

Religious discrimination in the South African workplace

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Thesis submitted for the degree *Doctor Legum*
in Perspectives on the Law at the Potchefstroom Campus
of the North-West University

Promoter: Prof N Smit

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*To the memory of my loving Mother,
Daphne Henríco,
thank you for just being you.*

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LIST OF ABBREVIATIONS

AAcad	Acta Academica
ACur	Amicus Curiae
AJBE	African Journal of Business Ethics
AJur	Acta Juridica
AHRLJ	African Human Rights Law Journal
AJCL	American Journal of Comparative Law
AJHSS	American Journal of Humanities and Social Sciences
AJSMS	American Journal of Social and Management Sciences
AJPSIR	African Journal of Political Science and International Relations
AlbLR	Alberta Law Review
ARR	African Research Review
ArsD	Ars Disputandi: Online Journal for Philosophy of Religion
ATheol	Acta Theologica
AULR	American University Law Review
BCEA	Basic Conditions of Employment Act
BCICLR	Boston College International and Comparative Law Review
BCLR	Bulletin of Comparative Labour Relations
BFOR	<i>bona fide</i> operational requirement
BMJ	British Medical Journal
BostUILJ	Boston University International Law Journal
BYULR	Brigham Young University Law Review
CanBR	Canadian Bar Review
CanES	Canadian Ethnic Studies
CanJC	Canadian Journal of Communication
CanJHR	Canadian Journal of Human Rights
CanJLJ	Canadian Journal of Law and Jurisprudence
CanJLS	Canadian Journal of Law and Society
CanJPS	Canadian Journal of Political Science
CanJW&L	Canadian Journal of Women & the Law

CanLLJ	Canadian Labour Law Journal
CanLR	Canadian Law Review
CCMA	Commission for Conciliation, Mediation and Arbitration
CCR	Constitutional Court Review
CEEA	Canadian Employment Equity Act
CFC	Constitutional Forum/Forum Constitutionnel
CHRA	Canadian Human Rights Act
CHRC	Canadian Human Rights Commission
CHSJ	Culture, Health and Sexuality Journal
CILSA	Comparative and International Law Journal of Southern Africa
CLLPJ	Comparative Labor Law and Policy Journal
ColHRLR	Columbia Human Rights Law Review
ColLR	Columbia Law Review
CornILJ	Cornell International Law Journal
CPRRC	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CSJ	Crime and Social Justice
CWRJIL	Case Western Reserve Journal of International Law
DalJLS	Dalhousie Journal of Legal Studies
DepLR	Depaul Law Review
DEFIRB	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
DRTheolJ	Dutch Reformed Theological Journal
EEA	Employment Equity Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EGPJ	Ethics and Global Politics Journal
EJCL	Electronic Journal of Comparative Law
EJIL	European Journal of International Law
EmILR	Emory International Law Review
EmLJ	Emory Law Journal

Empl	Employment Law
ErasLR	Erasmus Law Review
FedGov	Federal Governance
FordhILJ	Fordham International Law Journal
FordhLR	Fordham Law Review
GeorgLJ	Georgetown Law Journal
GLJ	Global Labour Journal
HarvHRJ	Harvard Human Rights Journal
HarvIL J	Harvard International Law Journal
HLR	Health Law Review
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Political Rights
IICLR	Industrial International and Comparative Law Review
IJCanS	International Journal of Canadian Studies
IJCL	International Journal of Constitutional Law
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
IJDL	International Journal of Discrimination and the Law
IJJPL	International Journal for Jurisprudence and Philosophy of Law
IJLPF	International Journal of Law, Policy and the Family
IJLSS	International Journal of Law and Social Sciences
IJRF	International Journal for Religious Freedom
IJRR	Interdisciplinary Journal of Research on Religion
ILJ	Industrial Law Journal
ILO	International Labour Organization
IndICLR	Indiana International and Comparative Law Review
IROJ	inherent requirement(s) of the job
ISIS	Islamic State in Iraq and Syria
IsrLR	Israel Law Review
JAL	Journal of African Law
JAmAR	Journal of the American Academy of Religion
JAmF	Journal of American Folklore

JGR&J	Journal of Gender, Race & Justice
JHR	Journal of Human Rights
JHSuzmF	Journal of the Helen Suzman Foundation
JIMI	Journal of International Migration and Integration
JIR	Journal of Intergroup Relations
JJS	Journal of Juridical Science
JLERI	Journal of Legal, Ethic and Regulatory Issues
JLP	Journal of Legal Pluralism
JLR	Journal of Law and Religion
JLSP	Journal of Law and Social Policy
JMD	Journal of Management Development
JNatZuH	Journal of Natal and Zulu History
JPPL	Journal of Parliamentary and Political Law
JPSL	Journal of Philosophy, Science and Law
JPT	Journal on Perspectives of Terrorism
JRH	Journal of Religious History
JR&S	Journal of Religion and Society
JSI	Journal of Social Issues
JSR	Journal for the Study of Religion
JTSA	Journal of Theology for Southern Africa
JWH	Journal of World History
JurInt	Juridica International
KansURLP	Kansai University Review of Law and Politics
KentLJ	Kentucky Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LCP	Law and Contemporary Problems
LD&D	Law, Democracy & Development
LexE	Lex Electronica
LouLR	Louisiana Law Review
LRA	Labour Relations Act

MacqLJ	Macquarie Law Journal
MalLJ	Malawi Law Journal
MarJIL	Maryland Journal of International Law
McGill LJ	McGill Law Journal
MichLRFI	Michigan Law Review First Impressions
-MLR	Modern Law Review
MJSS	Mediterranean Journal of Social Sciences
MurULR	Murdoch University Law Review
NebrLR	Nebraska Law Review
NELR	North East Law Review
NYLSLR	New York Law School Law Review
NJCL	National Journal of Constitutional Law
NotreDLR	Notre Dame Law Review
NTM	Nordisk Tidsskrift for Menneskerettigheter
NWJIHR	Northwestern Journal of International Human Rights
NWULRC	Northwestern University Law Review Colloquy
OHLJ	Osgoode Hall Law Journal
OHRC	Ontario Human Rights Commission
OHRCODE	Ontario Human Rights Code
OHRT	Ontario Human Rights Tribunal
OJPR	Online Journal for Philosophy and Religion
OttLR	Ottawa Law Review
OxJLR	Oxford Journal of Law and Religion
OxJLS	Oxford Journal of Legal Studies
PAJA	Promotion of Administrative Justice Act
PAREJ	Practical Assessment, Research & Evaluation Journal
PEPUDA	Promotion of Equality and Protection of Unfair Discrimination Act
PER	Potchefstroom Electronic Law Journal
PILR	Pace International Law Review
PubL	Public Law
QLJ	Queen's Law Journal

R&PA	Rhetoric & Public Affairs
RCS	Review of Constitutional Studies
RDUS	Revue de droit de l'Université de Sherbrooke
RJur	Ratio Juris
SACRRF	South African Charter of Religious Rights and Freedoms
SAJBL	South African Journal of Bioethics and Law
SAJE	South African Journal of Education
SAJHR	South African Journal on Human Rights
SAJHRes	South African Journal of Human Resources
SAJIP	South African Journal of Industrial Psychology
SAJLR	South African Journal of Labour Relations
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
SAPhJ	South African Pharmaceutical Journal
SAPL	Southern African Public Law
SaskLR	Saskatchewan Law Review
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
SCJIL	Santa Clara Journal of International Law
SCLR	Supreme Court Law Review
SCR	Studies in Comparative Religion
SecJ	Security Journal
SHEccI	Studie Historiae Ecclesiasticae
SLR	Statute Law Review
SMLJ	Southern Methodist Law Review
StanILJ	Stanford International Law Journal
Stell LR	Stellenbosch Law Review
SWJ	Social Work Journal
TempLR	Temple Law Review
TILJ	Texas International Law Journal
TheoS	Theological Studies

TSAR	Tydskrif vir Suid-Afrikaanse Reg
TulJCIL	Tulsa Journal of Comparative and International Law
UBCLR	University of British Columbia Law Review
UCDJL&P	UC Davis Journal of Juvenile Law & Policy
UDHR	Universal Declaration of Human Rights
UNBLJ	University of New Brunswick Law Journal
UPennJCL	University of Pennsylvania Journal of Constitutional Law
UPennJIEL	University of Pennsylvania Journal of International Economic Law
UPennLR	University of Pennsylvania Law Review
Utah LR	Utah Law Review
UTorLJ	University of Toronto Law Journal
UtrLR	Utrecht Law Review
VEccl	Verbum et Ecclesia
VirgLR	Virginia Law Review
YJLF	Yale Journal of Law and Feminism
YJLH	Yale Journal of Law and Humanities
YLJ	Yale Law Journal

PUBLICATIONS AND CONFERENCE CONTRIBUTIONS EMANATING FROM DOCTORAL STUDIES

Articles

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National

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Henrico R "Non-compliance with the principle of subsidiarity in South African administrative law: what are the consequences?" The Administrative Justice Association of South Africa Conference (11 and 12 February 2016 KwaZulu-Natal)

International

Henrico R "Substituting '*quo modo*' with 'in what manner'? A metamorphosis of legal jargon to user-friendly English when teaching law to non-law students" Faculty of Law, Department of International Practical Business Law International Conference (6 September 2011 Johannesburg)

Henrico R "Flexible adjudication in religious discrimination workplace disputes" Unpublished contribution delivered at the *International Labour and Social Security Law Conference* (17 September 2015 Cape Town)

Henrico R "Administrative Justice in South Africa: Formalistic Legislation Giving Rise to a Dual System of Law and Uncertainty" Riverside University Symposium on Global Policy and Administration (4 and 5 December 2015, Los Angeles, California)

Henrico R "Educating our future legal practitioners: The imperative of transformative education" at 5th Annual International Conference on Law, Policy and Regulation (31 May 2016 Singapore)

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ABSTRACT

South Africa is a country reflective of a society rich in cultural and ethnic diversity. Locally and internationally the term "rainbow nation" is used to describe South Africa. This diversity that once separated many due to political ideologies and policies is now used as a collective notion. Under the Constitution of the Republic of South Africa, 1996 (the Constitution) we are enjoined to be united in our diversity so as to establish a society based on democratic values, social justice and fundamental human rights. Tolerance is essential for purposes of embracing diversity. The realisation of social justice is made possible through a commitment to transformative constitutionalism and *ubuntu*.

The aforesaid cultural diversity of South African society also translates into a diversity of religions. This is as much apparent in society as it is in the workplace. South Africa can be regarded as a secular neutral state on account of the lack of intervention by government in private religious affairs and/or activities either on the part of individuals or religious organisations. However, the manifestation of religious freedoms on the part of an employee in the workplace can conflict with the inherent requirements of the job (IROJ). It may even conflict with the operational requirements of an employer's business. Religious organisations may insist that the IROJ demand employees share their religious beliefs, or exclude applicants from employment. The aforesaid instances give rise to claims of unfair discrimination on the basis of religion.

These claims are often fraught with complexities since they arise from competing fundamental rights. On the one hand, the right which the employee has to freely express his or her religious freedom in the workplace; on the other, the right which an employer has to conduct business in accordance with the IROJ which may limit, restrict or even preclude an employee from manifesting religious freedom in the workplace. The tensions which arise from a conflict between the above fundamental rights in the workplace should be effectively resolved through mutual dialogue between the employee and employer as role-players. However, it is more often

intensified on account of the inherent imbalance in the bargaining power between the parties to the employment relationship. This renders constructive dialogue difficult – if not elusive. On account of this fact, there is a need for unfair discrimination on grounds of religion to be addressed in terms of an effective legislative and constitutional framework.

The Bill of Rights protects a variety of fundamental human rights. The right to, *inter alia*, equality, human dignity, freedom of expression and association, freedom of religion and fair labour practices are expressly recognised as basic entitlements. Whilst these rights are accorded to everyone, they are not absolute. They are all subject to a general limitation of rights clause which provides for a reasonable and justifiable limitation of rights in an open and democratic society based on human dignity, equality and freedom. The manner in which a fundamental right may be limited is subject to principles of rationality, reasonableness and proportionality. These considerations have significant roles to play in assessing the extent to which discrimination on the basis of religion can be said to (un)fair.

The legislation addressing religious unfair discrimination in the workplace is currently regulated by the Employment Equity Act 55 of 1998 (the EEA) and the Labour Relations Act 66 of 1995 (the LRA). Common to both these Acts is the fact that workplace discrimination by an employer on the basis of religion may be fair if it is based on the IROJ. Any advantage afforded a claimant in terms of pursuing an unfair discrimination claim on an alleged arbitrary ground in terms of the EEA is significantly diminished by the onerous burden of proof such claim attracts. The purpose of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is to address unfair discrimination in the private and public spheres of life, other than workplaces. PEPUDA is, however, relevant to religious unfair discrimination in the workplace on account of its generous and expansive definition of whether discrimination is (un)fair.

All legislation is required to be interpreted to in a way that gives effect to the underlying values and principles of the Constitution. This requires that such

legislation and the text of the Constitution be interpreted "generously" and "purposefully" in a manner that gives impetus to transforming our society. On account of the manner in which the expression of religious freedom manifests itself in the workplace, unfair discrimination claims often present themselves more frequently in the form of indirect as opposed to direct forms of discrimination.

When adjudication conflicting fundamental rights, giving effect to substantive, as opposed to formal, equality simply means that it is impossible to accord both competing fundamental rights equal treatment. What is required instead, is that the competing rights will be treated in accordance with their respective merits, regard being had to the circumstances of each case. An overarching means of determining the fairness of whether discrimination on the basis of religion is fair is to use what our courts have referred to as a "nuanced context-sensitive approach. Thus, there appears to be a general tendency on the part of our courts to no longer simply adjudicate religious unfair discrimination workplace disputes in terms of the so-called *Harksen v Lane* test, but to rather have regard to a host of factors thereby giving added impetus to substantive equality.

Canada serves as an appropriate international comparator. Like South Africa, Canadian society is multicultural in nature and diversely reflective of many religions. It too has a constitution based on human rights, namely the Canadian Charter (the Charter). Due to the Charter's limited vertical application, unfair discrimination on the basis of religion is addressed and regulated by the Canadian human rights framework which consists of various legislative measures operating at federal level. An analysis of Canadian jurisprudence on religious unfair discrimination in the workplace is advantageous on account of the emphasis it places on the need for considering the overall issue of substantive equality as opposed to the normative confines of nuances between direct and indirect (adverse) discrimination. Moreover, there is also emphasis on the need for mutual accommodation, as opposed to mere reasonable accommodation when considering the issue of (un)fairness.

The findings of this thesis are that South African labour law currently does address religious unfair discrimination in the workplace. This is done in the main through the legislative and constitutional framework. However, there is room for improvement. It is recommended that the current restrictive wording of the EEA and LRA be amended to make provision for a wider and broader meaning of (un)fair discrimination. A meaning that permits the adjudicator to take into account multiple factors currently contained in section 14 of PEPUDA is encouraged. More specifically, an employer's defence should not be limited to the mere IROJ, but should be permitted to extend to include operational requirements. In addition, allowance should be made for instances where so-called negative and positive duties are imposed upon employers. A negative duty is where an employer has no knowledge of the employee's religious belief, as a result of which he cannot be required to act in any particular manner. A positive duty is where knowledge on the part of the employer requires particular steps, the fairness of which are relative to the circumstances. It is further recommended that a Code of Good Practice Concerning Religious Discrimination in the Workplace be incorporated into the EEC. The rationale for this is to increase awareness and education in the workplace with a view to establishing and encouraging appropriate dispute resolution mechanism procedures in relation to claims of religious unfair discrimination.

In addition, through the "nuanced context-sensitive" approach adopted by our courts greater effect should be given to the notion of mutual accommodation since this advances the notion of substantive equality and recognises the important role to be played by both employer and employee in seeking a solution to a problem in the workplace.

KEY WORDS

multicultural, tolerance, transformative constitutionalism, *ubuntu*, democracy, equality, religion, religious freedom, secularism, tensions between fundamental competing rights, limitation of rights, workplace, inherent requirements of the job, unfair discrimination, rationality, reasonableness, justifiability, proportionality, mutual accommodation, "nuanced context-sensitive " adjudication.

OPSOMMING

Suid-Afrika is 'n land wat 'n samelewing weerspieël wat ryk is aan kulturele en etniese diversiteit. Plaaslik en internasionaal word die term "reënboognasie" gebruik om Suid-Afrika te beskryf. Hierdie diversiteit wat op 'n stadium baie mense van mekaar vervreem het weens politieke ideologieë en beleidsrigtings, word nou as 'n kollektiewe begrip gebruik. Kragtens die Grondwet van die Republiek van Suid-Afrika, 1996 (die Grondwet) het ons die opdrag om in ons diversiteit verenig te wees om sodoende 'n samelewing te skep wat gegrond is op demokratiese waardes, maatskaplike geregtigheid en fundamentele menseregte. Verdraagsaamheid is noodsaaklik om diversiteit te akkommodeer. Die verwesenliking van maatskaplike geregtigheid word moontlik gemaak deur middel van 'n verbintenis tot transformerende konstitusionalisme en *ubuntu*.

Bogenoemde kulturele diversiteit van die Suid-Afrikaanse samelewing word herlei na 'n diversiteit van godsdienste. Dit is ewe sigbaar in die samelewing en in die werkplek. Suid-Afrika kan as 'n sekulêre neutrale staat beskou word weens die gebrek aan regeringsingryping by private godsdiensaangeleenthede en/of -aktiwiteite van óf individue óf godsdiensstige organisasies. Die manifestasie van godsdiensvryheid by 'n werknemer in die werkplek kan egter strydig wees met die inherente vereistes van die werk (die IVVW). Dit kan selfs strydig wees met die bedryfsvereistes van 'n werkgever se besigheid. Godsdiensstige organisasies kan daarop aandring dat die IVVW vereis dat werknemers hul godsdiensstige oortuigings deel, of aansoekers van werk uitsluit. Voornoemde gevalle kan aanleiding gee tot bewerings van onbillike diskriminasie op grond van godsdiens.

Hierdie bewerings is dikwels gekompliseerd, aangesien hulle uit strydige fundamentele regte spruit. Aan die een kant is daar die reg van die werknemer om vrylik sy of haar godsdiensvryheid in die werkplek uit te druk; aan die ander kant die reg van die werkgever om sake te doen in ooreenstemming met die IVVW wat 'n werknemer kan beperk, inperk of selfs belet om godsdiensvryheid in die werkplek te manifesteer. Die spanning wat ontstaan weens 'n teenstrydigheid tussen

bogenoemde fundamentele regte in die werkplek moet doeltreffend opgelos word deur wedersydse dialoog tussen die werknemer en werkgever as rolspelers. Dit word egter dikwels vererger as gevolg van die inherente wanbalans in die bedingingsmag tussen die partye tot die diensverhouding. Dit maak konstruktiewe dialoog moeilik – indien nie onmoontlik nie. Weens hierdie feit bestaan daar 'n behoefte om aandag te gee aan onbillike diskriminasie op grond van godsdiens ingevolge effektiewe wetgewing en binne 'n grondwetlike raamwerk.

Die Handves van Regte beskerm 'n verskeidenheid fundamentele regte. Die reg op, onder andere, gelykheid, menswaardigheid, vryheid van uitdrukking en assosiasie, vryheid van godsdiens en billike arbeidspraktyke word uitdruklik as basiese regte erken. Hoewel almal aanspraak kan maak op hierdie regte, is hulle tog onderworpe aan 'n algemene klousule van beperking van regte wat voorsiening maak vir 'n redelike en regverdigbare beperking van regte in 'n oop en demokratiese samelewing gegrond op menswaardigheid, gelykheid en vryheid. Die manier waarop 'n fundamentele reg beperk kan word, is onderworpe aan rasionaliteit, redelikheid en proporsionaliteit. Hierdie oorwegings het beduidende rolle om te vervul om die mate te bepaal waarin diskriminasie op grond van godsdiens na bewering (on)billik is.

