provision of the Bill of Rights, in this case the owner's property rights. The court further expanded this line of reasoning by saying that, "*although tension between different entrenched rights is sometimes unavoidable the law would be unacceptably contradictory if it barred communal religious practice from infringing property rights but permitted individual religious practice to do so.*"[52]

This precedent presents a clear-cut potential constitutional shortfall, in that section 6 of the Civil Union Act grants a civil marriage officer the right to refuse to conclude a same-sex union on religious grounds. Further, this right is afforded

51 2002 (1) SA 372 (SCA) para 1.

52 *Nkosi*, para 43.

as a superior right over that of same-sex couples' right to marriage, to dignity and to equality. If the Court were to uphold section 6 as a justifiable religious practice, it would have to evaluate and be satisfied that same-sex couples do not face any greater barriers when seeking to conclude civil unions than those faced by heterosexual couples. As has been demonstrated however, same-sex couples do face increased obstacles to concluding a marriage, including finding a public official who is willing to marry them, which can be a difficult and frustrating process, and which significantly derogates the right to marriage equality.

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

Briefly, the facts of S v Lawrence surround the prohibition of alcohol sales after hours and on a Sunday. All three appellants were charged and convicted of contravening this prohibition and subsequently appealed on the basis that the prohibition was unconstitutional. This was a landmark decision in that the court was called on to assess religious freedom rights. In the end, the Court held that the appellant failed to establish that section 90 of the Liquor Act was inconsistent with the right to freedom of religion recognised in section 14 of the Interim Constitution of the Republic of South Africa.[53]

In assessing the claim, the Court made it clear that the South African Constitution treats religion differently than the United States of America's Constitution, particularly because the Constitution of South Africa does not include an establishment clause.[54] An establishment clause in the first amendment of the United States of America's Constitution prohibits the government from making any law enabling the establishment of religion. This clause not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favour one religion over another.[55] The Court found there is nothing in the normative framework of the protection of the right to freedom of religion that made provision for an establishment clause.[56] The Court emphasised that the Constitution deals with unequal treatment and discrimination in the equality clause; therefore, unequal treatment of religions may well give rise to an equality issue.[57] This was, however, not raised before Court in this matter. The Court further stated that to "*read "equitable considerations" relating to state action into section 14(1) would give rise to any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion, which would go far beyond the difficulties raised by the "establishment clause" of the US Constitution.*" In rejecting the appellant's claim, the Court noted that section 90 of the Liquor Act does not force people to "*act or refrain from acting in a manner contrary to their religious beliefs.*"[58] Put simply, the connection between Christianity and the restriction against the sale of wine on Sundays was too tenuous for the restriction to be deemed an infringement of the appellant's right to religious freedom.[59]

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53 Act 200 of 1993; 1997 (4) SA 1176 (CC) para 105.

54 *Lawrence*, para 100 – 101.

55 *Lawrence*, para 100-01 (explaining: "we ought not to read into its provisions principles pertaining to the advancement or inhibition of religion by the state. To do so would have far-reaching implications beyond the apparent scope and purpose of section 14.")

56 Ibid para 102.

57 Ibid.

58 Ibid para 94.

59 Ibid para 105.

This ruling demonstrated that an essential component of the right to religious freedom is the strength of the association between the issue at hand and the individual's religious practice. In the case of non-religious civil marriage officers, this could be interpreted to mean that requiring public servants to solemnise same-sex unions is not a violation of section 15 of the Bill of Rights. The Civil Union Act does not require individuals to condone or participate in any act of homosexuality; what is required is simply for marriage officers to provide their civil service, administratively allowing same-sex couples to marry, without discrimination. The mere fact that the religious beliefs of some civil marriage officers view homosexuality negatively does not mean that offering civic services, or any other service for that matter, to same-sex couples infringes on the marriage officer's right to freedom of religion.

5.5.3. *Christian Education v. Minister of Education*, 2000 (4) SA 757 (CC)

Christian Education concerned the prohibition of corporal punishment in schools, and the religious and cultural freedom rights of parents and students who wished to permit the practice to continue in independent schools, in line with their religious beliefs. The Court took this opportunity to flesh out the limitation clause analysis applicable to freedom of religion cases. The Court held that the prohibition in the South African Schools Act 84 of 1996 of corporal punishment did not violate the rights of parents who wished to permit its use based on their religious beliefs. The appellants argued that the Schools Act infringed on their right to religious freedom under sections 15 and 31 of the Constitution, and that corporal punishment with parental consent was not inconsistent with the Bill of Rights.[60] The appellants further argued that because the Schools Act substantially impacted sincerely held religious beliefs, the Act's lack of an exemption could only be justified by a compelling state interest.[61] In opposition, the respondent argued that corporal punishment violated the school children's right to equality and dignity.[62]

Both parties submitted that the Schools Act limited the parents' religious beliefs under both sections 15 and 31 of the Constitution.[63] The Court then provided a detailed description of the limitation clause analysis, explaining that:

> *"[W]hat is in issue is not so much whether a general prohibition on corporal punishment in schools can be justified, but whether the impact of such a prohibition on the religious beliefs and practices of the members of the appellant can be justified under the limitations test of section 36. More precisely, the proportionality exercise has to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption for which the appellant asked, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality."*[64]

60 2000 (4) SA 757 (CC) para 16.

61 *Christian Education*, para 16.

62 Ibid para 17.

63 Ibid para 27.

64 Ibid para 32.

Most notably, the Court commented on the challenges surrounding the proportionality analysis in the context of religious rights.[65] With respect to balancing rights, the Court acknowledged that religious and secular activities are difficult to separate, *"first because of the problems of weighing considerations of faith against those of reasons and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way."*[66]

Turning to the constitutionality of the Schools Act, the Court explained that the Act did not deprive parents of raising their children in the Christian faith; rather, the Act was limited to preventing schools from administering corporal punishment.[67] After balancing the scales in favour of the protection of the rights and dignity of children, the Court upheld the Schools Act notwithstanding the appellant's claim for an exemption.[68] In doing this, it laid firm boundaries for religious freedom wherein compelling state interests and individual rights conflict with religious practice. *Christian Education* affirmed the principle, related to that set out in *Nkosi v Bührmann,* that fundamental constitutional rights cannot be impeded for the sake of upholding a religious individual or community's principles if, and when, the two conflict. When applied to the Civil Union Act, especially given the preamble's premise that *"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",* this principle poses a significant challenge to the validity of section 6.[69]

5.6 Three-Prong Test for Religious Exemptions

In developing its religious freedom jurisprudence, the Constitutional Court has adopted a three-prong balancing test to review conduct which affects religious beliefs, and to determine whether that belief qualifies for constitutional protection. This test was first formulated in the *Prince*[70] case and later expanded on in the *Pillay*[71] case, although neither case contained the test in clear and unambiguous terms. Mhango states that this test translates into three distinct parts.[72] A court will ask the following questions: first, whether the source of the claim is a recognised religion; secondly whether the practice in question is a central part of the religion and thirdly, the sincerity of the applicant's belief in the practice.[73]

65 Ibid para 33.

66 Ibid para 34.

67 Ibid para 38.

68 Ibid para 52.

69 Preamble, Act 17 of 2006.

70 *Prince v the President of the Law Society of the Cape of Good Hope* 2002 SA 794 (CC).

71 *MEC for Education v. Pillay* 2008 (1) SA 474 (CC).

72 Mtende Mhango 'Right to recognition and protection of religion in South Africa' in O Viera & Baxi U & Viljoen F (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 360.

73 Ibid 360.

5.6.1. *Prince v the President of the Law Society of the Cape of Good Hope* 2002 SA 794 (CC)

In *Prince*, the Court held that the State's failure to make an exemption to the Drugs and Drug Trafficking Act, 140 of 1992 for Rastafaris to possess and use cannabis was reasonable and justifiable under the Constitution.[74] The appellant was a member of the Rastafari religion and used cannabis as a means of religious expression. He challenged the Act's prohibition on the possession and use of cannabis as a violation of his religious freedom because it did not provide an exemption for the religious use of cannabis.[75] The Attorney-General and Minister of Health accepted that the prohibition infringed on the appellant's constitutional right to freedom of religion, but argued that the prohibition was reasonable and justifiable in terms of the limitation clause.[76]

Citing *Lawrence* and *Christian Education*, the Court explained:

> *". . . [T]he right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination."*[77]

Applying the three-prong test to *Prince*, both the majority and the minority agreed that Rastafari is a recognised religion for the purposes of sections 15 and 31 of the Constitution.[78] With respect to the second prong, the Court declared that it need not enter into the debate of determining, "*whether a particular practice is central to the religion unless there is a genuine dispute as to the centrality of the practice*." Here, it was accepted that the use of cannabis was central to the Rastafari religion.[79] Lastly, the Court found that the appellant's beliefs were sincerely held.[80]

Here, similar to *Christian Education*, the Court accepted that the prohibition on the use of cannabis limited the religious rights of the appellant, and unanimously agreed upon the determinations regarding the aforementioned prongs. Nevertheless, the Court disagreed with respect to whether the limitation on the prohibition of cannabis without exemption for religious use was justifiable under the limitation clause found in section 36 of the Constitution.[81] The majority found that the prohibition was reasonable and justifiable in terms of the limitation clause[82] because the use of cannabis could not be authorised without hampering the "*state's ability to enforce its legislation in the interest of the public and honour its international obligations.*"[83] Conversely, the minority asserted that the government had not met its burden of

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74 *Prince*, para 139.

75 Ibid para 27.

76 *Prince*, para 28.

77 Ibid para 38.

78 Ibid para 40.

79 Ibid Para 42 – 43.

80 Ibid.

81 Ibid para 44.

82 Ibid para 111.

83 Op cit note 52 at 362.

persuading the Court that the prohibition on the religious use of cannabis was reasonable and justifiable,[84] and favoured the application of a reasonable accommodation approach.[85] A key aspect of the majority judgment was that it confirmed an interpretation that the public interest was one among many possible legitimate reasons to limit religious freedom, even if the practice at hand passes the three-prong test.

The example of *Prince* and the concept of the three-prong test bring to light another potential constitutional shortfall of section 6 of the Civil Union Act. A civil marriage officer's objection to solemnising a same-sex marriage may theoretically qualify for exemption according to the test. Many of these objections are grounded in recognised religious faiths and/or denominations, and tradition; the concept of upholding "traditional marriage" may conceivably be a fundamental tenet of these religions and/or denominations; lastly, the officers' objections could be sufficiently sincere in light of applicable religious views. Despite the indisputability of these claims, and theoretical eligibility for religious exemption, *Prince* demonstrates that a significant state and public interest can militate against providing a religious accommodation even where the three-prong test is met. No matter how sincere or central a religious belief, it cannot be upheld at the expense of the state's ability to enforce its own legislation, and specifically the Constitution. Section 6 of the Civil Union Act hampers the state's ability to effectively deliver the services guaranteed by the Act in the first place. As the legislation protects a compelling public interest, namely fundamental human equality, dignity and non-discrimination which is aimed at addressing past injustices, it would be reasonable and justifiable to limit the religious practices of civil marriage officers.

5.6.2. *MEC for Education v. Pillay* 2008 (1) SA 474 (CC).