Die wetgewing wat oor onbillike diskriminasie op grond van godsdiens in die werkplek handel, word geregleer deur die Wet op Gelyke Indiensneming 55 van 1998 en die Wet op Arbeidsverhoudinge 66 van 1995. Wat hierdie twee wette gemeen het, is die feit dat werkplekdiskriminasie op grond van godsdiens billik kan wees indien dit op die IVVW gegrond is. Enige voordeel wat dit vir 'n eiser kan inhou om 'n eis van onbillike diskriminasie te kan instel word, word egter verminder deur die beswarende bewyslas wat sulke eise meebring. Die doel van die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie 4 van 2000 is om aandag te gee aan onbillike diskriminasie in die private en openbare lewensfeer, buiten die werkplek. Die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie het egter ook betrekking op onbillike diskriminasie op grond van godsdiens en in die werkplek weens die omvangryke en uitgebreide omskrywing van of diskriminasie (on)billik is wat daarin vervat is.

Alle wetgewing moet op 'n wyse vertolk word wat uitvoering gee aan die onderliggende waardes en beginsels van die Grondwet. Dit vereis dat wetgewing en die teks van die Grondwet "ruimhartig" en "met 'n bepaalde doel" geïnterpreteer moet word op 'n wyse wat stukrag gee aan die transformasie van ons samelewing. Weens die wyse waarop die uitdrukking van vryheid van godsdiens in die werkplek tot uiting kom, kom eise weens onbillike diskriminasie dikwels voor in die vorm van regstreekse in teenstelling met onregstreekse vorms van diskriminasie.

Wanneer strydige fundamentele regte beoordeel word wat uitvoering gee aan substantiewe in teenstelling met formele gelykheid, beteken dit dat dit eenvoudig onmoontlik is om aan die twee strydige fundamentele regte gelyke behandeling te verleen. Wat in plaas daarvan vereis word, is dat die strydige regte ooreenkomstig hul onderskeie meriete hanteer word, gelet op die omstandighede van elke geval. 'n Oorwoënde manier om vas te stel of diskriminasie op grond van godsdiens billik is, is om wat ons howe 'n "genuanseerde, konteksgevoelige" benadering noem, te gebruik. Dit wil dus voorkom asof daar 'n algemene geneigdheid by ons howe is om nie meer eenvoudig geskille oor onbillike diskriminasie in die werkplek op grond van godsdiens te beoordeel ingevolge die sogenaamde *Harksen v Lane*-toets nie, maar om eerder 'n magdom faktore in aanmerking te neem en sodoende bykomende stukrag aan substantiewe gelykheid te gee.

Kanada het gedien as 'n geskikte internasionale vergelyker. Soos Suid-Afrika is die Kanadese samelewing multikultureel en kom daar baie verskillende godsdienste voor. Kanada het ook 'n grondwet gebaseer op menseregte, die Kanadese Handves (die *Charter of Rights and Freedoms*). Weens die Handves se beperkte vertikale toepassing word onbillike diskriminasie op grond van godsdiens deur die Kanadese menseregteraaamwerk hanteer en gereguleer, wat uit verskillende wetgewende maatreëls bestaan en op federale vlak funksioneer. 'n Ontleding van Kanadese regsleer oor onbillike diskriminasie in die werkplek op grond van godsdiens is voordelig vanweë die klem wat dit plaas op die behoefte aan die oorweging van die totale kwessie van substantiewe gelykheid in teenstelling met die normatiewe grense van nuanses tussen regstreekse en onregstreeks (nadelige) diskriminasie. Boonop is daar ook

klem op die behoefte aan wedersydse tegemoetkoming wanneer die kwessie van (on)billikheid oorweeg word.

Die bevindings van hierdie proefskrif is dat Suid-Afrikaanse arbeidsreg op die oomblik wel aandag gee aan onbillike diskriminasie in die werkplek op grond van godsdiens. Dit vind hoofsaaklik plaas binne die wetgewende en grondwetlike raamwerk. Dit kan egter verbeter word. Daar word aanbeveel dat die huidige beperkende bewoording van die Wet op Gelyke Indiensneming en die Wet op Arbeidsverhoudinge gewysig word om voorsiening te maak vir 'n wyer en breër betekenis van (on)billike diskriminasie. 'n Betekenis wat die beregter in staat stel om veelvuldige faktore in aanmerking te neem soos wat tans in artikel 14 van die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie vervat is, word aangemoedig. Meer spesifiek, 'n werkgever se verweer moet nie bloot tot die IVWW beperk word nie, maar moet toegelaat word om tot bedryfsvereistes uitgebrei te word. Boonop moet toegewings gemaak word vir gevalle waar werkgewers sogenaamde negatiewe en positiewe pligte opgelê word. 'n Negatiewe plig is waar 'n werkgever geen kennis van die werknemer se godsdiensooruigings dra nie, en daar gevolglik nie van hom of haar verwag kan word om op 'n sekere manier op te tree nie. Positiewe plig is waar kennis by die werkgever sekere stappe vereis, waarvan die billikheid volgens die omstandighede bepaal word. Daar word ook aanbeveel dat 'n Kode van Goeie Praktyk rakende Diskriminasie in die Werkplek gegrond op Godsdiens ingesluit word by die Wet op Gelyke Indiensneming. Die rasionaal hiervoor is om bewustheid en opvoeding in die werkplek te verhoog met die oog daarop om geskikte geskilbeslegtingsmeganismes met betrekking tot eise van onbillike diskriminasie op grond van godsdiens te vestig en aan te moedig.

Daarby moet, deur middel van die "genuanseerde kontekssensitiewe" benadering wat deur ons howe aangeneem is, groter uitvoering gegee word aan die idee van wedersydse tegemoetkoming, aangesien dit die idee van substantiewe gelykheid bevorder en die belangrike rol erken wat beide die werkgever en werknemer speel om 'n oplossing vir 'n probleem in die werkplek te vind.

SLEUTELWOORDE

multikultureel, verdraagsaamheid, transformerende konstitusionalisme, *ubuntu*, demokrasie, gelykheid, godsdiens, godsdiensvryheid, sekularisme, spanning tussen strydige fundamentele regte, beperking van regte, werkplek, inherente vereistes van die werk, onbillike diskriminasie, rasionaliteit, redelikheid, regverdigbaarheid, proporsionaliteit, wedersydse tegemoetkoming, "genuanseerde konteksgevoelige" benadering

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*Thus the whole of our continent shows that we
must neither preach nor practice intolerance*

...
*Toleration, in fine, never led to civil war;
intolerance has covered the earth with
carnage*

...
*Reflect on the frightful consequences of the
right of intolerance ...*

*Religion was instituted to make us happy in
this world and the next. What must we do to
be happy in the next? Be just. What must we
do to be happy in this world, as far as the
misery of our nature allows? Be indulgent.*

Voltaire: *Toleration and Other Essays*
(McCabe (ed/transl) 1912)

CHAPTER 1: INTRODUCTION

1.1 Background

The excerpt from Voltaire on the previous page reflects at length on the advantages to be gained and the disadvantages to be suffered from religious tolerance and intolerance respectively.¹ Religion has defined and continues to define our history and lives in various ways.² Ancient Egypt owes its history, mystical buildings and dynasties that have transfixed humanity from time immemorial, to the influences of religious beliefs.³ A description is given of God in the book of Exodus as "[t]he Lord is a man of war: the Lord is his name".⁴ However, in Corinthians it is stated as follows: "For God is not the author of confusion, but of peace ...".⁵ Are these two verses an anomaly, or is the first merely an exhortation that in certain instances we need to act diligently, and if need be, with discipline and rigor, to achieve our objectives?⁶ Religion has been employed not only as a measure of goodness,⁷ but also as an instrument of harm. The Church of England, with Queen Elizabeth II currently as its official head or "Defender of the Faith", owes its origins to the seismic break King Henry VIII made with Rome and the Catholic faith in 1534, albeit for

¹ Becker and Parker (2014) *JSR* 234; Roux *Safe Spaces: Human Rights Education in Diverse Contexts* 29; Nehustan *Intolerant Religion in a Tolerant-Liberal Democracy*; Clark and Corcoran 2000 *R&PA* 627; Amoah and Bennett 2008 *AHRJ* 357-375; FOR SA 2015 <http://www.forsa.org.za/growing-intolerance-and-discrimination-against-christians>.

² Mill *On Liberty, Utilitarianism and Other Essays* 415-416; see also Trisk 2011 *JTSA* 74-78; Mitchell and Mullen *Religion and the Political Imagination in a Changing South Africa*; Strauss "A philosophical approach to law and religion: the context of human society" 382; Rautenbach 2014 *PER* 521-621; Phillips *The Telegraph*; Volf *Flourishing: Why We Need Religion in a Globalized World*; Sandburg *Religion, Law and Society*.

³ Oakes and Gahlin *Ancient Egypt* 268-277; Okon 2012 *AJSMS* 96-97.

⁴ Chapter 15:3 *Holy Bible* Old Testament 92.

⁵ Chapter 14:33 *Holy Bible* New Testament 225. A similar diametrically opposed proposition appears from the verse "I form the light, and create darkness: I make peace, and create evil: I the Lord do all these things" in Isaiah 45:7 *Holy Bible* Old Testament 839.

⁶ It is submitted that a parallel may be drawn between these *prima facie* diametrically opposed verses and the Greek notion of *pathei-mathos* derived from *The Agamemnon of Aeschyles* (c. 458 BCE) meaning in the humanitarian sense that through adversity or suffering and learning comes wisdom and knowledge. For further reading see Smyth *Aeschyles, Agamemnon* 176-181.

⁷ Mpedi 2008 *ATheol* 105; Mogoeng "Law and Religion in Africa: the quest for the common good in pluralistic societies"; see also De Barros 2014 www.mambaonline.com/2014/05/28; Du Toit 2006 *BYULR* 684; Van der Vyver 2012 *SCJIL* 157.

reasons of fulfilling his self-serving interests of being able to divorce and remarry.⁸ St. Bartholomew's Day massacre on 15 August 1572 will also be remembered as a time when human beings were slaughtered merely for being Protestant or non-Catholics, and where the streets of Paris and the River Seine turned red with the blood of the victims.⁹ Mary Queen of Scots is remembered as "Bloody Mary" for the 300 Protestants she sentenced to be hanged merely on account of their faith.¹⁰ The loss of too many innocent lives and the terror which gripped the world in the aftermath of the November 2015 terror attacks in Paris which took place in the name of a fundamentalist organisation called ISIS, professing to represent the true calling of the Muslim faith, is an all too vivid reminder of religious intolerance. The gunning to death of over 50 innocent people in a gay club in Orlando, America on 13 June 2016 by someone pledging allegiance to ISIS is another example of religious intolerance. It is paradoxical that religion, which should serve as a vehicle for sanctuary and edification, has also served as the very stage upon which humanity has suffered untold misery, misfortune and sadness. What makes this drama relevant and demanding of our attention is that it is not confined to the annals of history. It continues to play itself out in modern-day society, both nationally and internationally.¹¹

In Western societies which have become increasingly modern, globalised, multicultural, secular and pluralistic¹² the need exists to pay attention to the phenomena of religion, as it manifests itself in society in general and in the

⁸ Ackroyd *The History of England* 83 ff.

⁹ Holt *The French Wars of Religion, 1562-1629* 26; Probasco "Queen Elizabeth's reaction to the St. Bartholomew's day massacre" 80-83.

¹⁰ Dawson *The Politics of Religion in the Age of Mary, Queen of Scots, The Earl of Argyll and the Struggle for Britain and Ireland* 20.

¹¹ In 2016, 35 out of 50 countries listed religious persecution as the most worrying factor by governments in consequence of religious extremism terror attacks – see Open Doors 2016 <https://www.opendoorsuk/documents/www.report-160113.pdf>. Also see Pityana 1994 *JTSA* 10-13; Possamia, Richardson and Turner *Legal Pluralism and Shari'a Law*, McConnell 2015 *YLJ* 535.

¹² In the sense that a society is representative of people from various cultural, ethnic, racial and religious backgrounds – see Coertzen 2012 *Supplementum* 175-178; De Freitas 2014 *BYULR* 425-426, especially authority cited at fn 16; Botha 2009 *Stell LR* 193-194, 204-210, 214-215.

workplace in particular. In South Africa,¹³ with a population of 54,4 million,¹⁴ available statistics on religious observation and affiliations¹⁵ reflected that 86 per cent of the population regarded themselves as being Christians. An estimated 1.9 per cent considered themselves to be Muslim; 5,4 per cent asserted they followed ancestral, tribal, animist or other traditional beliefs whilst only 0,2 per cent of the population indicated they were Jewish.¹⁶ It is also interesting to note that the manifestation of religions is geographically defined in that Christianity was most prevalent in the Northern Cape at 98,4 per cent and in the Free State at 97,7 per cent whereas in KwaZulu-Natal Christianity stood at 78,5 per cent, 12,3 per cent of the population followed ancestral, tribal, animist or other traditional African religions and 3,3 per cent professed they followed "nothing in particular". The Western Cape revealed itself as containing the highest density of Muslims at 5,3 per cent whereas in Gauteng the rate was recorded as being 2,4 per cent. The highest percentage of Hindus was found to occur in KwaZulu-Natal at 3,3 per cent.¹⁷ With regard to religious observance 75,6 per cent of individuals following the Muslim faith indicated they attended religious services and ceremonies, to the exclusion of weddings and funerals, according to the survey. Furthermore 52,5 per cent of adherents of the Christian faith and 36,6 per cent of Hindu followers attended services once a week.

¹³ As a country, South Africa can in no way be considered to be a religious country in the sense that the state is dominated by religion being at the helm of government as is the case in Saudi Arabia, for example. However, it is a subject of ongoing debate whether South Africa is purely secular or religiously neutral on account of its recognition of cultural diversity co-existing with the protection of religious freedom and communities. For further reading see Amien 2010 *IJLPF* 362; Prinsloo 2009 *Alternation* 40-48; Benson 2013 *Supplementum* 23-26; Ferrari 2011 *IJRF* 35; Feron 2014 *EGPJ* 185-188. See also Brown "Religion, spirituality and the postcolonial: A perspective from the South" 3-4. The issue of secularism is analysed and reflected on in Chapter 2.

¹⁴ Stats SA 2015 <http://www.statssa.gov.za/publications/P0318/P03182015.pdf> 8-9. Also see Coertzen 2014 *AHRLJ* 127-128 for statistical data on religious groups in South Africa as in 2007.

¹⁵ What is meant by "observation" appears from Stats SA 2015 <http://www.statssa.gov.za/publications/P0318/P03182015.pdf> (hereafter the Survey) to be gauged in terms of the frequency with which a member of a particular religious belief attends church or religious services. Whilst "affiliation" is not defined it could arguably be gauged in terms of membership fee records and or fees paid; however, for purposes of the Survey "affiliation" should, it is submitted, be accepted in terms of the census which was conducted on the basis of persons stating their association or membership in respect of a particular faith or religion.

¹⁶ Stats SA 2015 <http://www.statssa.gov.za/publications/P0318/P03182015.pdf> 30-31. Also see summary at p 3 of this Survey.

¹⁷ Stats SA 2015 <http://www.statssa.gov.za/publications/P0318/P03182015.pdf> 30.

The survey noted that the highest level of "infrequent participation in services" was found in respect of individuals who said they followed ancestral, tribal, animist or other traditional African religions. Individuals affiliated to the latter religion represented 16,7 per cent but indicated they were most likely never to attend religious services; followed by 8,4 per cent of Muslims and 6,6 per cent of Hindus.¹⁸ The need to pay attention to religion, as previously mentioned, is borne out by the somewhat prescient observation made by Judge Albie Sachs in 1990:

Ideally in South Africa, all religious organisations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities – it would be up to the participants themselves to define what they consider to be their fundamental rights.¹⁹

A decade later, and as Coertzen has pointed out, "without being aware of what Judge Sachs had written"²⁰ a South African Charter of Religious Rights and Freedoms (the SACRRF) was duly signed by 24 Christian denominations and a multitude of other religious groups²¹ at the University of Johannesburg on 21 October 2010.²² The SACRRF was adopted pursuant to the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).²³ Even more noteworthy is that it was the first charter of its kind to be developed in the new South Africa.²⁴ It was a document which sought to address religious freedoms and rights by means of a collective effort and initiative on the part of civic and religious interest groups of South Africa in an attempt to unite the interests of all religious concerns (and individuals) without the need for any formal legislative regulation.²⁵ Essentially, the right to self-determination of religious freedom – with reference to the rights and responsibilities as set out in the various articles of the Constitution (which is explored in greater

¹⁸ Stats SA 2015 <http://www.statssa.gov.za/publications/P0318/P03182015.pdf> 31.

¹⁹ See Sachs *Protecting Human Rights in a New South Africa: Contemporary South African Debates* 46-47.

²⁰ Coertzen 2014 *AHRLJ* 126-129.

²¹ Such as, for example, the Hindu faith; the Tamil Federation; the Muslim theologians; the African Independent Churches – groups representing a sum total of an estimated 10,5 million of the then total South African population of 52 million. See Coertzen 2014 *AHRLJ* 129.

²² See Coertzen 2014 *AHRLJ* 129.

²³ In terms of section 234 civic organisations have the capacity to draft such instruments like the SACRRF.

²⁴ See Coertzen 2014 *AHRLJ* 129.

²⁵ See Coertzen 2014 *AHRLJ* 129.

detail in Chapter 2) – would seek to obviate the need for judicial intervention. The involvement of interest groups in creating the SACRRF is demonstrative not only of the relevance of religious freedom but also a culture of healthy participatory conduct and dialogue in a multicultural democracy. Commitment to a sense of community and the success of a democratic dispensation makes it imperative to celebrate diversity which must surely also extend to the recognition that there are others in our community who have no religious inclinations²⁶ or whose degree of orthodoxy varies but whose beliefs nevertheless deserve to be acknowledged, respected or even accommodated in the interest of tolerance. The requirement to tolerate means to put up with something – not necessarily because we agree with what we have to tolerate, but on account of a greater benefit derived from our tolerance than would result from intolerance.²⁷ There must also be a limit to such tolerance. One cannot be expected to tolerate conduct, behaviour or the manifestation of a belief that contributes to a denigration of another's human dignity or causes harm to another.²⁸ The by-product of tolerance is expressed notionally in the idea of "live and let live". Depending on the circumstances, intolerance can result in hostility, conflict, litigation and economic loss. Tolerance, on the other hand, can strengthen our sense of humanity, community, society, commitment to change²⁹ – all of which are important to South Africa in the context of transformative constitutionalism:³⁰ a change from a culture which was once authoritarian and exclusionary to a culture which is now

²⁶ Namely those who are atheists or agnostics.

²⁷ Meski 2010 *PER* 41-42; Preece 1998 *Politica* 150; Du Plessis 2016 *JRH* 241-243.

²⁸ Becker and Parker 2014 *JSR* 261-262; Jackson 2014 *JSR* 14.

²⁹ For further reading see Hoexter and Olivier *The Judiciary in South Africa* 78-81, especially the authorities cited at fns 77 and 78; Klare 1998 *SAJHR* 150; Pieterse 2005 *SAPL* 161; Ngcobo 2011 *Stell LR* 37; De Vos 2001 *SAJHR* 9.

³⁰ As coined by Klare 1998 *SAJHR* 171 and subsequently popularised by jurists and scholars in South African jurisprudence. See, for example, Mureinik 1994 *SAJHR* 33-37; Pieterse 2005 *SAPL* 156-160; Rapatsa 2014 *MJSS* 889; Le Roux 2005 *TSAR* 105-110; Langa 2006 *Stell LR* 353-356; Van Marle 2009 *Stell LR* 288-290; Liebenberg 2006 *Stell LR* 7; Davis *Democracy and Deliberation: Transformation and the South African Legal Order* 178; Zitke 2014 *AAcad* 63-65; *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 634E-F; *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of the State President of the RSA* 2000 2 SA 674 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC); *Matatiele Municipality v President of the RSA* 2007 1 BCLR 47 (CC) para 100.

justificatory,³¹ inclusive and embracing of all those living in South Africa, with all their differences, be these cultural, ethnic or religious.³² Support for this submission is borne out by the fact that the colloquial reference to South Africa as the "rainbow nation" echoes the imperative contained in the Preamble of the Constitution that "South Africa belongs to all who live in it, united in our *diversity*".³³ The benefits to be derived from a culture of tolerance in diversity are far outweighed by the losses sustained and suffered through intolerance. It speaks of a willingness on the part of interested persons to seek a change – to transform our society from its recent past, an association with hostility, intolerance and exclusivity, to one of hospitality, tolerance and inclusivity. Implicit to this notion is a change that can and must be activated by our legal system. However, as articulated below, the need, desire and catalyst for a change in the way we perceive things, react, consider and conduct ourselves and treat our fellow members in society in general and in the workplace in particular is an imperative that far transcends the confines of the regulatory framework of our legal dispensation. It is a spirit for changing our society that must come from each and every person making up the rich social diverse tapestry of South Africa that infuses all dimensions of society and our existence.