In *MEC for Education v. Pillay*, the Court held that a public school's rule prohibiting the applicant from wearing a nose stud to school in accordance with her religious and cultural beliefs violated her right to equality under PEPUDA.[86] The Court noted that the section 9 prohibition of discrimination on the basis of religion or culture is distinct from the applicant's rights under sections 15 and 30 of the Constitution. Nevertheless, the, *"two rights may overlap, however, where the discrimination in question flows from an interference with a person's religious or cultural practices."*[87] Therefore, in order to establish discrimination, the applicant was required to demonstrate that the school interfered in her practice or expression of religion or culture by prohibiting her from wearing the nose stud.[88]

In finding for the applicant, the Court observed that the Constitution and PEPUDA protect both mandatory and voluntary religious and cultural practices.[89] Fairness required that the school provide a reasonable accommodation for the

84 Op cit note 54 at para 56.

85 Ibid para 76.

86 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

87 Ibid para 46.

88 Ibid.

89 *Pillay*, para 64-65.

applicant[90] as long as it did not impose an undue burden on the school.[91] The Court ultimately held that the applicant was unfairly discriminated against on the basis of her culture in violation of PEPUDA, and the school should have made reasonable accommodations for her.[92] The judgment in *Pillay* identified the line between reasonable and unreasonable accommodation, in that the state can opt to recognise voluntary observances if they do not impose an undue burden on public institutions and on others.[93]

Applying this principle to the Civil Union Act uncovers significant differences between this accommodation and that provided by section 6. In the former case, the nose stud was broadly immaterial to any assessment of the school's future ability to advance its interests:

> *"Both discipline and education are legitimate goals. However, care must be taken not to state the School's interest too broadly. Sunali's interest in wearing her nose stud could never outweigh the general importance of ensuring discipline in schools."*[94]

But in the case of civil marriage officers who refuse to solemnise same-sex unions at public offices, which forces couples to find alternative arrangements, section 6 undermines the original interests of the Civil Union Act. The Civil Union Act, by allowing marriage officers to conscientiously object to offering civil services to same-sex couples, acts against the state's ability to provide basic public services in a non-discriminatory and non-biased manner as envisaged by the Constitution. Section 6, therefore, does not qualify for the reasonable accommodation set out in *Pillay*, and to continue to permit such discriminatory and prejudicial practices is unreasonable.

5.7 Religious exemption clause versus the right to equality

In carrying out the balancing exercise, the Court has stated that:

> *"In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected…Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."*[95]

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90 Ibid para 79.

91 Ibid para 97.

92 Ibid para 112.

93 Ibid.

94 Ibid para 98.

95 *Christian Education*, para 31.

In South Africa, there have not been any cases about the exemption provided to civil marriage officers in section 6 of the Civil Union Act. Nonetheless, *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*[96] is a relevant religious exemption case which can provide some useful context, together with the cases above. The applicant, a music lecturer employed as an independent contractor at a church, succeeded on his unfair discrimination claim against the church for terminating his contract when it learned that he was a homosexual man. In this case, a church organisation relied on the freedom of religion as entrenched in the Constitution to justify the unfair discrimination against the applicant. The right to equality of the complainant had to therefore be balanced against the freedom of religion of the church.[97]

The Court acknowledged the importance of religious freedom as an entrenched right in the Constitution. The Court also acknowledged that religious freedom can, *"potentially be outweighed by other constitutionally protected rights…Religious freedom is apt to run up most often against demands for equality. These demands will be most compelling with regard to discrimination on the basis of race, sex and sexual orientation."*[98] The Court also emphasised the position of equality as a fundamental right that is the core value of the South African Constitution.

The church argued that keeping the applicant in his teaching position in light of the church's view on homosexuality as a cardinal sin means that they would have "condoned" a homosexual relationship.[99] However, the Court found that, *"if the church was questioned why they had a work contract with a practicing homosexual, they could have stated that it was required by the Constitution that they not discriminate on the basis of a person's sexual orientation when concluding a contract of work. For instance, if a person in a homosexual relationship was employed or contracted to do typing work as a secretary of the "kunste-akademie", terminating his contract on that basis (his sexual orientation) would clearly amount to unfair discrimination in terms of the listed grounds in the Constitution. Again, the explanation for employing such person is clear: it would amount to unfair discrimination based on sexual orientation to terminate his contract."*[100]

The Court weighed the impact that denying the church an exemption from anti-discrimination legislation would have against the discrimination faced by the applicant on the basis of his sexual orientation.[101] In finding for the applicant, the Court held that the impact on the church's religious freedom was minimal compared to the enormous impact on the applicant's right to equality, a foundational value of our Constitution.[102] Further, the Court found that the right to dignity was seriously impaired by the decision of the church, and this was unjustifiable.

Similarly, the impact of requiring a state official to fulfil their public duty to solemnise same-sex marriages, contrary to their religious views, and in a manner that is consistent with the values and rights of the Constitution, is heavily

96 2009 (30) ILJ 868.

97 *Strydom*, para 8.

98 Ibid.

99 Ibid, para 23.

100 *Strydom*, para 24

101 Ibid para 25.

102 Ibid.

outweighed by the impact the refusal of such service has on a same-sex couple's dignity and right to equality when they are turned away and not permitted to marry despite the law allowing them to do so. In such an instance therefore, the need to ensure that the provision of government services is done in an equal and dignified manner is not only aimed at protecting the rights of same-sex couples. It is also aimed at ensuring that the historical discrimination and marginalisation of LGBTI persons is systematically addressed, and that South Africa transforms into a more equal, tolerant and diverse country. Equality, therefore, holds a much stronger purpose and objective than the objection to conclude same-sex marriages based on the need to protect religious views of civil marriages officers, which are not impacted or limited by allowing couples to sign forms and recite the marriage oath to them. This is so even when we recognise that there can be no doubt that the right to freedom of religion, belief and opinion, in the open and democratic society contemplated by the Constitution, is essential.

6. CONSCIENTIOUS OBJECTION: AN INTERNATIONAL PERSPECTIVE

6.1 Relevant provisions in international human rights mechanisms

One of the basic principles of the Charter of the United Nations relates to the dignity and equality inherent in all human beings. Member States are committed to taking action to promote and encourage universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.[103] To enact a piece of legislation that limits the right to equality of same-sex couples is directly contradictory to this idea, and it encourages the differentiation and discrimination by the state and its officials against such couples. To oblige these officials to perform their jobs is not a violation of their human rights and cannot be given equal weighting as the rights to equality and marriage.