Work is an inexorable part of human existence. It is the lifeblood of commerce, industry and a significant aspect of the lives of people from diverse cultural, ethnic, political, social, economic and religious backgrounds within our society. It is the means by which persons are able to sustain themselves, their life partners or families. Some work to survive; others to live a more fulfilled life and thereby reach their goals. In whichever way one looks at the scenario, it cannot be denied that work forms an integral part of the lives of all people of society. People have to work in order to live. They also live to work. The workplace, in the traditional sense of the word, referring to an area where employees engage with colleagues and their employers, is in many instances a micro-image of our macrocosmic society. In this

³¹ The notion of a paradigm shift from an authoritarian culture to one which is justificatory is one which was captured by Mureinik 1994 *SAJHR* 31.

³² McDonald 2015 *JSR* 205. See also Mofokeng 2007 *LD&D* 130; Rautenbach 2010 *JLP* 163-165; Van Vollenhoven 2015 *PER* 2309-2311.

³³ Emphasis added.

sense, it can only be expected that the multicultural diversity that characterises society will also be visible in the workplace. A variety of religious rights and interests in the workplace does not and will not necessarily translate into a satisfactory working environment. An example of this would be where the inherent requirements of the job (IROJ) may be the performance of abortions at a clinic, which an employee finds offensive and objectionable on grounds of his or her religious belief. A further example is where an employer, out of economic considerations and for operational reasons, requires its employees to work on a Saturday, but is met by an objection from an employee or employees who are Seventh Day Adventists who claim that Saturday is their day of worship and attending church. Or take the case of an applicant for work³⁴ to an airline carrier for the position of a flight hostess. The applicant wears a *hijab*, *niqab* or *burka* on account of her Islamic faith and the inherent requirement of the position advertised is that a specific uniform is worn whilst performing duties as a flight hostess, which uniform cannot be worn with any of the aforesaid Islamic covers or scarves. This example aligns itself closely with one in which employees of, for example, the Christian faith wish to display a piece of jewellery representing a crucifix around their necks. A problem might arise in such cases where the dress code of the employer, due to the IROJ, prohibits the wearing of the crucifix, for example when the employer has a uniform dress code or may operate in an industry that renders services to a clientele that is traditionally Muslim or Jewish, such as a butcher selling solely kosher or halaal meat.³⁵ Another example is where non-mainstream religious employees at a workplace³⁶ request that since Christian public holidays³⁷ are recognised on the calendar, certain of their days of spiritual belief should also be duly recognised. What of the case of a devout Muslim male who works for an employer who traditionally is permitted additional time off on a Friday to perform his *salah* (prayers); however, due to operational requirements of

³⁴ Who qualifies for protection of rights afforded to employees in terms of the authority as laid down in *Wyeth SA (Pty) Limited v Manqele* 2005 6 BLLR 523 (LAC) para 20.

³⁵ Assuming, of course that the employee would be performing a role within the workplace that relates to interacting and engaging with clientele or customers and is hence going to be visible and an integral part of the business of the employer.

³⁶ Such as Rastafari, Taoism or traditional African religions.

³⁷ Such as, for example, Good Friday (March/April) and Christmas (25 December).

the employer either the workplace must relocate to premises where it would be geographically impossible for the employee to leave the premises; alternatively, in the absence of relocation, operational requirements do not permit additional time being granted to the employee. A further example might be where a customer of an employer operating in the service industry³⁸ objects to being treated or touched by an employee of the employer who is not of the same religion as the customer.³⁹ These examples can all be traced back to the IROJ which ultimately impact on the operational requirements of the employer.⁴⁰ However, other examples of different forms of religious discrimination can be identified where employees are singled out and unfairly discriminated against by either their employer or co-employees simply on the basis of their (the employee's) religious belief. Take a case of an employee of the Muslim faith who is treated with hostility at the workplace due to terrorist attacks carried out by Islamic fundamentalists.⁴¹ As a result of stereotyping⁴² the employee falls victim to being painted by the same brush as all fundamentalist terrorists simply on account of being a follower of the Islamic faith.

The aforesaid examples are provided to serve as possible instances of the confluence of competing rights and interests creating potential for conflict. In the employment relationship various fundamental and constitutionally enshrined rights relevant to this study are accorded both the employee and employer. Both parties enjoy the right to:

³⁸ For example, where the employer runs a spa and skin body treatment facility offering, *inter alia*, facials and pedicures.

³⁹ A further example could be a male practitioner employed in a private hospital clinic who is not of the Islamic faith who is called upon in a medical emergency case regarding the admission of a female patient who is an orthodox Muslim who refuses, or whose husband refuses, that she (the patient) is attended to by the non-Muslim medical practitioner.

⁴⁰ The contention being that the more removed the function is from the core business of the employer, the less relevant the religious affiliation of the employee is to the overall operation of the employer; an example being a Catholic diocese advertising a vacancy for an ordained priest to perform missionary services in a specific area which would be a core function the religious beliefs of the church. This is opposed to an advertisement for a vacancy for a person to tend the gardens at certain church halls on a regular basis – which function cannot be said to be a core function related to the religious beliefs of the church.

⁴¹ See Chidester 2008 *Scriptura* 360-364; Lincoln *Thinking about Religion after September 11*.

⁴² See Moloto, Brink and Nel 2014 *SAJHR* 573; Van der Walt, Mpholo and Jonck 2016 *VEcl* 7; Cameron "Dignity and disgrace – moral citizenship and constitutional protection" 1-19.

equality;⁴³ human dignity;⁴⁴ religious freedom;⁴⁵ freedom of expression;⁴⁶ freedom of association⁴⁷ and fair labour practices.⁴⁸ In addition, an employer is afforded the right to freedom of trade⁴⁹ and may organise itself as a religious association in accordance with its religious beliefs.⁵⁰ None of these rights are absolute since they are subject to the general limitation clause.⁵¹ Complexities arising⁵² from the competing aforesaid rights and interests are further vexed by the inherent imbalance of power characterising the employment relationship – and perhaps this is just a microcosmic exemplar of the greater social inequality divide that currently exists.⁵³ Put differently, one cannot ignore the fact that in most employment relationships the balance of power is pitted in favour of the employer, placing the employee by default in a disadvantageous and more vulnerable position.⁵⁴ The presence of potential conflict *per se* does not necessary transpose into the need for concern. It is where the rights and interests of the respective parties to the employment relationship are potentially compromised in general, or where the dynamic of the trust imperative of such relationship, in particular, is impacted on, that the need to address these concerns arises.

⁴³ In terms of s 9(1) of the Constitution, the content and scope of which is expanded on in Chapter 2.

⁴⁴ In terms of s 10 of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁴⁵ In terms of s 15(1) of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁴⁶ In terms of s 16(1) of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁴⁷ In terms of s 18 of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁴⁸ In terms of s 23(1) of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁴⁹ In terms of s 22(1) of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁵⁰ In terms of s 31(1) of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁵¹ In terms of s 36(1) of the Constitution, the content and scope of which is expanded on in Chapter 3.

⁵² Such as ongoing disputes in the workplace in the form of an employee finding continued working conditions intolerable due to the inherent requirements of the employer's business restricting or impacting on an employee's right to religious freedom, alternatively an employee being unfairly harassed by co-employees on the basis of his or her religious beliefs.

⁵³ See Du Toit 2014 *ILJ* 2623; Smit 2010 *TSAR* 5-10; Mbeki and Mbeki *A Manifesto for Social Change: How to Save South Africa* 27-31, 37-38, 43-44.

⁵⁴ See Kahn-Freund *Labour and the Law*; Botha 2014 *PER* 2047-2048; Davidov and Langile *The Idea of Labour Law*; Collins *Employment Law*.

Due to the fact that the abovementioned rights are constitutionally based, either party in the employment relationship seeking to enforce such rights must do so using national legislation giving effect thereto. The underlying rationale is the principle of subsidiarity (or avoidance) which provides that a party cannot by-pass national legislation giving effect to a constitutional right and rely directly on a constitutional provision unless the national legislation in question is unconstitutional.⁵⁵ National legislation giving effect to the employment-related rights referred to above finds expression in the form of the Labour Relations Act⁵⁶ (hereafter the LRA) and the Employment Equity Act⁵⁷ (hereafter the EEA). Although the Promotion of Equality and Protection of Unfair Discrimination Act⁵⁸ (hereafter PEPUDA) is strictly speaking not relevant to the employment relationship, in instances where the EEA has application, for reasons advanced in this study,⁵⁹ it must be considered. The purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace.⁶⁰ Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination is the stated purpose of the EEA.⁶¹ PEPUDA sets forth multiple objects, the most relevant of which is the provision of measures to eradicate unfair discrimination.⁶²

Recalling the concern Judge Albie Sachs expressed that citizens need to define their fundamental rights for themselves, it would be safe to say that this identification has in a sense translated into fundamentally protected rights as concretised and protected in terms of the Bill of Rights. Coertzen also advocates the need for the SACRRF to work as a means by which interested parties could resolve their

⁵⁵ See Chapter 3 in which the principle of subsidiarity is discussed in greater detail.

⁵⁶ 66 of 1995.

⁵⁷ 55 of 1998.

⁵⁸ 4 of 2000.

⁵⁹ As they appear in Chapter 5 and in the recommendations contained in the conclusion (Chapter 6).

⁶⁰ See s 1 of the LRA which is expanded on in Chapter 3.

⁶¹ In terms of s 2(a) which is expanded on in Chapter 3. The affirmative action purpose as contained in s 2(b) is not relevant to this study.

⁶² In terms of s 2(c) which is expanded on in Chapter 3. This is the normative and regulatory framework that not only delineates rights and obligations but enables our courts to adjudicate disputes arising from the workplace relating to claims relevant to religious unfair discrimination disputes, both of which are reflected on in greater detail in Chapters 3 and 5 respectively.

differences without resorting to a court of law. But enshrined rights or guidelines do not necessarily translate into awareness on the part of employees of their respective rights.⁶³ Put differently, for rights to be fully enjoyed and engaged in, there must be awareness on the part of beneficiaries of such rights.⁶⁴ In reality, however, how many employees or employers are aware of the SACRRF? Whilst employers may be under a duty to familiarise themselves with core obligations arising under the Basic Conditions of Employment Act⁶⁵ (hereafter the BCEA) and the industry or trade in which they operate, at most it could be said they would be sensitive particularly to issues of discrimination in the form of racial discrimination, given our sociopolitical landscape where racial tensions were a distinguishing feature of South Africa's legacy.⁶⁶ The pluralistic make-up of the South African workplace, representative of persons of diverse religious backgrounds, is fertile ground for potential conflict and hostility and would and could benefit greatly from greater awareness in relation to rights of parties to the employment relationship that can lead to potential conflict. This concern must be kept in mind with reference to the fact that conflict of religious beliefs in the workplace is usually resolved with reference to the regulatory legislative and constitutional framework.⁶⁷ The aims and purposes of the framework are noble and noteworthy; however, in the unfolding matrix of a real-life workplace dispute relating to religious discrimination, the mere ability of social dialogue to play a greater role between the parties toward the effective resolution of the problem at hand would have various benefits. It would obviate the need for intervention by a third party in the form of an arbitrator or judge as adjudicator; through enabling both parties to seek a resolution to the problem it would also educate parties of the awareness of their rights and obligations, and have the potential to encourage healthy and positive dialogue between the parties which is conducive to the employment relationship. Social dialogue is used in the sense of it being a construct

⁶³ Thus far the SACRRF has not been adopted or incorporated as a schedule in any legislation.

⁶⁴ See Mubangizi 2015 *AHRLJ* 504-512; Scott and Macklem 1992 *UPennLR* 31-32.

⁶⁵ 75 of 1997.

⁶⁶ See Corder *Judges at Work: The Role and the Attitudes of the South African Appellate Judiciary, 1910-1950*; Dugard *Human Rights and the South African Legal Order*; Forsyth 1988 *SALJ* 679.

⁶⁷ As expanded on and examined in Chapter 3.

of decent and productive work.⁶⁸ Moreover, it can serve as a valuable means of contributing to the transformation of our society to a more participatory democracy in which all are effectively given a role to play through the medium of social dialogue.⁶⁹ However, the likelihood in South Africa of it being employed to advance decent work is severely hampered and far from being realised due to factors such as increased levels of activity within the informal sector;⁷⁰ lack of basic education on the part of workers;⁷¹ atypical employment⁷² or even where the identity of the employer is not readily ascertainable,⁷³ and income disparities between employees and management that exacerbate the overall inequality imperative in our society and the workplace in particular.⁷⁴ The need for social justice and the reality of lack of social dialogue galvanised by parties' low levels of awareness education as well as awareness rights, makes the role played by legislation, constitutional imperatives, international instruments and case law more relevant. This is in order to regulate and address religious discrimination in the workplace as and when it arises.

An effective enforcement mechanism of the legislative and constitutional framework is the judiciary.⁷⁵ In the adjudication of religious discrimination workplace disputes numerous tests have been developed by our courts. However, non-workplace-related disputes of fundamental rights between individuals and organisations, whether at schools or churches, are also reflected on in this study on account of the value they

⁶⁸ Cohen 2012 *PER* 14-15 and authority cited at fn 87; Smit and Mpedi *IJCLLR* 320-325; Spooner 2015 *GLJ* 246; Schoeman 2012 *Phronimon* 23-24.

⁶⁹ See Moseneke 2015 constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/.

⁷⁰ Cohen 2012 *PER* 2.

⁷¹ Statistics published by Gauteng Treasury in 2016 indicate that the majority of South Africa's labour force do not have qualifications above matric (Grade 12) – out of a workforce of 21 million people, 7,7 million (36,6%) had qualifications below matric level and 6,6 million (31,5%) had only a matric qualification. See Gauteng Provincial Government 2016 [www.finance.gpg.gov.org/Documents/SERO 2016.pdf](http://www.finance.gpg.gov.org/Documents/SERO%202016.pdf).

⁷² Cohen 2012 *PER* 4.

⁷³ Cohen 2012 *PER* 4.

⁷⁴ See Collier, Idensohn and Adkins 2010 *SAJLR* 90-95; Odeku 2013 *MJSS* 838. According to the World Bank overview as at 12 April 2016 South Africa is described as "a country with one of the highest inequality rates in the world, perpetuating inequality and exclusion" (World Bank 2016 www.worldbank.org/en/country/southafrica/overview). South Africa at present has the highest Gini coefficient in the world, namely 0,660 in 2016.

⁷⁵ Chapter 5 of this study looks at the jurisprudential significance, development and impact of various decisions pertaining to religious discrimination in the South African workplace.

contribute to religious discrimination jurisprudence when having regard to the purposeful and meaningful manner in which the Bill of Rights is interpreted.⁷⁶ The various tests employed by our courts in the adjudication of religious discrimination disputes warrant examination in the context of this study in order to comment on the appropriateness of such tests.

1.2 Area of focus

South Africa is a pluralistic society as evidenced by its various cultures. Differences in religion and the resulting potential clash of rights and interests in the workplace is a phenomenon that warrants attention and examination. This study focuses on addressing religious unfair discrimination in the South African workplace. It examines and explores the influence and appropriate role and scope of labour law in a constitutional dispensation in preventing and regulating religious unfair discrimination in the South African workplace. It differs from existing accounts concerned with religious unfair discrimination in the workplace to the extent that it focuses on a deeper understanding of the extent to which this phenomenon is currently appropriately addressed by South African labour law.

This thesis is premised on the fact that it is of the utmost importance to determine the influence of constitutional values and rights, legislation and case law on religious unfair discrimination in the South African workplace.

1.2.1 Central research question

The central research question explored in this study is how effective South African labour law is in our constitutional dispensation in addressing religious unfair discrimination in the workplace.

⁷⁶ See Currie and De Waal *The Bill of Rights Handbook* 146; Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* xxvi-xxvii; Du Plessis 2011 *PER* 94; O'Regan 2012 *MLR* 1-72. Also see Klare 1998 *SAJHR* 171 ff; Cooke "The road ahead for the common law" 691; Bilchitz and Williams 2012 *SAJHR* 159; *Dlamini v Green Four Security* 2006 11 *BLLR* 1074 (LC) para 11.

1.2.2 Aims of the study

The aims of this study are to:

1. critically reflect on the importance of South Africa generally being a secular pluralistic society and the consequence thereof in terms of the imperative of tolerance;
2. define and explain what is meant by "religious unfair discrimination";
3. explain why there is a need for religious unfair discrimination to be addressed in order to prevent its manifestation or occurrence in the workplace;
4. examine the manner in which transformative constitutionalism can assist in addressing religious unfair discrimination in the workplace;
5. critically analyse and discuss the legislative and constitutional framework in place regulating religious unfair discrimination in the workplace;
6. critically analyse and discuss the tests our courts have developed in adjudicating disputes of religious unfair discrimination and reflect on whether such tests are appropriate;
7. critically analyse and discuss how Canadian law addresses religious discrimination in the workplace with the view to seeing to what extent, if any, we can benefit from Canadian law;
8. critically discuss how effective South African labour law has been in addressing religious unfair discrimination in the workplace; and
9. suggest how to further improve accommodation and regulation of religious freedom in the workplace.

1.2.3 Hypotheses and assumptions

1.2.3.1 Hypotheses

1. The Constitution guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law.
2. The Bill of Rights is part of the Constitution and guarantees supremacy of the Constitution and the rule of law.

3. The Bill of Rights provides everyone with a variety of fundamental rights.
4. Everyone has inherent dignity and the right to: have their dignity respected and protected; freedom of religion, taking into account notions of conscience, thought, belief and opinion; the right to freedom of association, and the right to fair labour practices.
5. Expression of the right to religious freedom, in particular when this is in conflict with the IROJ, can give rise to tensions in the workplace resulting in claims of religious unfair discrimination.
6. Religious associations which decline to employ job applicants for reasons relating to the IROJ may also face claims of alleged religious unfair discrimination which give rise to tensions within the workplace.

1.2.3.2 Assumptions

1. Religious diversity is a consequence of South Africa's multicultural society.
2. Tolerance of diversity and differences is imperative to the success of transformative constitutionalism.
3. Transformative constitutionalism is necessary to realise social justice.
4. Conflicts arise in the workplace due to tensions between religious freedom on the part of an employee and the IROJ imposed by the employer.
5. Conflicts also arise in the workplace due to associations employing workers to the exclusion of other workers on grounds of religion on the basis of the IROJ.

6. These conflicts in the workplace arising from tensions between religious freedom and the IROJ must be addressed in terms of the existing legislative and Constitutional framework.
7. Our courts have an important role to play in the manner in which they adjudicate claims of religious unfair discrimination arising from the workplace.

1.3 Research methodology

This research is conducted by critically analysing and reflecting on a literature review⁷⁷ of relevant sources and works relating to religious unfair discrimination in the South African workplace. The issue is considered within the overarching context of our constitutional dispensation. The formal legal framework regulating religious discrimination in the workplace which is considered and reflected on is the legislative framework currently in place, which framework must be interpreted subject to a constitutional imperative. In addition, foreign instruments such as relevant International Labour Organisation Conventions are considered. Regard is also had to South African case law authority in relation to religious discrimination, not only in the workplace context but also non-workplace-related situations inasmuch as the latter jurisprudence can facilitate a better understanding of how to deal with religious discrimination in the workplace. The views of certain leading constitutional and labour law scholars are drawn on largely to sustain certain arguments advanced in this thesis and in other instances to support suggestions and recommendations. This research acknowledges the normative effect to be given to the relevant literary, judicial and instrumental sources impacting on the issue of religious unfair discrimination.⁷⁸ However, it is submitted that the interpretation of such sources must speak to the notion of transformative constitutionalism without which the sources of our law remain hollow, lifeless norms deprived of the necessary oxygen required to animate the values and principles necessary to create a tangible democratic social

⁷⁷ Randolph 2009 *PAREJ* 2-4; see also Strydom 2013 *SWJ* 151 who contends that such research is akin to exploratory research.