The Universal Declaration on Human Rights recognises both the right to freedom of religion and conscience, and the right to equality.[104] Article 1 starts by saying that, "*all human beings are born free and equal in dignity and rights*"[105] and the Declaration states further in article 7 that, "*all are equal before the law and are entitled, without any discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*"[106] This is a clear indication that equality is a fundamental human right. There is also recognition for protection of religious freedom in article 18 where it says that, "*everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*"[107] This seems to create an equal balance between the right to equality and the right to freedom of religion and conscience. However, article 29(2) qualifies these rights by stating that, "*in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public*

103 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

104 UN General Assembly, (1948), *Universal declaration of human rights* (217 [III] A), Paris.

105 Ibid at Article 1.

106 Ibid at Article 7.

107 Ibid at Article 18.

order and the general welfare in a democratic society."[108] As has already been established, the Constitution has equality as one of its founding values and determines that no one may be discriminated against on the basis of, *inter alia*, sexual orientation. To allow civil marriage officers to practice their religious beliefs by denying same-sex couples the opportunity to have their marriages solemnised, and denying access to basic, judicially mandated equality, is disrespectful of the rights of same-sex people and does not comply with the requirements of a democratic society based on the values of equality, dignity and freedom.

The General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief recognises that freedom of religion is an essential component of people's lives and should be accorded the appropriate protection and recognition.[109] The Declaration does state in its preamble that given that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief, it is inadmissible to use religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations, and the purposes and principles of the present Declaration. Using the right to religious belief and thought in the issue at hand is to use it for purposes that are inconsistent with the Charter on Human Rights and various other instruments that ensure the equality of and non-discrimination against other people. The use of it for the purpose of discriminating against same-sex couples would, therefore, be inadmissible in terms of this international provision on religious freedom.

The position across the board, internationally, is that freedom of religion is important to protect and should be respected as a priority, but that it cannot be exercised in contravention of other human rights, or for the purpose of violating the principles of equality and non-discrimination, which also have priority. Thus, the position on section 6 of the Civil Union Act in terms of these provisions is clear: it is against international law entrenchments discussed above.

6.2 Solemnising same-sex marriages by non-religious marriage officials: jurisprudence from foreign jurisdictions

The question of conscientious objection to, or abstaining from, providing civil services to same-sex couples has been raised in a number of cases globally. It is useful to examine some of these instances and how states have responded to such cases.

In *McClintock v Department of Constitutional Affairs*[110], an English case, a Justice of the Peace who sat in family cases asked to be relieved from dealing with adoption cases involving same-sex couples. His request was refused and he thus resigned and claimed unfair dismissal on the basis of his religious beliefs. The claim was dismissed by both the Employment Tribunal and the Employment Appeal Tribunal on the grounds that judges could not "cherry pick" which laws they want to apply.[111]

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108 Ibid at Article 29.

109 UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55.

110 (2008) IRLR 29.

111 Ibid, para 19.

In *Ladele v The London Borough of Islington*, a registrar refused to register civil partnerships between same-sex couples on the grounds that this would violate and be contrary to her "*orthodox Christian*" beliefs, and particularly her belief in the sanctity of [Christian] marriage.[112] When Ms. Ladele was threatened with dismissal for her actions, she claimed that this was direct and indirect discrimination on the basis of her religious beliefs. Initially, the Employment Tribunal found in her favour, but this was later overturned by the Employment Appeal Tribunal and subsequently upheld by the Court of Appeal. The Court of Appeal found that there was no discrimination by the Council because their threats of dismissal were in response to her refusal to carry out her duties and not to her professed religious beliefs. The Court noted that she was, "*employed in a public job and was working for a public authority; she was being required to perform a purely secular task …[and her] refusal to perform that task involved discriminating against gay people in the course of that job.*"[113] It further found that there was no discrimination because the Council's aim was to ensure that same-sex couples who wished to register a civil partnership would be able to access the necessary services and officials willing to conduct those services. This went hand-in-hand with the Council's policy of acting against the discrimination experienced by gay and lesbian citizens and employees. The Court endorsed the finding of the Employment Appeal Tribunal that:

> "*Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate – and in truth it was bound to be – then…it must follow that [the Council] was entitled to require all registrars to perform the full range of services.*"[114]

Importantly, the Court held that the Council's policy of requiring all of its registrars to perform civil partnership duties was a proportionate means of achieving its aim of providing a non-discriminatory public service. The Court held that the *Equality Act (Sexual Orientation) Regulations 2007*[115], which prohibits discrimination on the basis of sexual orientation, in regard to the provision of goods and services, is a more important consideration. It takes precedence over a claim of the right to practice discrimination against same-sex couples on the basis of religious beliefs.

A notable series of Canadian cases, initiated by a person who was denied a same-sex marriage by a marriage commissioner on the basis of the latter's religious convictions, was brought before the Saskatchewan Human Rights Tribunal. The Marriage Commissioner's defence in refusing to solemnise same-sex marriages was that he should have the discretion as to whether or not to provide government services based on his religious beliefs.[116] The Human Rights Tribunal dismissed this defence in a decision, which was upheld by the Saskatchewan Court of Queen's Bench, finding that refusing to solemnise a same-sex marriage was indeed discriminatory and that making an accommodation for the commissioner's religious beliefs was not necessary.[117] In denying the commissioner the relief sought, the Court spoke of the struggle

112 (2009) ICR 387.

113 Ibid, para 52.

114 Op cite note 118 at para 49.

115 (SI 2007/1263).

116 (2008), 63 CHRR D/145.