⁷⁸ See Kroeze 2013 *PER* and authority cited at fn 58; also see Mitchell and Le Roux 2009 (1 & 2) *Progressio* 80-82 (although pertaining to the methodology of writing an article, the reasoning is apt for purposes of a thesis).

order which celebrates our diverse society. By virtue of reflecting on the literature and instruments reviewed herein, this study attempts to understand the extent to which our current system of labour law in South Africa addresses religious unfair discrimination in the workplace. The effectiveness of South African law in addressing religious unfair discrimination in the workplace is the central research question posed by this thesis. As a noun, effectiveness notionally envisages the extent to which South African law in its present form can be considered to successfully provide a legal mechanism whereby this form of discrimination is adequately and sufficiently dealt with. Alternatively, the question is to what extent, if any, there are inadequacies and deficiencies in the legal system that require attention for religious unfair discrimination in the workplace to be optimally provided for by suitable rules and regulations.

It is envisaged that the comparative study with Canada⁷⁹ will be sufficiently informative to draw suitable assumptions relevant for use and application to the South African system of law. The rationale for the comparative study is to support the recommendations⁸⁰ which should be used by our courts in the adjudication of unfair discrimination in religion-based workplace disputes.

1.4 Study outline

For purposes of addressing the research question posed in this study, Chapter 2 begins by analysing conceptual and theoretical perspectives on religious unfair discrimination in the South African workplace. It defines, delineates and seeks to make clearer the concepts and terminology used in this study which advance the meaning and understanding of the various arguments used to address the research question. The chapter also highlights the importance of religious unfair discrimination in the workplace as an integral aspect and component to the notion of transformative constitutionalism which is imperative for our constitutional dispensation to succeed and flourish.

⁷⁹ As expanded on in Chapter 4.

⁸⁰ As expanded on in Chapter 6.

Chapter 3 analyses the South African legislative and constitutional framework regulating religious unfair discrimination in the workplace.

Chapter 4 adopts a comparative focus where the foreign jurisdiction of Canada is examined in terms of the manner in which the Canadian legal system has addressed religious unfair discrimination in the workplace.

Chapter 5 focuses on the jurisprudence of South African courts. The tests that have been adopted by our courts in the adjudication of certain general religious discrimination disputes and particularly the tests that have been employed in respect of religious unfair discrimination disputes in the workplace are considered. This chapter explores the appropriateness of the tests our courts apply in the adjudication of unfair discrimination in religion-based workplace disputes.

Chapter 6 offers recommendations aimed at adopting the most appropriate approach and tests within a regulated statutory and constitutional framework with an overall objective of giving effect to the notion of transformative constitutionalism.

CHAPTER 2: SCOPE AND CONCEPTUAL MEANING OF IMPORTANT TERMS PERTAINING TO RELIGIOUS UNFAIR DISCRIMINATION IN THE WORKPLACE

2.1 Introduction

This study examines the manner in which South African labour law addresses religious unfair discrimination in the workplace. The purpose of this chapter is to examine the scope and conceptual meaning of important terminology with reference to religious discrimination in the workplace. By doing so a normative basis is created from which the overall purpose of this study is explored and advanced.

The chapter is divided into specific subsections under which each term is expanded and reflected on in terms of its definition, meaning and relevance to the study of religious unfair discrimination in the workplace. The following terms will be examined: understanding of the notion of religion in various contexts; the significance of secularism in South Africa and in particular the workplace; the meaning of "discrimination" in South African labour law; equality and the distinction between formal and substantive equality; the importance of human dignity; the rule of law and its effectiveness in advancing religious freedom; and the importance of transformative constitutionalism as well as its relevance to religious discrimination in the workplace.

2.2 Religion

2.2.1 Introduction

It is important to establish what is meant by the term "religion". In order to study religious unfair discrimination in the workplace it is fundamentally important that one establishes, at least notionally and conceptually, an understanding of what is meant by religion. Due to the diverse religions one encounters not only in South Africa, but globally, and the fact that the term itself is so inexorably linked to subjective views of

ideas, beliefs, traditions and cultures, religion as a term eludes precise definition. Conceptually, an analogy has been drawn between religion and medicine. It has been said that just as in medicine, where it is sometimes easier to identify illness than health, so in religious freedom, it is easier to define unfair discrimination on the basis of religion than to define religion itself.⁸¹ This paragraph aims at obtaining a normative understanding of the complexities surrounding the term "religion". Regard is had to the term as it appears from the text of the Constitution. As an aid to understanding why there is no universal definition that can be ascribed to the term, reference is also had to various judicial decisions and the manner in which the term has been interpreted. In addition, regard is also had to international instruments and foreign case law which indicate an overall reluctance to clothe the term with a universal definition. The failure to accord "religion" a universal definition does not detract from the protection afforded religious freedom – in fact, on account of its malleability and flexibility as a term it is submitted that more rather than restrictive protection can be offered in respect of such right.

2.2.2 The term "religion" as provided for under the Constitution

Section 15 (1) of the Constitution guarantees that:

Everyone has the right to freedom of conscience, *religion*, thought, belief and opinion.⁸²

Common to the aforesaid terms is that they are all associated with something which can innately be held by an individual human being who has the intellectual capacity to demonstrate certain emotions coloured, fashioned and influenced by certain convictions. The notion of "conscience" refers to a moral sense of what is right and wrong⁸³ which governs one's conduct.⁸⁴ There can be no quibble with the fact that "thought" constitutes our capacity to reason enabling one to communicate intelligently or be imaginative and expressive. The notion of "belief" refers to a state of mind in relation to a certain matter. Take the case of vegans who are opposed to

⁸¹ See Marshall 2013 *IJRF* 7 11-16.

⁸² Emphasis added.

⁸³ See Van Zyl and Visser 2016 *PER* 8.

⁸⁴ See Underkuffler 1992 *DepLR* 96; Le Roux 2001 *Codicillus* 20.

the eating of animal flesh on the grounds that they consider this ethically objectionable.⁸⁵ This state of mind, to constitute a "belief", need not necessarily be logical or make common sense. One person can believe in the paranormal or in the existence in the afterlife whereas another can believe that such phenomena do not exist because there is no scientific proof thereof. The notion of "opinion" refers to a point of view. In this regard it could range from an informal view taken with regard to the music preference an individual expresses to the more formal understanding of an opinion written by counsel, alternatively the opinion expressed by the manifesto of a political party. The most neighbourly association appears between the nouns "religion" and "belief". "Religion" can be described as a subjectively held view of something which is spiritual.⁸⁶ Although not all instances of being steeped in a particular state of mind, such as the belief in veganism, is related to religion, everyone who is a follower of a particular religion has a "belief" or state of mind influenced and informed by their religion.⁸⁷ All beliefs are not grounded in religion; however, all religions are based on beliefs. On account of the notion of morality with which "conscience" is suffused, some may go so far as arguing that it too is not alien to "religion".⁸⁸

Seldom is the term "religion" used in isolation. Most often it is employed with the term "belief". "Conscience", "belief" and even "opinion", used notionally or collectively, are arguably capable of constituting a singular component or dimension of religion. A subjective and reverently held belief, thought, conscience and opinion on matters spiritual or sacred can, on the one hand, conduce to something which is religious. On the other hand, a belief, thought, conscience and opinion on matters of a purely temporal and non-spiritual nature to the extent of disavowing anything

⁸⁵ See De Villiers 2012 *SAJHR* 18-30.

⁸⁶ See paragraph 2.2.3 below.

⁸⁷ The degree of adherence to a particular religion and its tenets of faith to the extent that one can be described as adhering thereto in an ardent (orthodox) or informal and casual manner would vary from person to person and religion to religion.

⁸⁸ It has been pointed out that in the epistles of the New Testament, the Apostle Paul mentions "conscience" twenty-three times as a phenomenon capable of inducing a sense of guilt. In this regard see Vischer *Conscience and The Common Good: Reclaiming the Space Between Person and State* 50. For an exploration of the term "conscience" see Humphreys 2015 *Humanity* 7-27; Higgins *The Ethics of the Greek Philosophers Socrates, Plato and Aristotle*.

sacred or godly can be said to be non-religious to the extent that it is atheistic or agnostic. Support for this is found in the wording of the SACRRF which reads:

Whereas religious belief may deepen our understanding of justice, love, compassion, culture...⁸⁹

The above excerpt can, however, be a catalyst for much debate when we allow notions of religion to enter the arena of the extent to which religious beliefs should influence justice (or at least judicial reasoning).⁹⁰ Recalling the extent to which transformative constitutionalism must rely on a framework grounded in law⁹¹ and also that the judiciary has been earmarked as the solitary forum in South Africa where the rule of law applies,⁹² it is submitted that it is not only reasonable but also rational to expect that a judicial officer should strive to adjudicate a matter not with reference to his or her own religious values in a manner as described in subparagraph 3.2.2 below.

A close nexus is apparent between the concepts "belief" and "religion" in terms of which religion is expressed not as a notional concept in and of itself but as an expression of one's belief – a personally held belief. No doubt this view can lend itself to debate since the divide between a "belief" and "culture", for example, may often be blurred in terms of traditions, practices and even customs. In this regard reference is made to an African or indigenous⁹³ religion⁹⁴ which can be regarded as a

⁸⁹ Article 8.

⁹⁰ See Bhardwaj *Mail & Guardian*, in which an attack is launched against remarks by Chief Justice Mogoeng on morality at a conference on religion and law in Stellenbosch. The author insightfully refers to the case of *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

⁹¹ See subparagraph 2.9.2 below.

⁹² See subparagraph 2.8.3 below.

⁹³ Which has been described as consisting of some "one thousand African peoples (tribes) ... each [having] its own religious system..." by Awolalu 1976 *SCR* 2 (referring to Mbiti *African Religions and Philosophy* 1). Also see Amoah and Bennet 2008 *AHRLJ* 361-363; Beyers 2010 *TheoIS* 341.

⁹⁴ A study conducted in 2010 revealed that approximately one third or more of the South African population possessed traditional African sacred objects such as shrines to ancestors, feathers, skins, skulls, skeletons, powder, carved figurines or animal objects (see Pew Forum on Religion and Public Life 2010 <http://www.pewforum.org/2010/04/15/executive-summary-islam-and-christianity-in-sub-saharan-africa> 33-35. It has been estimated that 12 per cent of the total number of followers of African traditional religion in 2007 were in South Africa (see Coertzen 2014 *AHRLJ* 127). Coertzen also points out that signatories to the SACRRF included representatives of the African traditional religions (at 129). Whether witchcraft can be considered

form of religion steeped as much in belief as it is in culture. On the other hand, however, orthodox Jews would contend that their ritualistic observation evidences a religion that transcends mere belief to that of a lifestyle or culture, as would many devout Islam or Christians also contend is the case with the way in which they practise, observe and live out their religious lifestyles. Where to draw the line between what can be regarded simply a religion, or a mere belief in a spiritual higher power, alternatively a moral conscience and opinion to follow religious orders which then becomes part of one's culture and ultimately way of life merges into a collective identity capable of recognition but eluding precise definition.

2.2.3 How "religion" has been interpreted

The definitions section⁹⁵ of the Constitution is silent on what is meant by the term "religion". This leaves the door open to our courts to attach a meaning thereto consistent with the interpretative provision⁹⁶ of the Bill of Rights which provides as follows:

When interpreting the Bill of Rights, a court, tribunal or forum must ... promote the values that underlie an open and democratic society based on human dignity, equality and freedom [and] must consider international law...⁹⁷

An additional requirement is that:

When interpreting any legislation, and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.⁹⁸

Thus, when interpreting the term "religion", a court is at liberty to apply the rules and principles ordinarily applicable to legislative interpretation⁹⁹ but subject to the Constitution given that the Constitution is an extraordinary statute, the source of

a religion in terms of African traditional beliefs is an issue which continues to vex our law; see Van der Vyver 2008 *AHRLJ* 340-341.

⁹⁵ Section 239.

⁹⁶ Section 39(1).

⁹⁷ Section 39(1)(a)(b)(c). See *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 2 SA 584 (CC) para 30 and the authorities cited at fn 24.

⁹⁸ Section 39(2). See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 33.

⁹⁹ See Rautenbach and Malherbe *Constitutional Law* 42. This analysis draws on the following article by the author: Henrico 2015 *TSAR* 784.

legislative and executive authority¹⁰⁰ and the supreme law of the Republic.¹⁰¹ Interpreting a term in the Bill of Rights charges the court to ascertain its Constitutional meaning as with ordinary language, by looking at the way it has been used.¹⁰² In the absence of a literal meaning of the term providing a satisfactory answer (referred to hereafter as a textual interpretation) we are enjoined to employ a purposive interpretative approach¹⁰³ (referred hereinafter as purposeful interpretation) which is generously in favour of rights rather than restricting them.¹⁰⁴ It is also useful to keep in mind that the interpretation of any particular term is not due to proverbial divine intervention but rather the end-product of how the matter is pleaded by the parties, argued before the court¹⁰⁵ and the judicial experience and sagacity brought to the matter by the judge.¹⁰⁶ This interpretation, whether textual or purposeful, must promote the values underlying a democratic and open society based on human dignity, equality and freedom.¹⁰⁷ The rights in the Bill of Rights are

¹⁰⁰ Per Chaskalson P in *S v Makwanyane* 1995 3 SA 391 (CC) para 15.

¹⁰¹ Section 2 as read with s 8(1). See *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC) para 62.

¹⁰² Currie and De Waal *The Bill of Rights Handbook* 146 fn 5.

¹⁰³ See Currie and De Waal *The Bill of Rights Handbook*; Meyerson *Jurisprudence* 139-141; Ackermann *Human Dignity: A Lodestar for Equality in South Africa*; Du Plessis 2011 *PER* 94; O'Regan 2012 *MLR* 1-72. Also see Klare 1998 *SAJHR* 171; Bilchitz and Williams 2012 *SAJHR* 159. It is said that the text must be read in the sense that it is a legal document and thus it must be approached without the sophistry of moral or philosophical ideals, as pointed out in Meyerson *Rights Limited* xxvi-xxvii when referring to the decisions of *S v Makwanyane* 1995 3 SA 391 (CC) para 206 and *S v Zuma* 1995 2 SA 642 (CC) para 18 in which one is reminded of the fact that the Constitution as a legal instrument must be interpreted as such and not in accordance merely with the personal convictions of the judge. However, the duty to interpret the Bill of Rights in a manner that gives effect to the spirit, purport of the values and principles therein contained essentially charges any judge to infuse the legal interpretation with values which are necessarily laden with a sense of what is morally correct to advance the imperative of transformative constitutionalism and the realisation of social justice.

¹⁰⁴ Currie and De Waal *The Bill of Rights Handbook* 150.

¹⁰⁵ See *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 11.

¹⁰⁶ See Pillay 2003 *ILJ* 57; Cameron *Justice: A Personal Account* 12; Fredman 2013 *PubL* 297-298; Bix *Law, Language, and Legal Determinacy* 63-76; Greenawalt "Constitutional and statutory interpretation" 298-299. Cf Dyzenhaus, Ripstein and Reibetanz Moreau *Law and Morality: Readings in Legal Philosophy* 331-333; Lenta 2004 *SALJ* 237 who all argue about the implications of an antimajoritarian influence of jurisprudence in terms of which an unelected branch of government through the means of judicial interpretation imposes its power and influence upon the electorate.

¹⁰⁷ See Langa 2006 *Stell LR* 351-353; Bishop and Brickhill 2012 *SALJ* 711; Fagan 2004 *AJur* 134-135; Wallis 2010 *SALJ* 690; Budlender 2005 *SALJ* 718.

subject only to the general limitation of rights under section 36 of the Constitution¹⁰⁸ and judicial officers interpreting such rights are in turn subject to such limitations imposed on them by the doctrine of *trias politica* and the rule of law.¹⁰⁹

Whilst subsections 1 and 2 of section 39 of the Constitution afford a certain means and mechanism to assist in interpreting the term "religion", the fact remains that the term itself remains undefined. So too do we find no definition in respect of the other terms with which "religion" is associated in its present form as contained in section 15(1) of the Constitution.

Accordingly, it is important to examine how "religion" as a concept has been addressed in terms of case law to facilitate our understanding of its meaning within the constitutional guarantee of the right to freedom of religion.¹¹⁰ The cases which are focused on below have been selected by reason of their accessibility since they are reported.¹¹¹ They are worth exploring for the way in which they indicate the way in which the term "religion" has thus far been interpreted by our courts in the context of South African law. More significantly, they are testament to the fact that there is no universal definition of the concept "religion". Whether this is as a result of the fact that "religion" has been couched together with other fundamental rights as contained in section 15(1) of the Constitution or due to the fact that "religion" *per se* is incapable of a precise and finite definition by reason of the very nature of it being a phenomenon as a personally held belief system is an issue that appears to remain unanswered.

Claassen¹¹² points out that the meaning of the term "religion" was first considered in our law in the matter of *Annama v Express Collection Agency*¹¹³ and later in

¹⁰⁸ Discussed in greater detail in Chapter 3. For a discussion on the relationship between s 39(1), ss 9 and 36, see Currie and De Waal *The Bill of Rights Handbook* 237-238; Meyerson *Rights Limited* 40-44. See also Oosthuizen and Russo 2001 *SAJE* 261.

¹⁰⁹ Sections 1(c) and 165(2); see also *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 46.

¹¹⁰ This analysis draws on the following article by the author: Henrico 2015 *TSAR* 784.

¹¹¹ This study does not discount the fact that there may be many other unreported cases in South African law in which the term "religion" is explored.

¹¹² *Dictionary of Legal Words and Phrases* 296.

*Publication Control Board v Gallo (Africa) Ltd.*¹¹⁴ In the *Publication Control Board* case, Rumpff CJ sets out various dictionary meanings of "religion"¹¹⁵ and observes the following:

Religious *beliefs* are highly subjective and are founded on *faith*. It is not a sphere in which objective concepts of reason are particularly apposite.¹¹⁶

From this *dictum* the association between "religion", "belief" and "faith" is apparent. It is also a state of mind which is assessed from a subjective point of view and one in which "reason" need not be a prerequisite to the determination of the validity of the religion.

In *S v Lawrence, Negal, Solberg v The State*¹¹⁷ Solberg had been convicted of contravening the Liquor Act¹¹⁸ by selling alcohol on a Sunday. In considering the constitutional validity of the conviction, the Constitutional Court had to consider whether the prohibition of selling alcohol infringed Solberg's rights to freedom of religion and economic activity¹¹⁹ under the interim Constitution. Chaskalson P, in conceding that the court was unable to offer a better definition of freedom of religion, referred to the Canadian authority of *R v Big Drug Mart Ltd*¹²⁰ wherein Dickson CJC held the following:

The essence of the concept of religion is the right to entertain such religious *beliefs* as a person chooses, the right to declare religious *beliefs* openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.¹²¹

¹¹³ 1930 NPD 44.

¹¹⁴ 1975 3 SA 665 (A) 672.

¹¹⁵ 672A-674B.

¹¹⁶ 673B-C. Emphasis added.

¹¹⁷ 1997 4 SA 1176 (CC).

¹¹⁸ 27 of 1989.

¹¹⁹ Sections 14 and 26 of the interim Constitution, now ss 15 and 22 of the Constitution respectively. Section 14(1) of the interim constitution provided as follows: "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning." Save for the reference to academic freedom, the remaining content of s 14(1) of the interim Constitution came to be adopted by s 15(1) of the Constitution.

¹²⁰ 1985 1 SCR 295.

¹²¹ Para 92. Emphasis added.

Central to this view of religion is that it is a belief of a personal subjective nature which an individual has the right to exercise free of any restrictions. Once more the alliance between "religion" and "belief" is apparent.

The appellants¹²² in *Christian Education South Africa v Minister of Education*¹²³ challenged the constitutionality of legislation that would prohibit corporal punishment in schools contending that corporal punishment¹²⁴ was central to their Christian ethos and that its prohibition invaded "their individual, parental and community rights freely to practise their religion".¹²⁵ Sachs J, who penned the judgment for the majority, approached the issue as one in which there was a "multiplicity of intersecting constitutional values and interests".¹²⁶ At issue was a child who was a member of a religious community with certain religious values entitled to protection¹²⁷ but who was also entitled to protection accorded in terms of the right to human dignity,¹²⁸ freedom of torture¹²⁹ and what was in the best interests of a child.¹³⁰ In doing so, Sachs J adopted an approach most "favourable to the applicant"¹³¹ and enquired whether the limitation on the rights of the applicant to practise their religion under section 15 could be justified in terms of section 36 of the Constitution. However, mindful of the competing constitutional values and interests at stake, the court pointed to a "nuanced and context-sensitive form of balancing"¹³² required when applying the limitation test. Heeding the definition accorded to freedom of religion by Chaskalson P in *Lawrence*,¹³³ Sachs J, for the majority,

¹²² A voluntary association of Christian schools in South Africa representing 14 500 pupils "to promote evangelical Christian education".