117 *Nichols v Saskatchewan (Human Rights Commission)*, 2009 SKQB 299, [2009] 10 WWR 513.

faced by same-sex couples in pursuit of the right to marry.[118] The Court explained that, "*...putting gays and lesbians in a situation where a marriage commissioner can refuse to provide his or her services because of their sexual orientation would clearly be a retrograde step – a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions.*"[119] Further, the Court explained that a marriage commissioner is, "empowered to act only in accordance with" the relevant law, in this case the law governing marriages, because a commissioner is considered to be a representative of the government in so far as it is their duty to implement legitimate government schemes.[120] The Court held that when acting in this capacity, a person's, "*freedom of religion ought to be limited to exclude discrimination on the basis of sexual orientation.*"[121] The Court emphasised that, regardless of the religious basis to the views, acting on them constituted discrimination and if there were to be any accommodation for the religious views, it would have to be done without causing someone to be expressly denied a service on the basis of their sexual orientation.[122] In response to the finding in this case, two versions of a law on marriage commissioners was submitted to the Saskatchewan Court of Appeal for an opinion.[123] One version proposed to "grandfather" existing marriage commissioners, allowing them to continue to refuse to perform a marriage contrary to their religious beliefs. The second version of the law sought to allow any marriage commissioner to refuse to perform a marriage contrary to his or her religious beliefs. In the *Saskatchewan Marriage Reference*, the Court unanimously held that both versions of the law were unconstitutional on the basis that they unjustifiably infringed on equality. Richards JA elaborated:

> "*It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer "I won't help you because you are black (or Asian or First Nations) but someone else will" or "I won't help you because you are Jewish (or Muslim or Buddhist) but someone else will." Being told "I won't help you because you are gay/lesbian but someone else will" is no different.*"[124]

Richards JA also expressed concern about the impact on same-sex couples, especially in more isolated areas of the country where access to services are more limited, if a large number of marriage commissioners refused to perform these marriages. This is an important concern that De Vos also raises, when he states that section 6 makes it far more difficult for same-sex couples to conclude a marriage when they live in a small South African town that would typically only have one magistrate who then objects to performing such a marriage.[125]

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118 Ibid para 45.

119 Ibid.

120 *Nichols v Saskatchewan (Human Rights Commission)*, para 53.

121 Ibid para 73.

122 Ibid para 57.

123 Op cit note 35 at 153.

124 *Reference re Marriage Commissioners Appointed Under The Marriage Act, 1995 (Sask)*, 2011 SKCA 3, 327 DLR (4th) 669.

125 Op cit note 26 at 173.

In the case of *M. Franck M. et autres*, seven French mayors argued that the constitutional "*freedom of conscience*" clause was sufficient reason to include an additional provision in the French same-sex marriage act allowing them to refuse to solemnise same-sex marriages. The French Constitutional Court struck down the challenge, maintaining that the integrity of the constitutional clause was not weakened by the absence of a conscientious objection provision. Rather, the public interest and proper functioning of government instruments were of greater consequence than the preservation of religious freedom in this case. The Court emphasised the importance of maintaining neutrality in the provision of public services.[126]

In the Netherlands, applicants have brought similar claims regarding discrimination in the workplace. The Commissie Gelijke Behandeling (the Dutch Equal Treatment Commission) (CGB) heard a case in 2008 in which it rejected the applicant's claim against a municipality for refusing to accommodate his religious objection to performing same-sex marriages.[127] The municipality had required all newly hired civil servants to marry all couples, irrespective of sex.[128] The applicant, a member of an orthodox church, sought employment as a civil servant but did not apply for the position because the municipality would not accommodate his religious objections.[129] The CGB held that the municipality was entitled to refuse to accommodate the applicant because it, "*had a duty not to discriminate against people on the basis of their sexual orientation.*"[130] The CGB explained that a civil servant's freedom of religion does not entitle him or her to discriminate against others during his or her time in office.[131]

These decisions in foreign jurisdictions have taken note that a civil servant wanting to be exempted from solemnising same-sex marriages is, in fact, in conflict with the core aspect of being an officer of the state and having to be neutral in the provision of state services.[132] These decisions also emphasise the harm that occurs when religious exemptions are allowed in these circumstances, and that the effects ripple beyond the individuals into communities and society at large. The idea that your government essentially tells you that your lifestyle and family choices are not good enough and stand to be condemned is incredibly harmful.[133] This is the harm that is apparent in allowing section 6 to continue to be implemented in South Africa, which provides some of the best same-sex protections on paper, but not in reality. The legislation needs to follow in the steps of these cases and do away with allowing civil marriage officers to continue to perpetuate inequality. We have emphasised the need to address the significant past discrimination against LGBTI persons in South Africa – this need is consistent with the values of equality and dignity as entrenched in the Constitution.

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126 *Franck M.*, decision no. 2013-353 QPC, Oct. 18 2013, at para 10; *Alkotmánybíróság* (AB) (Constitutional Court) Mar. 25, 2010, No. 32/2010 (Hungary.).

127 Op cite note 39, at 150-51

128 Ibid.

129 Ibid.

130 Ibid.

131 Ibid.

132 *INCLO Drawing the Line: tackling Tensions Between Religious Freedom and Equality* (2015) 11.

133 Ibid 11.

6.3 Regulating religious exemption to same-sex marriages in foreign jurisdictions

In a report compiled by the Oxford Pro Bono Publico (OPBP) unit, there are countries that have legalised same-sex marriages and that do not allow for civil marriage officers to conscientiously object to solemnising the marriages or unions of same-sex couples. It is necessary to understand the reasoning behind the different states' decisions not to allow religious exemptions. There are also a few jurisdictions that allow for civil marriage officers to conscientiously object to solemnising same-sex marriages or unions; however, the objections are regulated. It is worth understanding how these foreign jurisdictions regulate religious exemptions to same-sex marriages, and the impact these exemptions have on a same-sex couple's rights to marry and to equality. This goes towards understanding whether such regulations can be implemented in South Africa, or whether it would only continue to be an unjustifiable limitation on the rights to marry and to equality for same-sex couples.

Research indicates that the majority of the countries examined favoured a separation of church and state. State marriage officers are treated differently to religious marriage officers – religious exemption does not apply to the former, whereas it would be available to the latter group of marriage officers. The OPBP report identified this as being a reflection of the idea that state marriage officers are vehicles of the state[134] and, therefore, cannot rely on freedom of religion to exempt themselves from performing a civic duty. No jurisdiction studied has compelled a religious marriage officer to solemnise a marriage or union with which they or their religious organisation disagreed.[135] Some of the key findings of the (non-) application of religious exemptions to same-sex marriages and unions are discussed in detail below.