¹²³ 2000 4 SA 757 (CC) para 3.

¹²⁴ Referred to as "corporal correction" as they alleged before the court.

¹²⁵ Para 2.

¹²⁶ Para 15.

¹²⁷ Section 15 of the Constitution.

¹²⁸ Section 10 of the Constitution.

¹²⁹ Section 12 of the Constitution.

¹³⁰ Section 28 of the Constitution.

¹³¹ Para 28.

¹³² Para 30.

¹³³ Para 18 at which Sachs J points out that whilst he cannot offer a better definition of the main attributes of freedom he agrees with Dickson CJC that "freedom of religion means more than this".

pointed to the difficulty inherent in such a balancing of interests test in the following observation:

However religion is not always merely a matter of private individual conscience or communal *sectarian* practice. Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in broader society ... Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and *culture*.¹³⁴

This is notable for taking account of the secular dimension of South African society¹³⁵ and for adopting a broader view of religion in terms of viewing it not only as a "belief" but that it is a practice capable of constituting the way in which certain people in society demonstrably live their lives and give expression to their culture. In a sense, it becomes a more expansive interpretation of the term "religion".

Later in the judgment Sachs J states:

There can be no doubt that the right to freedom of religion, belief, and opinion in an open and democratic society contemplated by the Constitution is important ... Yet freedom of religion goes beyond protecting the inviolability of the individual *conscience*. For many believers their relationship with God or creation is central to all their activities ... Religious belief has the capacity to awake concepts of *self-worth and human dignity which form the cornerstone of human rights*.¹³⁶

What emerges from this is that in the context of freedom of religion, "religion" cannot be defined in terms of an austere reference to spiritual values and ideals. Instead, account must be taken of a myriad of factors that include "belief", "conscience", "culture", "way of life" and "self-worth and human dignity". It is submitted that this interpretation clearly extends beyond a simple textual interpretation of "religion" to take into account a broader spectrum of factors which provide a more comprehensive understanding of the concept of "religion" which in turn gives effect to the constitutional guarantee of freedom of religion.

¹³⁴ Para 33. Emphasis added.

¹³⁵ See subparagraph 2.4.3 below.

¹³⁶ Para 36. Emphasis added.

In the matter of *Prince v President of the Law Society of the Cape of Good Hope*¹³⁷ the court was called upon to decide on the constitutionality of prohibiting the use or possession of cannabis when its use or possession was employed for religious purposes by the Rastafari religion.¹³⁸ Whilst the court also relied on the aforesaid *dictum* of Dickson CJC in *R v Big M Drug Mart Ltd*,¹³⁹ Sachs J strove for a deeper understanding of "religion" by stating:

Religion is a matter of *faith* and *belief*. The *beliefs* that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational ... The believers should not be put to the proof of their *beliefs* or *faith*. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion ...¹⁴⁰

Close parallels exists between the description given by Rumpff CJ in 1975 in the matter of the *Publication Control Board* of religion transcending the boundaries of rationality, and Sachs J in the *Prince* case observing that religion can be anathema to rationality. Religion is not presented as a stand-alone concept. It is comprised of "faith" and "belief" but the rationality thereof need not meet any minimum threshold of perceived logicity. In *Prince*, Ngcobo J articulates the right to freedom of religion in a constitutional democracy based on human dignity, equality and freedom with reference to a society rich in its diversity and its respect for human dignity.¹⁴¹ These factors must inform the interpretation of all constitutional rights.¹⁴² It is significant to note how dignity is of inestimable value to the right to freedom of religion. Put differently, to deny a person the right to practise their "religion" in accordance with their "beliefs" detracts from their fundamental human dignity which is unconstitutional. Accordingly, it is significant to see that in defining the right to religious freedom, "religion" is not only considered in terms of "belief" and "faith" but also from the perspective of human dignity. This merger between dignity and

¹³⁷ 2002 2 SA 794 (CC).

¹³⁸ Para 4.

¹³⁹ Para 40.

¹⁴⁰ Para 97. Emphasis added. Also see also *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 16.

¹⁴¹ Section 10 of the Constitution.

¹⁴² Paras 49 and 50.

freedom of religion owes its existence to the generous interpretive approach adopted by the court as was also the case in the *Christian Education* case.

In *MEC for Education: Kwazulu Natal v Pillay*¹⁴³ the court was called upon to consider an appeal against the Pietermaritzburg High Court's decision which set aside the decision of the Equality Court¹⁴⁴ declaring null and void the school's decision prohibiting one of its Hindu/Indian pupils from wearing a gold nose stud. This was the first time the Constitutional Court had been called upon to decide on a discrimination dispute in terms of PEPUDA.¹⁴⁵ Langa CJ made a concerted effort of not confining the court to a specific definition of "religion" by stating the following:

Without attempting to provide any form of definition, religion is ordinarily concerned with personal *faith* and *belief*, while *culture* generally relates to *traditions* and *beliefs* developed by a community.¹⁴⁶

It becomes apparent from the above dictum how closely "culture" and "religion" are intertwined.¹⁴⁷ Acknowledging that religion concerns itself with personal faith and belief whilst culture relates to traditions and beliefs, Langa CJ proceeds, however, to point out that the two often overlap so that:

... religious practices are frequently informed not only by *faith* but also by *custom*, while *cultural beliefs* ... may be based on the community's underlying *religious* or spiritual *beliefs*. Therefore, while it is possible for a *belief* or practice to be purely *religious* or purely *cultural*, it is equally possible for it to be both *religious* and *cultural*.¹⁴⁸

The reticence on the part of Langa CJ not to attach a definition to the concept of "religion" is understandable when he points out that "culture and religion sing with the same voice".¹⁴⁹ Langa CJ also points to the relevance of human dignity as being central to equality.¹⁵⁰ It becomes apparent from the judgment that religion has the capacity of sharing an unusually intimate relationship with culture, making it all the

¹⁴³ 2008 1 SA 474 (CC).

¹⁴⁴ As constituted under ss 16(1) and 31 of PEPUDA.

¹⁴⁵ Para 39.

¹⁴⁶ Para 47. Emphasis added.

¹⁴⁷ At paras 47 and 48.

¹⁴⁸ Para 47. Emphasis added.

¹⁴⁹ Para 60.

¹⁵⁰ Para 62.

more difficult, if not impossible, for the court to apply a strict and stark legal definition to the term.

In a dissenting judgment, O'Regan J is of the following view:

Both "culture" and "religion" are terms that resist definition. And it is not desirable in this case to seek to identify a determinative definition of either. However, our Constitution does treat them differently ...¹⁵¹

She continues:

Although it is not easy to divine a sharp dividing line between the two, it does seem to me that the Constitution recognizes that culture is not the same as religion, and should not always be treated as if it is. Religion is dealt with without the mention of culture in section 15, which entrenches the right to freedom of belief and conscience. By associating religion with belief and conscience, which involve an individual state of mind, religion is understood in an individualist sense: a set of beliefs that an individual may hold regardless of the beliefs of others. The exclusion of culture from section 15 suggests that culture is different ...¹⁵²

In addition, O'Regan J reasons:

A religious belief can be entirely personal. The importance of a personal religious belief is more often than not based on a particular relationship with a deity or deities that may have little bearing on community or associative practices ... A religious belief is personal, and need not be rational, nor need it be shared by others. A court must simply be persuaded that it is a profound and sincerely held belief.¹⁵³

O'Regan J approaches the concepts of religion and culture in a more formal manner than the approach adopted by Langa CJ. Common to the majority and minority decision of the court is the fact that culture is viewed as a more expansive term relating more to a sense of associative community awareness whilst religion is informed by a more subjective personally held view more closely associated with the imperatives of "belief" and "conscience". What emerges from the judgment is that both "cultural" and "religious" practices are worthy of protection given that they are central to human identity and hence to human dignity which is itself central to

¹⁵¹ Para 141.

¹⁵² Para 143.

¹⁵³ Para 146.

equality.¹⁵⁴ Although the court interprets "culture" as a concept distinguishable from "religion" the communality shared between the two is the volition of the freedom of the individual to pursue his individual religious belief based on respecting the dignity of the individual. Hence, whilst "belief" and "faith" together with "culture" may collectively constitute part of "religion" the guarantee of religious freedom must also be interpreted in the context of the imperative of human dignity.

2.2.4 The term "religion" as interpreted by foreign and international jurisprudence

To the extent that the Bill of Rights urges international and foreign law to be considered,¹⁵⁵ it is apposite to consider the relevant instruments in this regard. The Universal Declaration of Human Rights¹⁵⁶ (the UDHR) provides that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...¹⁵⁷

And that:

Everyone shall have 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.¹⁵⁸

The exercise of freedom of religion in terms of Article 18 of the UDHR is subject to the proviso:

¹⁵⁴ Para 62.

¹⁵⁵ Section 39(1)(b) and (c).

¹⁵⁶ Approved by the UN on 10 December 1948. South Africa abstained, together with the Soviet Union and Saudi Arabia, from voting in favour of the adoption of the UDHR on account of the content of certain of the provisions therein that were inconsistent with its apartheid policies. See Reichert 2002 *JIR* 42-45; Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 13 esp fn 5. South Africa only signed the UDHR in 1994. See Yarwood *State Accountability under International Law: Holding states accountable for a breach of jus cogens norms* 120-128; Sohn 1982 *AULR* 11 esp fn 38 and 39; Hinds 1985 *CSJ* 6-7.

¹⁵⁷ Article 2.

¹⁵⁸ Article 18.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.¹⁵⁹

The significance of the UDHR has to do with its impetus to promote international human rights. Mubangizi¹⁶⁰ refers in this regard to the following observation by Davidson:

It [the UDHR] has not only formed the basis for the drafting of two international covenants and three regional human rights treaties, but it has also been the paradigm for the drafting of the human rights provisions of over 25 domestic countries.¹⁶¹

The UDHR, together with the two international covenants discussed below, is regarded as the International Bill of Rights.¹⁶² The two international covenants are the International Covenant on Economic, Social and Cultural Rights¹⁶³ (the ICESCR) and the International Covenant on Civil and Political Rights¹⁶⁴ (the ICCPR).¹⁶⁵ The significance of the ICESCR and ICCPR is that they serve to re-enact the standards laid down in the UDHR.¹⁶⁶ It is also necessary to consider how "religion" is expressed in terms of the latter Covenants.

¹⁵⁹ Article 30.

¹⁶⁰ Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 13.

¹⁶¹ Davidson *Human Rights* 67.

¹⁶² Also referred to as the International Covenant on Human Rights. See Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 13-14; Tadeo 2010 *AHRLJ* 328; Winks 2011 *AHRLJ* 451; Murphy 2011 *AHRLJ* 471; Elkins, Ginsburg and Simmons 2013 *HarvILJ* 66; Von Bernstorff 2008 *EJIL* 915-916; Dugard 2009 *MarJIL* 85-86; Dag Hammerskjöld Library 2016 <http://research.un.org/en/docs/humanrights/undhr>. It is also significant to note the extent to which the International Bill of Rights informed the drafting of the South African Constitution. In this regard see Babie and Rochow *Freedom of Religion under Bill of Rights* 87 esp fn 6; see also Chenwi "International human rights law in South Africa" 359-361.

¹⁶³ Entered into force 3 January 1976. South Africa signed the ICESCR in 1994 and ratified it on 12 January 2015. See Chenwi "International human rights law in South Africa" 342; Sohn 1982 *AULR* 11 esp fn 38 and 39. There is an Optional Protocol to the ICESCR which South Africa has not yet ratified.

¹⁶⁴ Entered into force 23 March 1976. Ratified by South Africa on 10 December 1998. See Chenwi "International human rights law in South Africa" 341; Sohn 1982 *AULR* 11 esp ftn 38 and 39.

¹⁶⁵ There are also two Optional Protocols forming part of the ICCPR.

¹⁶⁶ See Mwambene 2010 *AHRLJ* 81.

Although "religion" is not expressly mentioned in the ICESCR, the following provisions may be considered:

All peoples have the right to self-determination, including the right to determine their political status and freely pursue their economic, social or *cultural* development.¹⁶⁷

In addition:

Each State Party undertakes to take steps to the maximum of its available resources to achieve progressively the full realization of the rights of this treaty. Everyone is entitled to the same treatment without discrimination of whatsoever kind.¹⁶⁸

The States undertake to ensure the equal right of men and women to the enjoyment of all rights in this treaty.¹⁶⁹

And:

Limitations may be placed on these rights only if compatible with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society.¹⁷⁰

Articles 1 and 3 of the ICCPR replicate the wording of Articles 1 and 3 of the ICESCR. Moreover, provision is also made in the latter for a general prohibition against discrimination and the guarantee of equality as evidenced in the following:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination *of any kind* as to race, colour, sex, language, *religion*, ...¹⁷¹

Of particular interest are the following provisions, namely that:

Everyone has the right to freedom of thought, conscience and religion.¹⁷²

Everyone is equal before the law and has the right to equal protection of the law, without discrimination of any kind.¹⁷³

¹⁶⁷ Article 1. Emphasis added.

¹⁶⁸ Article 2.

¹⁶⁹ Article 3.

¹⁷⁰ Article 4.

¹⁷¹ Article 2. Emphasis added.

¹⁷² Article 18. The wording of this Article replicates the wording of Article 18 of the UDHR.

¹⁷³ Article 26.

And:

Ethnic, *religious*, or linguistic minorities shall not be denied the right to enjoy their own culture.¹⁷⁴

The ILO Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the DEFIRB)¹⁷⁵ enshrines the right to "thought, conscience, and religion or belief".¹⁷⁶ The manner in which the right to freedom of religion may be exercised is defined as follows:

This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.¹⁷⁷

Moreover, provision is also made that:

No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.¹⁷⁸

And that:

Freedom to manifest one's religion or beliefs may be subject to only such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.¹⁷⁹

Article 1 of ILO Convention 111¹⁸⁰ provides grounds upon which certain acts or conduct will constitute discrimination on the basis of religion. However, in neither ILO Convention 111 nor any other ILO Conventions¹⁸¹ pertaining to discrimination on the basis of religion is the term "religion" actually defined.

¹⁷⁴ Article 27. Emphasis added.

¹⁷⁵ See discussion in subparagraph 2.5.4 below.

¹⁷⁶ Article 1.

¹⁷⁷ Article 1.

¹⁷⁸ Article 2.

¹⁷⁹ Article 3.

¹⁸⁰ See discussion in subparagraph 3.4.3 below.

¹⁸¹ See, for example Article 2(c) of the Employment Policy Convention 1964 (No. 122); Article 5 of the Private Employment Agencies Convention 1997 (No. 181); Article 5(d) of the Termination of

Not only is "religion" left undefined in the aforesaid instruments; it is closely associated with the terms "thought", "conscience", "culture" and "belief" – a so-called association of rights as was the case when we looked at religious freedom under section 15(1) of the Constitution.¹⁸² Tahzib-Lie refers to the UDHR¹⁸³ as providing a definition of discrimination based on religion.¹⁸⁴ Whilst this may assist in highlighting an understanding of distinctions made on a religious basis, it fails, however, to give any definitive meaning to "religion" as a term under the UDHR. "Religion" is described as a freedom which may be expressed by a person or group in the public or private. This is subject to any general limitation of law and the limitation that such expression is not destructive of other fundamental rights. The notional manner in which the right to freedom of religion may be expressed, alternatively limited, in terms of the aforesaid relevant provisions of the UDHR or even the DEFIRB does not translate into a substantive definition of the term "religion". Conceptually "religion" and the associational terms are defined more in terms of how such freedoms may be expressed and practised by an individual or group than limiting the term to a specific definition.

Van der Vyver has pointed out that freedom of religion and belief have effectively been placed in the same category for definitional purposes (more for the sake of convenience than out of intentional design) making it almost impossible to attach a universal definition to religion.¹⁸⁵ Van der Vyver refers, for example, to the drafters of the UDHR and the International Covenants on Human Rights which fail to distinguish between religion and belief.¹⁸⁶

Van der Vyver has criticised this collective association of the term "religion" with other terms instead of it being treated as a stand-alone concept claiming its own

Employment Convention 1982 (No. 158); Article 5(a) and 7 (3) of the Indigenous and Tribal Peoples Convention 1989 (No. 169).

¹⁸² Discussed in subparagraph 2.2.2 above.

¹⁸³ Article 2.

¹⁸⁴ See Tahzib-Lie BG "Dissenting women, religion or belief, and the state: Contemporary challenges that require attention" 480 esp fn 123.

¹⁸⁵ See Van der Vyver 2008 *AHRLJ* 355.

¹⁸⁶ See Van der Vyver 2008 *AHRLJ* 355.

right to treatment on the stage of jurisprudential human rights. The arguments persist that "religion" is incapable of universal definition. The issue is perhaps moot by the fact that religion as a concept is too broad in depth and meaning to lend itself to the confines of a finite definition. David Little has pointed out that the absence of the aforesaid international law instruments ascribing a definition to "religion" must be interpreted as leaving it to each sovereign state to deal with the term in the context of its legislative or constitutional law framework.¹⁸⁷ Little's argument in this regard is compelling. What matters more, it is submitted, may be not that we are unable to define religion in terms of precise terminology but that the right an individual has to religious freedom is tolerated with due regard to what is reasonable in a democratic society based on equality, freedom and human dignity.

For purposes of looking at the manner in which the notion of "religion" has been interpreted abroad, Germany, Canada,¹⁸⁸ and the United Kingdom can be helpful in this regard.¹⁸⁹

Both Germany and Canada have written constitutions.¹⁹⁰ The United Kingdom is a constitutional state with an unwritten constitution.¹⁹¹ These countries have been

¹⁸⁷ See Little "Tolerance, equal freedom, and peace: A human rights approach" 10. Also see Witte "David Little: A modern Calvinist architect of human rights" 5-10.

¹⁸⁸ For reasons discussed in Chapter 4, Canada features as the international comparator of choice for purposes of the exploring the international regulation of religious discrimination in the workplace abroad in relation to the South African workplace. The foreign jurisdictions focused on in this subparagraph have been chosen for purposes of exploring merely how religion has been defined, or conceived, in foreign international jurisdictions including Canada.

¹⁸⁹ This subparagraph draws heavily on the following article by the author: Henrico 2015 *TSAR* 784.

¹⁹⁰ In Germany reference is made to the 1949 Constitution of the Republic of Germany, referred to as the German *Grundgesetz*, and in Canada regard is had to the Canadian Charter of Rights and Freedoms, namely the Canadian Constitution Act 1982.

¹⁹¹ The British constitution is noteworthy for the fact that it is "unwritten". Instead the British constitution is conceived of as something which has evolved since as early as the signing of the Magna Carta in 1215 by King John at Runnymede and the subsequent adoption and consolidation of various statutes, judicial decisions and treaties recognising the rights and liberties of its citizens. For further reading see Yardley *Introduction to British Constitutional Law* 2; Bogdanor *The British Constitution in the Twentieth Century* 30-31; Giussani *Constitutional and Administrative Law* 8-11; Bradley and Ewing *Constitutional and Administrative Law* 12-22; Allison *The English Historical Constitution: Continuity, Change and European Effects* 15-23. In addition, it is notable to point out that equality jurisprudence is addressed by regulatory legislation in the form of the Human Rights Act 1998 (the HRA) and Equality Act 2010. The European Charter of Human Rights (ECHR) was incorporated into UK law by the HRA. As to the legal consequences of

chosen given their appreciable impact on South African jurisprudence.¹⁹² In addition they can be counted among the world's strongest democracies in terms of legal influence. Moreover, they have had the benefit of many decades to develop a balance of the constitutional values underlying the tensions that exist between fundamental constitutional imperatives.¹⁹³

2.2.5 The term "religion" as interpreted in Germany

The German constitution¹⁹⁴ provides as follows:

No person shall be favoured or disfavoured because of sex, parentage, faith or religious *opinions*.¹⁹⁵

It also provides that:

Freedom of *faith* and *conscience*, and freedom to profess a *religious* or philosophical creed shall be inviolable.¹⁹⁶

It is significant to note that the *Grundgesetz* provides as follows:

Human dignity shall be inviolable. To respect it shall be the duty of all state authority.¹⁹⁷

and

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.¹⁹⁸

Brexit upon the United Kingdom, see Gordon and Moffatt *Brexit: The Immediate Consequences* 19-23, 62-64.