6.3.1. Belgium

Article 21 of the Belgian Constitution provides an exception to the separation of church and state, stating that a religious wedding ceremony requires a civil marriage to be performed by a state officer first before it can have the legal effects of a marriage. Civil marriages are performed by the mayor or "alderman" of a municipality. Belgium's equality law, Anti-Discrimination Law 2007 (amended in 2013),[136] prohibits discrimination on the grounds of sexual orientation and religion, among others. State marriage officers are not allowed to conscientiously object to solemnising a same-sex marriage.[137] Religious marriage officers, however, may be allowed to choose whether or not they will perform a same-sex marriage or union, but the allowance to object to performing such marriages is determined by the internal organisation of the religion.[138] The Belgian Constitution respects the separation of church and state, and ensures freedom of religion in Articles 19 and 20. Each religion is free in its own organisation.

134 Op cit note 24 at 3.

135 Op cit note 24 at 6.

136 Available at: https://www.legislationline.org/topics/country/41/topic/84 [Accessed on 3 July 2018].

137 Op cit note 24 at 21.

138 Ibid.

State marriage officers may only refuse to perform a marriage in instances where they suspect the marriage to be one of convenience, or where one of the formal requirements for a marriage has not been met by one or both parties.[139] Beyond these two instances, state marriage officers cannot refuse to marry a couple, let alone a same-sex couple, and cite religious reasons for their refusal. They are expected to take a neutral attitude to the marriage, as civil servants.

6.3.2. Germany

The German legislature legalised same-sex marriage in 2017, when the Law Introducing the Right to Marry for Persons of the Same-Sex was gazetted in July 2017 and became effective on 1 October 2017.[140] State marriages officers (registrars) are obliged to perform same-sex marriages. All marriages performed by a state marriage officer are legally valid, and marriages concluded by a religious marriage officer has no legal effect unless also concluded by a state marriage officer.[141] State marriage officers are obliged to perform a same-sex marriage if all the statutory requirements are met – there are no other grounds available to the state marriage officer to refuse to marry a same-sex couple. Therefore, German law makes no allowance for religious exemptions. It is highly likely that if a state marriage officer refused to perform a same-sex marriage on the grounds of it being repugnant to their religious beliefs, this would constitute a breach of duty, and they would face disciplinary measures.[142]

6.3.3. Ireland

Marriages in Ireland are concluded by a registered solemniser, who has been included in the Register of Solemnisers in terms of the Civil Registration Act 2004.[143] The solemnisers can be civil, religious or secular. Same-sex couples are able to get married in Ireland after a 2015 amendment to the Civil Registration Act 2004, which removed the bar to same-sex marriages. This 2015 Act does not contain a religious exemption provision in relation to state marriage officers; however, section 7 of the Act provides an exemption for religious marriage officers from performing same-sex marriages.

In cases where a state marriage officer refuses to register the marriage of a same-sex couple without 'reasonable cause', then he or she will be guilty of an offence in terms of section 69(4) of the Civil Registration Act. The Act does not define "reasonable cause", but it is interpreted not to include religious exemption.[144] Should the state marriage officer be found guilty of this offence, they are liable to pay a fine of €2,000, or face imprisonment for up to 6 months, or both.[145]

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139 Ibid, 22.

140 Translated German Government Gazette, 28 July 2017 available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2787.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27I_2018_22_inhaltsverz%27%5D__1530614894018 [Accessed on 3 July 2018]

141 Op cit note 24 25.

142 Ibid, 26.

143 Op cit note 24 at 27.

144 Ibid, 29.

145 Ibid.

6.3.4. The Netherlands

A civil marriage, performed by a civil marriage officer, is a requirement before a couple can have a religious marriage ceremony. This is stipulated in Article 1:68 of the Dutch Civil Code. The Netherlands does not have an express religious exemption clause or provision for state marriage officers. In 2014, a law was passed that prohibited the hiring of state marriage officers who would not perform marriage ceremonies in accordance with the Dutch General Equal Treatment Act, which protects sexual orientation.[146] Essentially, municipalities may only hire state marriage officers who are willing to perform same-sex unions. The 2014 law also provides for measures to be taken against state marriage officers hired before 2014 who refuse to perform same-sex unions.[147]

When a state marriage officer was dismissed for refusing to solemnise a same-sex union, the Court in The Hague considered this case of conflicting rights. It concluded that, in assessing whether dismissing the officer was a proportionate measure, the protection of the rights of same-sex couples not to be discriminated against was a legitimate aim.[148] It was held that the core task of the marriage officer was to perform marriages, and thus they were an extraordinary civil servant. The marriage officer was also seen to be an extension of the Municipality whose policy was to stimulate social acceptance of homosexuality. As a result, the Court held that the dismissal was proportionate. Municipalities are obligated to ensure that same-sex couples can get married in their municipality.[149]

6.3.5. The United Kingdom

In England and Wales, there are no legislative religious exemptions for state marriage officers to object to performing a same-sex union. The Marriage (Same Sex Couples) Act 2013, which governs same-sex marriage in England and Wales, does not permit employers to grant an exemption to performing any part of the duties of a registrar (state marriage officers).[150] A local authority, as the employer and public authority, is under a duty in terms of the Equality Act 2010 not to discriminate in the provision of services; therefore, it is not in a position to grant an exemption to a registrar where it will affect a same-sex couple's ability to marry.

Scotland's approach to religious exemptions is similar to that of England and Wales in that the legislation does not allow for religious exemptions. It is, however, unclear whether local authorities are in a position to grant exemptions for state marriage officers who object to performing a same-sex marriage. Northern Ireland does not allow for same-sex marriage; however, it allows for same-sex civil partnerships. It is necessary for the partnership to be solemnised at a registrar's office, and the Civil Partnerships Act 2004 does not allow for exemptions to be granted to registrars who refuse to solemnise the same-sex civil partnership. The registrar must complete the proceedings upon receipt of a civil

146 Ibid, 31.

147 Ibid.

148 Op cit note 24 at 31.

149 Ibid, 34.

150 Ibid, 35.

partnership notice and where no legal impediments exist to the formation of the partnership.[151] If there are no procedural errors or failings, then the registrar is obligated to register the partnership.