¹⁹² See *S v Makwanyane* 1995 3 SA 391 (CC) para 14 105 and 108; *Ferreira v Levin* 1995 2 SA 813 (W) 834D-E; *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 56; *De Lange v Smuts* 1998 3 SA 785 (CC) paras 51-52; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA* 2000 2 SA 674 (CC) paras 71 and 73; Cohen 2014 *NWJIHR* 145.

¹⁹³ See McAllister *TuIJCIL* 493.

¹⁹⁴ *Grundgesetz*. In all references to the *Grundgesetz* the English version is translated by the Federal Ministry of Justice and Consumer Protection in cooperation with juris GmbH (Saarbrücken 2014).

¹⁹⁵ Article 3(3). Emphasis added.

¹⁹⁶ Article 4(1). Emphasis added.

¹⁹⁷ Article 1(1).

¹⁹⁸ Article 1(2).

The *Grundgesetz* is the culmination of the decline of the Nazi regime of dictatorship which saw the worldwide devastation caused by gross human rights violations. Acknowledgement of human dignity, peace and justice feature as imperatives in the German constitution akin to a guarantee against the system of national socialism that wrecked social and world havoc from 1933 to 1945.¹⁹⁹ Four decisions of the Federal Constitutional Court²⁰⁰ shed some light on how the term "religion" is interpreted.

The first two cases arose in relation to workplace-related disputes. The third case is non-workplace related. In one case involving a complaint on behalf of schoolchildren against crosses or crucifixes being displayed in public elementary schoolrooms²⁰¹ the court was of the view that such display was a violation of the protection of the right to freedom of religion and faith which an individual was at liberty to exercise according to her convictions and not in accordance with the dictates of the state. Without defining "religion" the court stated that freedom of religion "guarantees participation in acts of worship [in] a *faith*".²⁰²

In another decision involving a Muslim school teacher who refused to abandon her headscarf whilst teaching on the basis that it was an expression of her religious belief²⁰³ the court took into account factors of cultural and religious diversity as well as the importance of accommodation in a religious pluralistic society.²⁰⁴ Concepts of "faith", "ideological belief", "conscience" and "beliefs" were considered collectively as constituting the notion of freedom of religion.²⁰⁵ Notably, the court acknowledged the diversity of religious beliefs based on the human dignity of mankind in the interests of self-determination.²⁰⁶ The finding of the court was that the teacher was

¹⁹⁹ For further reading see Eberle 1997 *Utah LR* 971; Foster and Sule *German Legal System and Laws* 40-47; Simpson "Atrocity, law, humanity: punishing human rights violators" 114.

²⁰⁰ *Bundesverfassungsgericht*.

²⁰¹ BVerfGE 1987 93 11.

²⁰² Para C II 1. Emphasis added.

²⁰³ BVerfGE 2003 108 282.

²⁰⁴ The decision provoked much debate in Germany, resulting in certain states in Germany passing laws expressly banning the wearing of the head scarf (or hijab) by woman whilst at work. See Foster and Sule *German Legal System and Laws* 251; Fogel 2006 *NYLSLR* 622.

²⁰⁵ Para II 2.

²⁰⁶ Para II 4.

not unsuitable to perform her role and functions as a teacher whilst simultaneously wearing her headscarf in support of her religion.²⁰⁷

In a case where a mother refused her newborn child suffering from acute anaemia a blood transfusion on grounds of her religious beliefs²⁰⁸ the court stated that:

... religious freedom is more than religious tolerance [since it] includes not only the (inner) freedom to *believe* or not to believe, but also to acknowledge the external freedom to manifest the *faith* ...²⁰⁹

The court went on to point out that religious freedom must be considered against the backdrop of a country in which human dignity is the supreme value.²¹⁰

Finally, in a case where the applicants as an association sought protection of their religious beliefs²¹¹ under Article 4(1), the court appears to develop a definition of religion as interpreted with reference to the aforesaid Article:

By religion ... is [meant] a certainty connected with the person of man about certain statements on the world as a whole, as well as the origin and the goal of human life; Religion is based on a "transcendent" reality which transcends and encompasses man ...²¹²

It is significant to note the extent to which the Federal Constitutional Court in the latter decision developed a definition of religion. This does facilitate a better understanding of religion as a term. However, it is submitted that the observation is in and of itself inadequate and a somewhat narrow interpretation which fails to capture a more liberal and generous understanding of the term.²¹³

²⁰⁷ Paras 40-48, 52-60.

²⁰⁸ BVerfGE 1971 32 98.

²⁰⁹ Para II 2.

²¹⁰ Para II 2.

²¹¹ BVerfGE 1992 21 90.

²¹² Para 23.

²¹³ See by way of contrast the interpretation ascribed to the term by the courts in South Africa as discussed in subparagraph 2.2.3 above, and in Canada in subparagraph 2.2.6 below.

2.2.6 The term "religion" as interpreted in Canada

The Canadian Charter of Rights and Freedoms provides for "freedom of *conscience* and *religion*".²¹⁴

When viewing Canadian case law we are reminded of *R v Big Drug Mart Ltd*²¹⁵ wherein Dickson CJC speaks of a concept of "religious beliefs" tantamount to a declaration free from any limitations. Later in the judgment, Dickson CJC observes that:

... the purpose of the freedom in question [namely religion] is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable to the meaning and purpose of *the other specific rights and freedoms with which it is associated within the text of the Charter*. The interpretation should be ... a generous rather than a legalistic one ...²¹⁶

The comparison which Dickson CJC draws between religious freedom and associated "other specific rights and freedoms" is almost prophetic of the manner in which the text of section 15(1) of the South African Constitution would later come to guarantee the right to freedom of religion, namely within the context of an association, alongside other specific rights and freedoms, with "conscience", "belief" and "opinion".

Moreover, when dealing with the concept of freedom of religion, Dickson CJC stresses the importance of society accommodating a diversity of beliefs so as to render it a truly free society aimed at equality with respect to the enjoyment of fundamental freedoms which are in turn founded upon respect for human dignity.²¹⁷ The views of Dickson CJC are profoundly significant in this regard since they seek an interpretation of "religion" that transcends a mere "belief", "conscience" or "faith" to include a freedom on the part of the individual whose freedom it is that must also be

²¹⁴ Section 2 (a). Emphasis added.

²¹⁵ 1985 1 SCR 295.

²¹⁶ Para 117. Emphasis added.

²¹⁷ Para 94.

viewed from the perspective of the most fundamental of human values, namely human dignity.

In *Ontario Human Rights Commission v Simpson-Sears Ltd (O'Malley)*²¹⁸ which dealt with whether an employer had reasonably accommodated an employee who had converted to a religious faith, the court recognised a flexible approach that must be adopted to the interpretation of human rights in a manner that will "advance its broad purposes".²¹⁹

In *Syndicat Northcrest v Amselem*,²²⁰ involving co-ownership in property and the question of the exercise of freedom of religion, the court stated that:

... [d]efined broadly, religion typically involves a particular and comprehensive system of *faith* and worship.²²¹

2.2.7 The term "religion" as interpreted in the United Kingdom

The UK, not unlike South Africa, is a secular pluralistic society²²² which nevertheless manifests a wide gamut of religions.²²³ The Equality Act²²⁴ of 2010 (hereafter the EA) heralded a unitary and harmonised perspective regarding the enforcement of equality rights in Britain.²²⁵ Section 10 of the EA deals with religion or belief. The following definition is given:

... any religion and a reference to religion includes a reference to a lack of religion.²²⁶

"Belief" is defined as meaning:

... any religious or philosophical belief [including] a reference to a lack of belief.²²⁷

²¹⁸ 1985 2 SCR 536.

²¹⁹ Para 12.

²²⁰ 2004 2 SCR 551.

²²¹ Para 39.

²²² See paragraph 2.4.1 below.

²²³ Williams "Civil and religious law in England: a religious perspective" 26; Edge "Islamic finance, alternative dispute resolution and family law: developments towards legal pluralism?" 137.

²²⁴ The Act came into operation on 1 October 2010, replacing the Employment Equity (Religion or Belief) Regulations 2003 and the Equality Act (Sexual Orientations) Regulations 2007.

²²⁵ Hepple *Equality: The New Legal Framework* 1.

²²⁶ Section 10(1).

A simple reading of EA indicates a close textual association between the concept "religion" and "belief". Underscoring this proximity is that the definition of "belief" is informed by "any religious ... belief" or "lack of "belief." In a sense "religion" and "belief" come to share an interchangeable identity in the context of the language employed by the legislature. Protections afforded individuals under section 10 of the EA must be read in conjunction with the overarching protection of freedom of thought, conscience and religion afforded by the European Convention on Human Rights (ECHR)²²⁸ which provides that:

Everyone has the right to freedom of *thought, conscience and religion* ...²²⁹

and the prohibition against discrimination²³⁰ which provides the following:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... religion.

The diverse pluralistic make-up of British society has given rise to a number of decisions dealing with freedom of religion issues.²³¹ In *R (Begum) v Head Teacher and Governors of Denbigh School*²³² the House of Lords held that whilst the appellant had an absolute right to hold a religious "belief", the right to manifest such "belief" by insisting on wearing a *jilbab* whilst at school had to be seen proportionate to the right of the school that the appellant conform to the school uniform policy.²³³ In considering the case, the court had regard to article 9 of the ECHR and the importance of the freedom of religion in a multicultural, pluralistic society.²³⁴

In the case of *Eweida and Others v The United Kingdom*²³⁵ all four applicants were practising Christians. The first two²³⁶ complained that their employers placed

²²⁷ Section 10(2).

²²⁸ The United Kingdom played an instrumental role in the drawing up of this convention.

²²⁹ Article 9(1). Emphasis added.

²³⁰ Article 14.

²³¹ Hepple *Equality: The New Legal Framework* 41.

²³² 2006 UKHL 15.

²³³ Para 26.

²³⁴ Para 20. In this regard the court referred to the decision in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

²³⁵ ECtHR 15 January 2013.

²³⁶ Ms Eweida and Ms Chaplin.

unreasonable restrictions on their visibly wearing Christian crosses around their necks while at work. The other two applicants²³⁷ were marriage registry officers who were dismissed for refusing to carry out their duties in registering the marriage of same-sex partners as they considered such unions to be against their religious beliefs. All four applicants lodged a complaint with the European Court of Human Rights (ECtHR) in Strasbourg claiming that domestic law failed to adequately protect their right to manifest their religion. More specifically, all applicants argued that the state had violated their right to freedom of religion under Article 9 of the ECHR and/or their right to be free from discrimination in the exercise of this freedom under article 14 and 9 of the ECHR. The court held that:

... to hold and change a religious belief under article 9(1) of the ECHR is absolute, however, the freedom to manifest one's belief through means of practice in public and worship is not an unqualified right; it is a right that must be weighed taking into account limitations that are "necessary in a democratic society" regard being had to the rights and freedoms of other persons.²³⁸

In upholding the claim for Ms Eweida, the court found that domestic authorities had failed to sufficiently protect her right to manifest her religion in the private sector, which manifestation was not specifically excluded by any legal provision or IROJ.²³⁹ In respect of the second applicant who also desired to wear a crucifix whilst at work, the court held that her desire to manifest her religious belief had to be limited by the safety requirement of the workplace. The workplace in question was a public hospital. Wearing a crucifix on the neck posed a health and safety risk in terms of possible injuries that could occur whilst handling patients. The health and safety requirement of the employer outweighed the applicant's right to wear her crucifix.²⁴⁰ As regards the two marriage officer applicants, the court took the view that the

²³⁷ Mr MacFarlane and Ms Ladele.

²³⁸ Page 3.

²³⁹ Having made such finding the court did not consider it necessary to enquire into the applicability of article 9 of the ECHR.

²⁴⁰ It must be noted that the *bona fide* conduct on the part of management of the hospital where the applicant was employed to work is demonstrated by the fact that the applicant was given an opportunity of wearing the crucifix in a manner that did not contravene the health and safety rules. The applicant was permitted to wear her crucifix attached to a badge on her uniform, however, the applicant refused to do so on account of the fact that the badge could not be worn at all times.

freedoms that were accorded to the protection of same-sex civil unions in a pluralistic society could not be said to have violated the rights of the applicants under either article 9 or 14 of the ECHR.

A noteworthy aspect of the judgment is the fact that "religion" is not defined as such but is dealt with in close association with the concept of "belief". Moreover, the wording of article 9 of the ECHR is not dissimilar to what we encounter in section 15(1) of the South African Constitution where "conscience" and "thought" are employed together with the concept of "religion" thereby creating a close textual association of terminology.

In the matter of *Chatwal v Wandsworth Borough Council*²⁴¹ the employment appeal tribunal had to consider a claim by the applicant that a job requirement for him to participate in cleaning the communal kitchen facilities constituted indirect discrimination on the basis of religion or belief. The claim was considered in the context of the EA. The applicant was unsuccessful in showing that a prohibition preventing the touching of meat or cleaning of the kitchen surfaces was an integral part of his belief or faith as a member of the Sikh religion. The tribunal did not consider "religion" in isolation but with reference to the concept of "belief".²⁴²

In *R (Williamson and Others) v The Secretary of State for Education and Employment*²⁴³ the claimants argued that a public banning of corporal punishment in schools was incompatible with their freedom of religion under article 9 of the ECHR. In considering the issue of freedom of religion, Lord Nicholls observed that "religious faiths call for more than belief".²⁴⁴

Later in the judgment Lord Walker observed the importance of the "manifestation of belief" being consistent with human dignity.²⁴⁵

²⁴¹ 2011 UKEAT 0487.

²⁴² Para 25.

²⁴³ 2005 UKHL 15.

²⁴⁴ Para 16.

²⁴⁵ Para 64.

The court of appeal in *Ladele v Islington London Borough Council and Liberty (Intervening)*²⁴⁶ held that the "right to freedom of thought, conscience and religion" as protected by article 9 of the ECHR is only worthy of respect and tolerance in a democratic society to the extent that they are not incompatible with "human dignity".²⁴⁷

The aforesaid decisions by the English courts²⁴⁸ do not attempt to narrow the concept of "religion" to a restrictive definition. The approach is to view "religion" not only through the portal of a statutory right under section 10 of religion constituting a "belief" or "philosophy", but to extend it to the broader parameters offered by the interpretation when applying article 9 of the ECHR where freedom of religion is very closely associated with the expression of "thought" and "conscience" in much the same way as we find the association of rights as they appear in section 15(1) of the Constitution.

Religious freedom is catered for in both the context of the German and Canadian fundamental constitutional laws. English law provides for religious freedom by way of the EA as read with articles 9 and 14 of the ECHR. Nowhere in the aforesaid regimes is the concept of "religion" interpreted in a strained manner as to confine it to a simple definition. On the other hand there is express association of the term with other fundamental concepts such as "faith", "belief" and "conscience".

2.2.8 Concluding observations on the interpretation of the term "religion"

Is the failure to deal with freedom of religion in terms of a finite definition of any significance? Interpreting freedom of religion by viewing "religion" alongside notions of "faith", "belief", "conscience", "culture" and "tolerance" underscored by the imperative of human dignity speaks of a wider interpretive approach. It is also purposive and generous in that it seeks to give effect to a cluster of factors guaranteeing the right to constitutional freedom of religion.

²⁴⁶ 2009 EWCA Civ 1357.

²⁴⁷ Para 54.

²⁴⁸ As handed down by the ECtHR.

Reception of the *Big M Drug Mart* case into our jurisprudence by the *Lawrence* case is in keeping with the discharge of the obligations of our courts under section 39(1)(b) of the Constitution. The articulation by Dickson CJC in *Big M Drug Mart* to the effect that freedom of religion must be interpreted more generously and less legalistically is akin to the approach our courts have adopted when dealing with the concept of "religion" within the constitutional guarantee of freedom of religion. Our courts too have jettisoned a legalistic approach. They have favoured interpreting the concept of "religion" set out in section 15 taking into account the associative rights therein contained in addition to South Africa's social history which now imposes demands for tolerance and celebration of diversity in the respect for human dignity.

What then can be distilled from the manner in which our courts have approached the concept of "religion" in interpreting the right to religious freedom? To what extent, if any, can it be argued that it is settled law that "religion is a matter of faith and belief"?²⁴⁹ It is submitted that whilst no universal definition exists for "religion"; the debate concerning the definition is, however, universal.²⁵⁰ The noticeable lack of a so-called dictionary definition of the term should sound no alarm owing to the complex nature of the concept. It would perhaps be unsuitable for any court to attempt to articulate a definition of something incapable of precise determination. In giving effect to the right to freedom of religion, conceptually "religion" has been interpreted alongside clusters of other rights such as "belief", "conscience" and "culture". Moreover, self-worth and human dignity have come to play an important

²⁴⁹ Per Sachs J in *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 97.

²⁵⁰ See Wald 2009 *CLLPJ*; Supiot 2009 *CLLPJ*; Gunn 2003 *HarvHRJ*. For example, does religion reach beyond traditional belief in a divine being or deity to include other philosophical beliefs (for example on issues such as death, life, morality and lifestyle choices, e.g. pacifism or atheism)? See Watson *EU Social and Employment Law Policy and Practice in an Enlarged Europe* (2009) 494; Marshall 2013 *IJRF* 11; Van der Vyver 2008 *AHRLJ* 338. See also *City of Tshwane Metropolitan Municipality v Afriforum* 2016 9 BCLR 1133 (CC) and especially the dissenting judgments of Froneman and Cameron JJ para 122 and esp authority cited in fn 77, paras 124-126 and esp authorities cited at fn 78, para 160 and esp the authorities referred to in fn 97. In this regard interesting thoughts, debate and argument are raised regarding the true relevance of minority views in a constitutional democracy; however, such views may be frowned upon persons holding mainstream majoritarian views. This issue is the subject of further discussion in subparagraph 2.9.3 below.

role in informing the interpretation of "religion" as a concept in giving meaning to what we should understand by "religion".

Our courts have teased out interpretations of "religion" consonant with the values and principles underlying the Constitution. To have imposed upon "religion" a formal interpretation akin to a dictionary definition would handicap the jurisprudential growth of future cases varied in the depth and breadth of circumstances wherein courts are required to establish the context in which the term has been used.²⁵¹ This much was borne out in the *Pillay* matter where the court's concern was not simply to define "religion"²⁵² but instead bristled with conceptual difficulties arising from religion's cross-pollination with the definition of culture.²⁵³ The competing values and interests arising from the text of the Constitution impose an interpretive duty upon our courts which transcend viewing the concept of "religion" through the confines of a mere strict definition.²⁵⁴

Our understanding of the notion of "religion" should be informed by the law of foreign jurisdictions inasmuch as such law contributes in a constructive manner to the debate. The adoption of principles from international or foreign jurisdiction is only relevant and useful inasmuch as they can be applied in the context of South African jurisprudence.²⁵⁵ This is obviously a matter which is dealt with more fully in Chapter 4.

2.3 Religious community and organisational rights under the Constitution in the context of labour law

2.3.1 Introduction

This paragraph seeks to establish the religious rights and freedoms granted to communities and organisations under the Constitution in the context of labour law. The purpose is to assess the role played by such entities in the South African

²⁵¹ See Dworkin *Life's Dominion* 119.

²⁵² In terms of ss 9 and 15 of the Constitution.

²⁵³ In terms of s 9(3) of the Constitution.

²⁵⁴ Currie and De Waal *The Bill of Rights Handbook* 147-148.

²⁵⁵ See De Wet 2004 *Fordh/LJ* 1558; *S v Makwanyane* 1995 3 SA 391 (CC) para 39.

workplace. The relevance of this extends to knowing, for example, the extent to which an entity²⁵⁶ is legally entitled to exercise its rights to religious freedom against an employee to the detriment of the employee's interest. An example is an establishment such as a Jewish butchery which practises koshering advertising a vacancy for a butcher. An IROJ is that the butcher must be of the Hebrew faith. However, when the same establishment places an advertisement for employing a security guard in the parking area of the business to watch over the motor vehicles of customers frequenting the butchery, surely the religious affiliation of the applicant for employment is irrelevant to the job required to be performed. On the other hand, to what extent, if any, would the butchery be entitled to say that they themselves or their clientele would object to knowing their motor vehicles were being watched over by someone who is not of a follower of the Jewish faith.

2.3.2 The constitutional guarantee of religious organisational rights

Section 31(1) and (2) of the Constitution provides for the following:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

To enjoy their culture, practise their religion and use their language; and

To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Clearly the above text ensures that communities and associations are given the right to practise their religion or culture provided they do so in a manner that is not contrary with any provision of the Bill of Rights. Essentially they are prohibited from exercising their religious rights in a manner that would cause harm to anyone.

²⁵⁶ Entity is used in the sense of a community or organisation but, as the subparagraph will show, it is intended more to focus on an entity as an employer either as a sole proprietor or a legal personality such as a juristic person. In this regard, the significance of the horizontal and particularly vertical application of the Bill of Rights under ss 8(1) and (2) respectively is relevant. See Vrancken "Application, interpretation and the limitation of the Bill of Rights" 40-45.

Although the provision is sufficiently broad to include the establishment of a community as a church,²⁵⁷ it is clearly not limited thereto given that an organisation can be established for non-church activities such as persons associating with one another in a collective body with the aim of sharing and exchanging religious philosophies or beliefs.²⁵⁸

Currently there is no statute or other constitutional provision which one can use as an aid in interpreting the provisions of section 31(1) and (2). What could work as a practical aid in providing meaning to what is meant by organisational or institutional rights to religious freedom are the rights that are provided to such entities as set out in the SACRRF. Items 9 and 10 of the SACRRF provide the following:

- 9 Every religious institution has the right to institutional freedom of religion.
 - 9.1 Every religious institution has the right (a) to determine its own confessions, doctrines and ordinances, (b) to decide for itself in all matters regarding its doctrines and ordinances, and (c) in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.
 - 9.2 Every religious institution is recognised and protected as an institution that has authority over its own affairs, and towards which the state, through its governing institutions, is responsible for just, constructive and impartial government in the interest of everybody.
 - 9.3 The state, including the judiciary, must respect the authority of every religious institution over its own affairs, and may not regulate or *prescribe matters of doctrine and ordinances*.
 - 9.4 The confidentiality of the internal affairs and communications of a religious institution must be respected. The privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected insofar as the interest of justice permits.

²⁵⁷ Specific legislation governs the formal official establishment and registration of a religious organisation as a church. Various incentives would drive an organisation to register as a church, not least of which is fiscal, namely to obtain status under the Income Tax Act as a non-profit organisation.

²⁵⁸ Such as, for example, a student religious organisation society on campus at a university.

9.5 Every religious institution is *subject to the law of the land*. A religious institution must be able to justify any non-observance of a law resulting from the exercise of the rights in this Charter.

10 The state may allow tax, charitable and other benefits to any religious institution that qualifies as a juristic person.²⁵⁹

The autonomy with which associations are permitted to conduct their affairs must surely be recognised. This is almost akin to the manner in which a juristic entity is permitted by law to govern its own affairs subject to the overriding condition that its conduct will not contravene any law.²⁶⁰ The express provision in Item 9.3 of non-involvement by the state and judiciary in the affairs of religious institutions is clearly a recognition of the need for religious freedom.²⁶¹ The rationale for bestowing associational rights on religious associations is provided for with reference to the right to self-determination,²⁶² which right is essential to the development and furtherance of the purposes of the interests of the association.

Item 9.3 of the SACRRF can, however, raise contentious issues. Where the particular practice by the religious institution is of such a nature as to constitute an express interference with a fundamental human right, such as taking the life of another person or torturing members, there is no doubt that such a practice will be considered wrong and prohibited²⁶³ and must be addressed through state authority intervention through means of appropriate involvement, by example, through the criminal justice system. However, the practice of religious institutions which discriminate against women for reasons relating to scriptural references, although the matter of much debate, is not always subject to censure by a court.²⁶⁴ An example in this regard is with reference to female virginity testing conducted in

²⁵⁹ Emphasis added.

²⁶⁰ Either by act or omission.

²⁶¹ See further discussions of the consequences thereof in para 2.4, subparagraphs 2.4.3 and 2.4.4 below.

²⁶² Van der Vyver 2011 *PER* 351. Although the subject matter of the article is the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (a state institution supporting constitutional provisions in terms of ss 181-194 of the Constitution) as formed and regulated by ss 185-186 of the Constitution, it is submitted that the reasoning is equally apposite in respect of associations falling within the ambit of s 15(1) of the Constitution; see Van der Vyver 2008 *AHRLJ* 355.

²⁶³ See De Vos *Daily Maverick*.

²⁶⁴ See De Vos *Daily Maverick*.

terms of traditions, doctrines or sermons of the African Traditional Religions (ATR)²⁶⁵ or Islamic faith.²⁶⁶ On the one-hand is the need to recognise the right to self-determination of the religious association. However, where such self-determination conflicts with the fundamental right to human dignity, then surely any conduct that results in harm to another individual ought not to be permitted. Whilst this is the normative concern, the reality is that ongoing acts of gender discrimination are perpetuated in the interests of self-determination²⁶⁷ Religious practices, as already mentioned, insisting on virginity testing remain a relevant concern. In recognition of the role played by indigenous or customary law in our constitutional dispensation²⁶⁸ is the provision of regulated virginity testing of children above the age of 16²⁶⁹ under the provision²⁷⁰ of the Children's Act.²⁷¹ Hence, acts perpetrated in the name of religious practices and customary law can lead to contentious issues involving allegations of gender discrimination.²⁷²

Item 9.5 of the SACRRF may acknowledge that the way in which religious associations conduct their affairs is subject to not only the general limitation of rights clause contained in section 36 of the Bill of Rights but more specifically any relevant law and especially the supremacy of the Constitution. But as already mentioned, conflicting religious freedoms and laws can give rise to complicated disputes and issues. Accordingly, any rights exercised by an association under the auspices of the SACRRF must be seen within the context that it is subject to the overall legislative and constitutional framework of the South African legal system. In particular, it is significant to enquire as to the legal nature and precise effects of the SACCRF when interpreting the Constitution.

²⁶⁵ See Vincent 2006 *CHSJ* 18-19. See further discussion on prevalence of ATR in South Africa in subparagraph 2.4.1 below.

²⁶⁶ See Tamale 2014 *AHRLJ* 153-154, 156-159.

²⁶⁷ See Van der Vyver 2008 *AHRLJ* 349-351.

²⁶⁸ See for example section 39(2) of the Constitution which enjoins a courts, tribunal or forum, when interpreting legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

²⁶⁹ For social, cultural and religious practices.

²⁷⁰ Section 12(5)(a)-(c).

²⁷¹ 38 of 2005.

²⁷² See Albertyn 2009 *CRR* 166-175; Sloth-Nielson 2012 *LD&D* 70-75; Lenaghan 2013 as cited by Holness "Language and culture".

Acknowledgement of the importance of associational rights under section 15(1) was recognised by the court in *Christian Education South Africa v Minister of Education*.²⁷³

The importance thereof refers to embracing minorities and individuals in a pluralistic society, for the following reasons:

If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism.²⁷⁴

From the aforesaid *dictum* it is clear that the promotion of the association of communities is key to embracing an optimal notion of democracy, namely one which takes account of widely divergent differences, especially those of minorities and the imperative of tolerance of such differences rather than exclusion thereof. The *Christian Education* case raised a multiplicity of constitutional issues. In the main, the attack focused on challenging the constitutionality of legislation which abolished corporal punishment in public schools on the basis that corporal punishment was a central tenet of the faith of the applicants and an integral part of their "community rights to freely practise their religion".²⁷⁵ On the other hand, the right to meet out corporal punishment impacted on the right of the child to human dignity,²⁷⁶ freedom of torture²⁷⁷ and the court being called upon to act in the best interest of the children. Ultimately, the right of the applicants to insist on corporal punishment fails to pass constitutional muster in terms of the limitation clause as provided for under section 36 of the Constitution.²⁷⁸

It is important to understand that associational rights under section 31(1) provide the necessary protection to an organisation, group or community wishing to be identified in terms of a particular religion with the constitutional right to self-

²⁷³ 2000 4 757 (CC).

²⁷⁴ Para 23.

²⁷⁵ Para 2.

²⁷⁶ Section 10 of the Constitution.

²⁷⁷ Section 12 of the Constitution.

²⁷⁸ Corporal punishment was recognised as an acceptable part of the religious belief in question, but the exercise thereof was limited due to such right being balanced against other rights, such as the right not to be subjected to cruel and inhumane torture.

determination to realise their religious goal as a collective whole or movement subject to the condition that such an objective does not undermine other fundamental rights in the Bill of Rights. It is submitted that the test to determine whether the associational or communal objective threatens another fundamental right would be a casuistic one, namely to be determined on a case-by-case basis with reference to the facts and circumstances of each and every case.

*Taylor v Kurstag*²⁷⁹ is authority for the associational right to freedom of religion enshrined in sections 31 and 18 of the Constitution, and that freedom includes the right of others to exclude non-conformists and to require those who join an association to conform with its principles and rules. Express provision is made for the associational right to institutional freedom of religion in terms of the SACRRF.²⁸⁰ A worker alleging religious discrimination on this basis would need to establish differential treatment amounting to discrimination on a listed ground. Associational rights as informed by sections 18 and 31 of the Constitution come to the fore when an association, for example the administrative offices of a particular church, would exclude non-conformist employees (or applicants for employment) on grounds that they do not conform to the religious beliefs, ideologies and practices of the church whose affairs they administer. The question to be posed is whether the mere administration of a church's affairs can be said to be so inexorably linked to the religious tenets of the church that an IROJ is for the employee to be a member of the church. Arguably, where it can be shown that the affairs of the church being administered are of such a nature that the church would consider it to be an infringement of its religious rights under section 18 of the Constitution, a case would need to be advanced that discrimination against non-conforming employees (or applicants for employment) is fair due to the IROJ in terms of the LRA²⁸¹ or EEA.²⁸²

²⁷⁹ 2004 4 All SA 317 (W).

²⁸⁰ Clause 9 and 9.1. See further discussion on the effects of the SACCRF when interpreting the Constitution in subparagraphs 2.3.3, 3.3.3, 5.4.1, and 5.4.3 below.

²⁸¹ Section 187(2)(a).

²⁸² Section 6(2)(b).

Alternatively, that the discrimination is rational and not unfair or otherwise justifiable in terms of the amended EEA.²⁸³

The case *MEC for Education, Kwazulu-Natal and others v Pillay*²⁸⁴ concerned a claim of religious discrimination based on PEPUA. Whilst the applicant was required to show differentiation amounting to discrimination²⁸⁵ on a listed ground, namely religion,²⁸⁶ the respondent bore the onus of showing either that the conduct was not based on one of the prohibited grounds²⁸⁷ or that discrimination was fair.²⁸⁸ Fairness, with reference to PEPUA, includes, but is not limited to, notions such as the fact that discrimination was necessary due to the intrinsic nature of the job²⁸⁹ and the extent to which the employer has taken steps that are reasonable in order to accommodate diversity.²⁹⁰

The protection of associational rights must be understood in the context of affording organisations, associations and communities the opportunity to pursue and fulfil their purposes and goals provided these are legitimate and not out of kilter with any fundamental rights in the Bill of Rights. Where a claim arises that there is a conflict between the pursuit of an associational right and another fundamental right, the court, it is submitted, would have to adopt an assessment test akin to the test as provided for in section 36(1) of the Constitution. The balance to be struck between what must or should be protected as a fundamental right in terms of the claim to protection of a religious belief on the one hand, and limiting such belief on the basis that the belief may be irrational and harmful to the general interests of society on the other hand is not always an easy exercise to employ or to adjudicate.²⁹¹ There

²⁸³ Section 11(1)(b). See Lenta 2012 *SAJHR* 231; Lenta 2013 *SAJHR* 250. Cf Bilchitz 2011 *SAJHR* 5.

²⁸⁴ 2008 1 SA 474 (CC).

²⁸⁵ Section 13(1) PEPUA.

²⁸⁶ Section 8(d).

²⁸⁷ Section 13(b).

²⁸⁸ Section 13(2).

²⁸⁹ Section 14(2)(c).

²⁹⁰ Section 14(3)(i).

²⁹¹ See De Vos 2015 <http://constitutionallyspeaking.co.za/on-eating-snakes-punching-sharks-and-animal-cruelty-legislation/>, an article on the "snake pastor" and the difficulties that often arise from placing limitations on the right to the expression of religious freedoms and beliefs. This

are instances where the aim of what a religious association may proclaim to be doing clearly becomes a controversial area of discussion in terms of whether such interests actually advance or seriously impede human dignity.²⁹² On the other hand, issues of associations and/or individuals acting as religious extremists pursuing terror attacks on other human beings is conduct amounting to so gross a violation of human rights, basic freedoms and the rule of law that it can never be condoned.

Claims of organisational or associational rights arising in the context of an employment relationship and their impact on a worker's right to religious freedom, alternatively the claim that the organisation or association has a religious right worthy of protection against a competing interest of an applicant for employment, need to be assessed within the context of the relevant legislative framework.²⁹³

2.4 South Africa as a "secular" society

2.4.1 Introduction

Given the variety of religions in South Africa²⁹⁴ and the fact that religious freedom is protected, the question remains to what extent it can be said that South Africa is a

balance, in terms of the proportionality test that must be conducted under s 36 of the Bill of Rights, is expanded on in subparagraphs 3.2.2 and 3.2.3 below.

²⁹² In South Africa examples which come to mind is the controversy surrounding the pastor who managed to get his congregants to eat grass in an attempt to get closer to God (see *Sowetan Live* 2014 <http://www.sowetanlive.co.za/news/2014/01/10>); or the church prophet who fed snakes to members of the congregation (see eNCA 2015 www.enca.com/south-africa/prophet-feeds-congregation-snakes). Further afield, in the US the use of snakes by the Pentecostal Church of God in the ritual of their religious practices remains a contentious matter; see Cevallos 2014 <http://edition.cnn.com/2014/02/26/opinion>. Also see Pretorius 2013 *IJRF* 203-210. See discussion in paragraph 3.4 below.

²⁹³

²⁹⁴ According to the 2015 Household Survey Report, religious affiliations per province are grouped under what appears to be a finite nomenclature, namely Christian; Muslim; Ancestral tribal, Animist or other African Traditional Religions (ATR); Hindu; Jewish; Other religion; Nothing in particular; and Do not know (Stats SA 2015 www.statssa.gov.za/publications/P0318/P03182015.pdf 30). But this table must be read in the context that each recognised religion has the potential to embrace other forms and types of religions. "Other traditional African religions" can constitute any amount or sum of religions or affiliations. By the same token the Hindu faith can include mainline Buddhism but does not necessarily exclude Sikhism and Jainism as part of Hinduism. Alternatively, to what extent should or could Confucianism or Taoism also be considered a religion under the umbrella term of "Other religion"? For further reading see Marshal 2013 *IJRF* 8-10. Where reference to ATR is concerned, the term is used loosely to refer to the wide variety of religions practices in Africa which range from more formal recognised religions such as Catholicism and Protestantism to the well-known

secular society, as opposed to a religious society. Alternatively, would it be more accurate to refer to South Africa as a neutral society taking into account the role played by government with reference to religious freedoms? The rationale for exploring this issue is to assess how the conceptual make-up of South African society impacts, if at all, on the issue of unfair discrimination on the basis of religion in the workplace.

2.4.2 South Africa prior to the democratic order

During the apartheid era²⁹⁵ South Africa was never considered to be a theocratic dispensation²⁹⁶ in the sense that government insisted its citizens live according to a strict religious code. And yet, ironically, legislation was passed which proscribed conduct on grounds of reasons relating to mainstream Christianity which became known as "Sunday observance laws".²⁹⁷ An example is the prohibition of the selling of alcohol in grocery stores on Sundays in terms of the Liquor Act.²⁹⁸ For ardent followers of mainstream Christianity this would not pose a problem; however, for atheists or agnostics or persons from other religious callings who did not regard the sale of alcohol on a Sunday as contrary to their beliefs, clearly the said legislation was tantamount to executive endorsement of mainstream Christianity.²⁹⁹ More significantly, mainstream Christianity was also used by specific churches in an attempt to justify the order of the apartheid regime³⁰⁰ thereby conceivably

Zion Church with its headquarters at Zion City of Moria, East of Polokwane to more traditional forms of worship of a ceremonial nature extending into deeply held cultural beliefs and traditions. For further reading on ATR see Van der Vyver 2008 *AHRLJ* 342-343; Hackett "Tradition, African, Religious, Freedom?" 92-95; Mndende 2013 *DRTheolJ* 82-83; Chimuka 2016 *SHEccI* 129-133.

²⁹⁵ Generally referred to as the time from 1948 when the National Party came into power until the transition of our political dispensation to the adoption of the interim Constitution; however, with colonialism included, racial segregation legislation can be traced back to a much earlier period, namely the Master and Servants Act of 1856.

²⁹⁶ Such as what one would find in Iran for example, where the state dictates to all who live within its boundaries that they are to conform to the order of its official religion, effectively leaving individuals with no freedom of choice. See Bilchitz and Williams 2012 *SAJHR* 160.

²⁹⁷ See Van der Vyver 2000 *EmILR* 779-781.

²⁹⁸ 27 of 1989.

²⁹⁹ See Ismail 1991 *IICLR* 565-568.

³⁰⁰ See Bilchitz 2011 *SAJHR* 237-240; Bilchitz and Williams 2012 *SAJHR* 160-162; Lenta "The South African constitutional court's reading of the right to freedom of religion" 29-30.

precluding other religions from exercising their rights freely.³⁰¹ Mainstream Christianity may have been utilised to advance and support government's agenda of racial segregation³⁰² but it was not used to such an extent that South Africa could be described as a theocracy³⁰³ during apartheid. Religion was one of the many means, but not the only, which the executive employed to advance its mandate of racial segregation. This utilisation of mainstream Christianity demonstrates that government did not adopt a stance of neutrality regarding religion. Although there were no overt measures to limit the right to freedom of religion, legislation upholding "Sunday observance laws" evidenced a clear intention on the part of government to

³⁰¹ An example would be that in terms of the Group Areas Act 41 of 1950 a Muslim association consisting of what were then referred to as "coloured" persons in terms of the Population Registration Act 30 of 1950 would not have been able to own property in areas designated for "white persons".

³⁰² As a pupil undergoing primary and secondary education at a government school in South Africa during the 1980s the author vividly recalls having to attend "bible study" classes. Although attendance was compulsory, no formal assessments of the subject matter was conducted. The subject matter was exclusively mainstream Christianity. In secondary school special permission was given to the children in the author's class who were of the Jewish faith to visit the school library for the duration of these classes on the basis that they objected to being taught or subjected to Christian doctrines. This is a further example of state intervention in the public sphere regarding religious freedom and belief. A more formal example would be the exclusion from marriage of same-sex partners on grounds that it was prohibited in terms of legislation. Lawful marriage could only be solemnised between one man and one woman. See *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 (8 March 1905); also the Marriage Act 25 of 1931 and *Fourie v Minister van Binnelandse Sake* [2002] ZAGPHC 50 53 para 5; 43 para 5. However, the policy which in no small way impacted upon the realisation of such legislation was influenced by mainstream religious values which took a dim view of same-sex relationships and partnerships. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) paras 46-49; *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC).