6.3.6. Canada

Marriages may be concluded by a state marriage officer, or a registered member of the clergy – the member must be registered for the marriage to have legal effect.[152] Same-sex couples may be married in terms of the Civil Marriage Act 2005, and whether or not state marriage officers are exempt from performing such marriages on religious grounds depends upon the applicable provincial law where they are situated. The OPBP report notes that:

> *"Ontario, Quebec, Nova Scotia, New Brunswick, Alberta and British Columbia do not exempt SMOs* [state marriage officers] *from performing same sex unions on religious grounds in their Marriage Acts. Commentators have noted that in British Columbia a SMO may refuse only on the condition that they refer the same-sex couple to an alternative, willing marriage officer. In each of the other provinces, SMOs reportedly also may refuse to perform SSUs* [same-sex unions], *although commentators have suggested that these policies are not consistently applied by all municipal governments.165 However, even if such policies are applied, they are not published."*[153] [Footnotes omitted]

The provinces of Saskatchewan, Manitoba, Newfoundland and Labrador do not exempt state marriage officers from performing a same-sex union, and require that an officer who refuses to perform a same-sex union must resign. In *Kisilowsky v Manitoba*[154], a state marriage officer challenged the revocation of his license for refusing to perform same-sex unions. The Court held that state marriage officers were government officials and they were required to perform their functions in a way that does not violate the rights of others. The Court also held that limiting the right to religious freedom of the state marriage officer was proportionate to the aim of protecting the rights of same-sex couples.[155] The state marriage official also had the option of registering as a religious marriage officer, and would therefore be able to benefit from the religious exemption as he could then give effect to his right to freedom of religion.

6.3.7. United States of America

In 2015, same-sex marriage was legalised at a federal level in the Supreme Court case of *Obergefell v Hodges*.[156] States may no longer bar marriage between same-sex couples; however, they may regulate same-sex marriages according to state law, but within the framework of federal law. The State of Mississippi passed the Protecting Freedom of Conscience

151 Ibid, 37.

152 Op cit note 24 at 41.

153 Ibid 41-42.

154 *Kisilowsky v Her Majesty the Queen in Right of the Province of Manitoba* 2018 MBCA 10.

155 Op cit note 24 at 44.

156 135 S Ct 2584 (2015).

from Government Discrimination Act in 2016, which allows state employees authorised to perform or solemnise a marriage to recuse themselves from doing so because of a sincerely held religious belief.[157] This would allow a state employee to refuse to marry a same-sex couple should it be contrary to their sincerely held religious belief.

The State of Utah passed legislation allowing government officials to recuse themselves from performing any marriage, for any reason.[158] They may only do so as long as another government official is available to solemnise the marriage. North Carolina allows magistrates, and assistant and deputy registers of deeds to recuse themselves from performing any marriage on the basis of any sincerely held religious objection.[159] In light of allowing religious exemptions, the State also requires a general availability of a magistrate to perform marriages for at least 10 hours per week, and over at least three business days per week.[160]

6.3.8. Argentina

The Civil and Commercial Civil Code of 2014 includes the unions of same-sex couples. All marriages in Argentina are to be performed by civil servants. The Code does not include religious exemptions for state marriage officers. Local Bills were introduced to regulate religious exemptions for state marriage officers performing same-sex unions, but these were quashed. There are currently no provisions allowing for religious exemptions.

6.3.9. Brazil

In 2011, the Brazilian Federal Supreme Court ruled that common law marriage, which could only be concluded between a man and a woman, violated subsection IV of Article 3 of the Brazilian Federal Constitution of 1998.[161] The subsection prohibits any form of discrimination. This made same-sex marriage possible throughout Brazil. The Brazilian National Council of Justice, an administrative body belonging to the judiciary, adopted Resolution 175/2013, which prohibits a public authority from recusing him or herself from solemnising a same-sex marriage or union.[162] This resolution binds the judiciary and all employees of the registries. Should any of these persons refuse to solemnise a same-sex marriage or union, then administrative procedures or sanctions can be instituted against them.

6.3.10. Colombia

In 2016, the Colombian Constitutional Court held that article 42 of the Constitution, which protects "*the free decision of a man and woman to contract matrimony,*" did not exclude the possibility of a same-sex marriage.[163] It was declared that same-sex couples have the right to marry, and the State has an obligation to guarantee the right. All marriages

157 Op cit note 24 at 46.

158 Ibid.

159 Ibid.

160 Ibid.

161 Ibid, 56.

162 Op cit note 24 at 56-57.

163 Ibid, 60.

in Colombia, including same-sex marriages, are concluded by judges, notaries or civil servants.[164] The Court made no reference to conscientious objection, on the grounds of religion, to same-sex marriages. Colombia, therefore, does not have a provision granting or denying religious exemptions.

6.3.11. Australia

The Marriage Amendment (Definition and Religious Freedom) Act, passed in December 2017, allows for same-sex marriage in Australia. Marriages are solemnised by an authorised celebrant, and includes both state and religious marriage celebrants.[165] State or civil celebrants are not allowed to conscientiously object to solemnising a same-sex marriage. They are required as agents of the Commonwealth, '*to uphold the definition of marriage under the Marriage Act without discrimination.*'[166] Should a state celebrant wish to refuse to perform a same-sex marriage, then they must register as a religious marriage celebrant.[167]

6.3.12. New Zealand

New Zealand allows for a marriage or union to be solemnised by a marriage celebrant (non-state marriage officer), or by a Registrar of Marriages located at a registry office. Legislation does not allow for a Registrar to be exempted from performing a same-sex marriage or union; however, marriage celebrants are allowed to refuse to solemnise a same-sex marriage if it is contrary to the religious beliefs held by the religious body, or approved organisation to which the celebrant belongs.[168] The only grounds upon which a Registrar may refuse to marry a same-sex couple would be that they have a reasonable cause to believe the marriage is prohibited by the marriage act, or the statutory requirements have not been complied with.[169]

The majority of the above foreign jurisdictions emphasise the same position: where a state marriage officer is allowed to perform a marriage, irrespective of the sex, gender and sexual orientation of the couple before him or her, in performance of this civic duty they cannot refuse to solemnise the marriage on the basis of a religious belief. They are a representative of the State. To allow for religious exemption to apply to state marriage officers would be contrary to the State's pursuit of equality and the obligation to give effect to the right of same-sex couples to marry. Given that the South African government has the same goal and obligation to respect, protect, promote, and fulfil rights, as envisaged by section 7 of the Constitution, in balancing the freedom of religion of state marriage officers against the rights of same-sex couples to marry and to equality, it would be reasonable and justifiable to limit the right to freedom of religion in circumstances where the person is acting in their capacity as a representative of the State. In these cases, it is crucial for civil servants to be impartial when providing a civic duty or public service on behalf of the state.

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164 Ibid.

165 Ibid, 64.

166 Ibid.

167 Ibid, 10.

168 Op cit note 24 at 69.

169 Ibid, 10.

7. CONCLUSION

Upon examining South African religious freedom jurisprudence and foreign case law on conscientious objections, several points arise that may be useful for developing a constitutional challenge to section 6 of the Civil Union Act. Firstly, the balancing analysis used in *Strydom* and *Reference re Marriage Commissioners Appointed Under the Marriage Act*, which weighed the right to religious freedom against the right to not be discriminated against on the basis of sexual orientation, can be applied to the Civil Union Act. Section 6 should not be permitted to be used as a vehicle to perpetuate discrimination against same-sex couples, particularly where the impact of a conscientious objection provision is markedly greater on the couple than on the potential objector. Balancing the two rights are also in line with the reasoning in religious freedom cases such as *Christian Education* and *Prince*.

Another critical point highlighted by *Reference re Marriage Commissioners Appointed Under the Marriage Act* and *Ladele* is that the civil servants and service providers voluntarily assume their roles. In choosing to accept the position as a marriage officer and its corresponding responsibilities, the officer should not be able to refuse to perform his or her duties on the grounds of conscience.

The roles the officers and providers have voluntarily assumed are also neutral in nature. In their decisions, as mentioned earlier, the French constitutional courts underlined the importance of upholding neutrality in the provision of public services. In applying the courts' reasoning to section 6, civil servants should not be allowed to object to solemnising civil unions of same-sex couples because the practice is secular and neutral, and civil servants are the only persons with the authority to solemnise such unions. Even more, allowing civil marriage officers to object to solemnising same-sex unions is contrary to the very ideals and obligations the state has assumed and is obliged to uphold in terms of the Constitution; the ideals and values of freedom, equality, and human dignity, and the pursuit of creating a society based on these ideals.

Moreover, foreign courts have diverged with respect to whether having an alternate officer on duty to solemnise the civil union should provide justification for entitling another officer to conscientiously object. The Canadian court in *Reference re Marriage Commissioners Appointed Under the Marriage Act* explained that the initial refusal by a marriage officer subjects the couple to impermissible discrimination, even if another officer agrees to marry the couple. The consequences of being denied marriage services in the first place, the court opined, constitutes an abridgment of the constitutional rights of same-sex couples due to the impact on same-sex couples of being told by a marriage commissioner that he or she will not solemnise a same-sex union. As can be easily understood, such effects are very significant and genuinely offensive.

Overall, a compelling argument can be made that section 6 of the Civil Union Act is unconstitutional. As it stands, the provision practically allows individual officers to discriminate against same-sex couples at will, and provides few

guidelines to govern their arbitrary behaviour. Both the Constitutional Court of South Africa and foreign courts have demonstrated that the right to freedom of religion can and should be limited in certain situations. With respect to the Civil Union Act, limiting the right to religious freedom is not only reasonable and justifiable, but is also necessary to protect the right not to be unfairly discriminated against on the basis of sexual orientation. In sum, a challenge to section 6 of the Civil Union Act rests on considerable domestic and international precedent for the preservation of fundamental dignities, as well as access to necessary services, over the right to claim religious exemption from the law.

In conclusion, in seeking to have the Civil Union Act reflect the constitutional values and rights relating to equality, dignity and others, a member of parliament has taken steps to have a private member bill introduced. The memorandum attached to the private members bill, Civil Union Amendment Bill (Bill), states, "*that the purpose of the Bill is to repeal section 6 of the Act, which allows a marriage officer to 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.*" The memorandum further explains that:

- In the context of South Africa, many same-sex couples may be obliged to have their marriages solemnised by civil servants given that many religious bodies are unwilling to solemnise same-sex marriages;
- The prevalence of homophobia in South Africa means, "*that a large number of civil servants will avail themselves of the statutory right to lodge objections, resulting in same-sex marriage becoming available in theory only, especially in rural areas. This would clearly constitute undue hardship for same-sex couples.*" This is also what Free Gender has found, as explained above.
- This, therefore, leads to a conclusion that section 6 of the Act limits the rights of same-sex partners to enter into a civil union, and this limitation cannot be justified in an open and democratic society.

The Bill, therefore, aims to repeal section 6 of the Civil Union Act as a way to ensure that the promise of equality and dignity in the Constitution and PEPUDA is made a reality for all same-sex couples. We submit that the amendment to the Civil Union Act as proposed by the private member Bill is a necessary stride in ensuring that the discrimination and marginalisation faced by same-sex couples, even after the enactment of the Civil Union Act, is effectively addressed and that the state embraces equality and dignity for everyone as both values and rights in the Constitution. This step will also ensure that the Department of Home Affairs and the government of South Africa fully and permanently reject deep-seated patterns of past discrimination and continuing homophobia, while also affirming the diversity of identities in South Africa, and acknowledging that religion is not a sufficient reason to marginalise this diversity. All marriage officers employed and designated by the state in terms of section 2 of the Marriage Act, as well as the Civil Union Act, should perform their service and duties without favour, discrimination and inequality.

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