³⁰³ Such as countries where religion is imposed by the state upon its citizens as a way of life where in effect an individual is left with no choice but to adhere to the official recognised religion failing which the result can be persecution as well as prosecution by the state authorities. This is especially the case in Islamic states (known as *dawla islamiyya* or caliphate states) governed by Sharia law. For further reading in this regard see Moosa 2001 *JLR* 185; Pew Research Centre 2013 www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-overview. According to this source an overwhelming percentage of Muslims in countries across the world actively seek Islamic law (Sharia) to be the official law of the land which governs their conduct whilst some subjects argue that the law should only apply to Muslims. Such an Islamic state must also be seen in the context of Islamic fundamentalism and the problems related thereto such as the 11 September 2009 Al-Qaeda attack on the Twin Towers in New York, the ongoing dispute over the Brotherhood in Egypt and the terrorist group the Islamic State (ISIS) in Iraq and Syria. In this regard see Al-Dawoody *The Islamic Law of War: Justifications and Regulations* 111. Pope Francis condemned religious fundamentalism as "deviant forms of religion" following the December 2014 terrorist attacks in Paris and the ongoing strife in the Middle East, according to Moloney *The Wall Street Journal*; see also Sedgwick 2015 9 *JPT* 39; Al-Dawoody 2015 *KansURLP* 103-104; Stilt 2010 *TILJ* 76-78.

attempt to impose a "moral authoritative mainstream Christian-charged" value system on society regardless of the plurality and diversity of its make-up.

2.4.3 South Africa under the democratic order

Any foreigner visiting South Africa who takes a tour of our countryside and visits places such as the Karoo or the Garden Route cannot but be intrigued by how so many of the small towns³⁰⁴ have as a dominating feature a colossal church building which is predominantly of the Dutch Reformed (or NG) church establishment. These church buildings are synonymous with Christianity. On the other hand, dispersed throughout all the major cities comprising South Africa one does not have to travel far before one encounters either a mosque³⁰⁵ or a synagogue, which are clearly buildings associated with the Islamic and Jewish religions respectively. Driving past the Faraday onramp in central Johannesburg one cannot miss the apparent conglomeration of sangomas who function as tradition African healers and can conceivably be regarded as part of African religion. These symbols of religious affiliations certainly testify to the fact that South Africa has many different religions in its society which evidently all have the freedom to practise their faith in society in general or within their specific communities.³⁰⁶

However, South Africa's description as a "rainbow nation"³⁰⁷ must be considered against the backdrop of its diverse cultural, ethnic and racial profile. This profile brings with it a cornucopia of divergent views, ideologies and opinions in respect of various subject matters, especially in relation to religion. But we are reminded that it

³⁰⁴ Colloquially referred to in Afrikaans as "dorpie".

³⁰⁵ In this regard reference is made to the mosque located in Greenside, Emmarentia which is clearly visible from Barry Hertzog Drive, as is the mosque in Midrand which can be clearly seen from the Old Johannesburg Road, or the mosque that can be seen from the Ben Schoeman highway if one travels between Johannesburg city centre and Sandton.

³⁰⁶ Mansueto 2008 *JR&S* 4; Mndende 1998 *JSR* 115; Prinsloo 2009 *Alternation* 32.

³⁰⁷ A term coined by Archbishop Desmond Tutu during South Africa's transition to a democratic dispensation. See Buqa 2015 *VEcc* 1-8; Herman 2011 *AJPSIR* 10-20.

is this very diversity that actually unites us as a country.³⁰⁸ Imperative to our understanding and comprehension of diversity is a sense of tolerance.³⁰⁹

There is no proof to suggest that the advent of democracy has brought with it an increasing sense of religious-awareness. The fact remains that our Constitution now embraces the notion of freedom of religion and we do no longer have "Sunday observance laws". Apart from Stats SA's Household Survey 2015 which gives an indication of the various forms of religions in and across South Africa, there is nothing to suggest that South Africa has become increasingly or less "religiously" orientated under the democratic dispensation. The fact that South Africa is able to boast of individual and organisational religious freedoms does not necessarily translate into making South Africa more religious and less secular. It does, however, highlight the fact that South Africa can be considered a secular state in the sense that there is no official or formal policy in terms of which religion is enforced on the citizens or members of the country.³¹⁰ The term "secularism" is derived from Latin *saecularum* meaning "from time to time" or "eternity".³¹¹ It has, however, come to be associated with being non-religious.³¹² It is important that it be understood in the context of a society which is not regulated as a theocracy³¹³ but one in which allowance is made for the pursuit of individual and collective freedoms subject to the rule of law.³¹⁴ We have seen above how such individual and collective rights and freedoms can be curtailed under an authoritative regime such as apartheid;³¹⁵ however, the limitation and restriction of rights in this historical context was insufficient to suggest that South Africa was ruled in terms of a theocracy. Conceptually, it may be more accurate to describe the system then as being relatively secularist inasmuch as rights and freedoms were limited. What matters is

³⁰⁸ See the wording of the Preamble to the Constitution which states that "South Africa belongs to all who live in it, united in our diversity".

³⁰⁹ Sachs 2013-2014 *KentLJ* 158; Clark and Corcoran 2000 *R&PA* 627; Morini 2010 *IsrLR* 611.

³¹⁰ See Leatt 2007 *JSR*; Ismail 2001 *IndICLR* 563-586; Cook 2013 *YJLH* 437; Ferrari 2011 *IJRF* 35.

³¹¹ See Benson 2013 *DRTHeolJ* 16-17.

³¹² See Benson 2008 *CCR* 298-299; Farrow *Recognising Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* 83-93; Benson 1999 *UBCLR* 520-521.

³¹³ In terms of imposing religious law.

³¹⁴ For further reading see Campos 1994 *ColLR* 1825; Lenta 2005 *SALJ* 363-366.

³¹⁵ In subparagraph 2.4.2 above.

not the name of the model of secularity under which South Africa as a country can be grouped and named, but that South Africa, as a constitutional democracy, can and should be regarded as a fair and reasonable system in relation to the exercise of religious freedoms within the framework of the rule of law.

The US, which is regarded by many as the pinnacle of democracy, liberty and freedom,³¹⁶ is also known for being a secular country attributed to what has been referred to as the "establishment clause". In terms of the US Constitution "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".³¹⁷ In *Everson v Board of Education*,³¹⁸ Justice Black stated:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, or prefer one religion over another ...

Effectively, what emerges from this model is a situation in which there is no involvement between the state or government and any religious affiliation and/or the practice thereof. Rawls advocates that this form of government is to be encouraged since the state refuses to use any particular form of religious ideology which it imposes on its citizens.³¹⁹ Religion and the freedom to practise one's beliefs is a matter left to the conscience and personal subjective belief of each and every person – it is not a realm into which the government intends venturing. This has attracted some criticism on the grounds that it is not sufficient for a government to simply distance itself from notions of religious freedom as is demonstrated by the "establishment clause". The reasoning behind the criticism is that government should not be so passive in relation to issues impacting on liberal democracies. However, when government has become more proactive in legislating laws which call for the banning of religious symbols in forcing women of the Muslim faith to remove the *hijab*, *niqab* or *burqa* for air travel or for driver's license purposes, which laws are

³¹⁶ The position of secularism in Canada is discussed in subparagraphs 4.2.4 and 4.2.5 below.

³¹⁷ First Amendment.

³¹⁸ 330 US 1 (1947) 15.

³¹⁹ See Rawls *Political Liberalism* 29-33.

upheld and enforced through the judiciary,³²⁰ its conduct has not escaped scrutiny and will no doubt be the matter of ongoing criticism and debate.³²¹ In whichever way one refers to the "establishment clause" as separating religion from state or the private affairs of citizens, this will not detract from the reality that in form and substance the state, even in what may conceivably be considered to be the most liberal of democracies, has an overriding interest in the name of public policy to limit basic and fundamental religious freedoms.³²²

Canada serves as an example of another country which is extremely diverse in terms of its population make-up and yet secular in terms of its relation between state and freedom of religion.³²³ The significance of the Canadian framework is the degree to which it has expressed the urgency and need of an inclusive all-embracing approach to accommodating diverse views in a pluralistic society. In this sense Canada is said to be inclusively secular.³²⁴ The diversity of views celebrated in a pluralistic society which has been recognised in Canadian jurisprudence³²⁵ is said to embrace an inclusive view of secularism. Benson refers to the Canadian Appeal court decision in *Chamberlain v Surrey School Board*³²⁶ in which Gonthier J states the following:

³²⁰ In *Muhammad v Paruk* 553 F. Supp.2d.893. (E.D. Mich.2008) a Muslim woman's claim against a car rental company who insisted she remove her veil was dismissed. The decision was upheld by the Supreme Court.

³²¹ See Halmai (year unknown) www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmi/Models-of-State-Church-Relations-and-Religious-Rights.pdf 11-12.

³²² See the report by Kader Asmal, Minister of Education on the National Policy on Religion and Education (Government Gazette No. 25459 vol. 459 12 Sep 2003 3-5) in which reference is made to various models of secularity in modern democracies. For example, a repressionist model aims to suppress religion; a separationist model seeks impartiality towards religions and worldviews and a "complete divorce of the religious from the public realm". Examples are given of France and the US but the practicality of giving effect to such a model based on the reality of public life is conceded. In addition there is the cooperative (what I would submit can be viewed as the embrative) model which seeks contructive dialogue between all interest groups and there is awareness of the need to heed against coercion from the state.

³²³ See Berman, Bhargava and Laliberte *Secular States and Religious Diversity* 103; Van Praagh 2001 *CanBR* 605; Moon *Law and Religious Pluralism in Canada* 2; Roald 2011 www.cmi.no/publications/file/4239.pdf 152-153; Benson 2010 www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1654405; Benson 2007 *EmILR* 111-165; Benson 2010 *JSR* 17-41; Berger 2002 *CanJLS* 39-68.

³²⁴ Benson 2008 *CCR* 299.

³²⁵ As expanded on in Chapter 4.

³²⁶ (2000) 80 BCLR (3d) 181 (CA).

... nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy ... The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.³²⁷

The above extract has much significance for South Africa and the model of secularism which we need to embrace. This is made apparent in the following observations of Sachs J in *Minister of Home Affairs v Fourie*.³²⁸

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other ... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner ... The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all ...³²⁹

Significant similarities may be drawn between the Canadian model and South Africa in relation to the workplace in terms of which freedom of religion is guaranteed as a constitutional right subject to restrictions which may be imposed relating to the IROJ.³³⁰

The need to look at the normative framework of secularism in relation to South Africa is to appreciate the fact that the right to religious freedom on the part of the individual or as a collective association or organisation is constitutionally guaranteed. It can be said that the government assumes a non-interventionist approach in the private sector in that there are no coercive measures taken by government to apply to its civilians of any particular religion, belief or faith. As far as the public sector is

³²⁷ Para 137.

³²⁸ 2006 1 SA 524 (CC).

³²⁹ Paras 94-98. For a discussion on accommodating a diversity of intensely-held world views and lifestyles, particularly majoritarian as opposed to minoritarian or less popular views, see *City of Tshwane Metropolitan Municipality v Afriforum* 2016 9 BCLR 1133 (CC) paras 8, 14 and 164 (discussed in subparagraph 2.9.3 below).

³³⁰ This is expanded on in Chapters 3, 4 and 5.

concerned³³¹ there is also no evidence to suggest government favours one particular religion above another. Currently, the National Policy on Religion and Education³³² (hereafter the Policy) expressly provides as follows:

Under the constitutional guarantee of freedom of religion, the state neither advancing nor inhibiting religion, must assume a position of *fairness*, informed by parity of esteem for *all religions*, and worldviews. This positive impartiality carries a profound appreciation of *spirituality* and *religion in its manifestations*, as reflected by deference to *God* in the preamble to our Constitution, but does not impose these.³³³

God is acknowledged in the Policy in a manner that echoes the reference to God in the Preamble – without providing any description of what God or whose God, according to the imperative of fairness in a society where there are many religions which are each deserving of respect as a spiritual belief in their own right subject to the Constitution and the rule of law.

There can be no doubt that South Africa remains an unequal society which is extremely multicultural in nature. South Africa is a society consisting of many people who have religious beliefs and others who have no religious beliefs. This in and of itself raises many complexities, both social and political, which when coming together in the workplace are destined to create disputes, controversies and conflict as already alluded to and as further demonstrated below.

2.4.4 Religious observances and symbols in the workplace

Respect for an individual is premised on the fact that one is recognised for one's inner worth and value. An individual of a particular religious faith or belief may seek to abide by the tenets of such religion through observances³³⁴ of the religion's order

³³¹ Education and health, for example.

³³² Available at www.gov.za/sites/www.gov.za/files/religion_0.pdf.

³³³ Policy 5. Emphasis added. As pointed out in the Policy, the South African Schools Act 94 of 1996 endorses the constitutional rights of all citizens to freedom of conscience, religion, thought, belief, and opinion, as well as freedom from unfair discrimination on any grounds whatsoever, including religion, in public education institutions (p 7).

³³⁴ For example, a Seventh Day Adventist who refuses to work on a Saturday, alternatively believes it to be a sin to submit to or be a recipient of a blood transfusion.

or by wearing symbols³³⁵ or dress³³⁶ associated with the religion. The significance of such observances, dress codes and symbols should not be underestimated, taking into account the nexus one often finds between the display thereof reflective of an individual's culture and way of life, which of itself is often unavoidably intertwined with religious belief.³³⁷ The comity between culture and religion as forming part of an individual's identity and thus one's self-determination and human dignity is something which the Constitutional Court took into account in the matter of *MEC for Education: Kwazulu Natal v Pillay*³³⁸ when Sachs J stated:

Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.³³⁹

Participation and expression of practices and traditions on the part of individuals which must be respected in order to respect their identity as a human being underscores their human dignity. Understandably, various persons will entertain divergent views and ideas of practices and traditions relating to their religions and whilst they exercise these in the privacy of their home it poses no problem. Potential problems arise in the workplace where conflicts might be caused by an employee's religious observances. An example could be where an employer employs someone known to be a member of the Seventh Day Adventist faith. No problem is foreseen on account of the employee not working on Saturdays since the employer does not operate on a Saturday. However, a problem does arise when economic circumstances dictate that to remain financially viable the employer must also

³³⁵ The crucifix is worn by many Christians as a manifestation of their Christian beliefs. Male members of the Jewish faith commonly wear the yarmulke (*Kippah* or skullcap) on their heads. Females of the Muslim faith traditionally wear veils covering their head and/or faces. These are but three instances of only the most mainstream religions. In traditional African religious beliefs, symbols can range from anything between the visible wearing of beads, amulets or animal skins to the painting of one's face out of respect for the ancestors and spirits. See De Waal and Cambron-McCabe 2013 *De Jure* 108-109; Truter 2007 *SAPhJ* 56-60; Chawane 2014 *JSR* 220; Omatseye and Emeriewen 2010 *ARR* 530-535.

³³⁶ For example, a Sikh employee who insists on wearing a Kara bracelet or Muslim women who insist on wearing the hijab, burqa, or niqab. For further reading see Laborde 2015 *IJCL* 398; Squelch 2013 *MurULR* 38.

³³⁷ See discussion in subparagraph 2.2.3 above.

³³⁸ 2008 1 SA 474 (CC).

³³⁹ Para 53.

operate on Saturdays and due to staff constraints cannot consider the possibility of rotating the Seventh Day Adventist employee to a non-Saturday shift day. A further example would be an on-board flight assistant of a particular airline carrier who is made to wear an outfit and uniform associated with the airline carrier in question. If the airline carrier services a predominantly Muslim clientele these clients may express complaints if being served by a flight assistant visibly displaying a crucifix around her neck as a sign of her Christian faith.

Another example would be an individual who applies to become a marriage licensing officer. What would happen when due to his religious beliefs he finds marriage between same-sex couples objectionable? The IROJ is that a marriage licensing officer is required to perform the necessary formalities³⁴⁰ and comply with the law³⁴¹ to formalise the ceremony, irrespective of the sexual orientation of the persons getting married. Surely the IROJ outweighs the licensing officer's religious freedom? This would, however, essentially depend on the nature of position held by the marriage officer.³⁴² One assumes then that the ability to refuse to solemnise a same-gender marriage is based solely on the religious affiliation of the marriage officer concerned. If, for example, the marriage officer or person is in the service of the State³⁴³ then the section 31 "refusal to solemnize" is not applicable. Although same-sex unions³⁴⁴ can now be entered into and solemnised under the Civil Union Act,³⁴⁵ a marriage officer,³⁴⁶ other than one referred to in section 5,³⁴⁷ may object on grounds of conscience, religion and belief to solemnise a civil union. In this instance, it is

³⁴⁰ As required by the relevant applicable legislation, namely the Civil Union Act 17 of 2006.

³⁴¹ See *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 96.

³⁴² Section 31 of the Marriage Act provides as follows: "Nothing in this Act shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or disciplines of his religious denomination or organization."

³⁴³ For example, every special justice of the peace and every native commissioner in terms of s 2(1) of the Marriage Act.

³⁴⁴ Which can also be referred to as marriage in terms of s 1 of the Civil Union Act.

³⁴⁵ Section 4, as read with s 1.

³⁴⁶ As defined under s 5, as read with s 1.

³⁴⁷ This would be referring to ministers of religion and marriage officers who are in the service of the state.

significant to consider the extent to which the right to freedom of religious belief is fundamentally protected.³⁴⁸

A further example would be where a nurse working in the private or public sector insists on displaying a crucifix on a chain around her neck as a manifestation of her religious belief. However, owing to health and safety requirements, namely in the interests of not endangering herself and/or any patient during the course of performing her activities whilst on duty, she may be requested to submit to the health and safety requirements of the job.³⁴⁹ Health and safety requirements impose obligations on employers to take certain steps to ensure the safety of their workers. An example is the wearing of a helmet when driving a motorcycle. A male employee who is a member of the Sikh faith covers his heads with a turban and may find the wearing of a helmet objectionable.³⁵⁰

Religious observances in the workplace are also an issue arising in respect of religious holidays. As businesses grow, and as they become reflective of a more diversified culture, so too do they become more representative of an employee profile that is more pluralistic in its religious make-up.³⁵¹ *Prima facie* it is a matter that raises no concern, especially where all or the majority of the employees are not observant of their specific religious tenets or holidays. On the other hand, where employees do insist on practising their religion by observing religious tenets or holidays the need for the employer to address the issue becomes relevant. The

³⁴⁸ This example highlights the point raised by Sachs J, for the majority, in *Fourie*. It is that in a democratic dispensation there is a need for mutually respectful co-existence between the "secular and religious". Significantly, in support of this view, the following was held at para 94:

It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.

Striking similarities of reasoning appear from the dissenting judgment in *City of Tshwane* discussed in subparagraph 2.9.3 below.

³⁴⁹ See the discussion of a case dealing with similar facts, namely *Eweida and Others v the United Kingdom* ECtHR 15 January 2013 in subparagraph 2.7.7 above.

³⁵⁰ See Ogilvie 2013 www.abc.net.au/news/2013-09-11/4951390.

³⁵¹ Webley 2011 https://www.ibe.org.uk/userassets/publicationdownloads/ibe_occasional_paper_3_religious_practices_in_the_workplace.pdf; Borstorff and Arlington 2011 *JLERI* 1; McGregor 2013 *JLS* 88.

seriousness of the matter is compounded by the number of employees and the diverse number of religious holidays sought to be celebrated. Permitting all employees to celebrate all religious holidays throughout the calendar year can realistically have a devastating effect on any employer's business.³⁵² This affects the IROJ.

Religious observances are an integral part of a person's faith and for many people they are inseparable from their way of live, culture and wellbeing. This merger is part of their make-up as an individual and their self-identity. Any limitation or potential interference with their right to religious freedom in general and in particular their right to human dignity is resisted. However, in the workplace there is a balance of interests which needs to be addressed, namely maintaining the viability of the employment relationship in a manner that is not inimical to the business interests of the employer against also protecting the rights of the employee to religious freedom. Due to the nature of the these competing interests the question of where to strike the optimal balance is not easily solved. The right to religious freedom in general, with reference to equality and human dignity in particular, must inform the debate on the extent to which observances of religious practices, dress codes or symbols in the workplace are to be limited by an employer. The general right to limit such freedom under section 36 of the Constitution³⁵³ and the right to limit based on account of the IROJ or perhaps even the operational requirements of the employer³⁵⁴ are considerations to be taken into account.

³⁵² Whether or not this would in fact be the case would be context specific in that it would naturally depend on the nature of the business, whether it is capital or human resource intensive and obviously the total number of employees seeking to take leave in respect of a religious holiday. See Cook 2013 *YJLH* 444-445. For further reading on accommodating religious holidays in the workplace, see Vermeulen and Belhaj 2013 *IJD* 132; Sokupa 2011 *IJRF* 111; Lenta 2009 *SALJ* 827.

³⁵³ Which is expanded on in Chapter 3.

³⁵⁴ Both these requirements are expanded on in Chapter 3.

2.5 Discrimination within the context of South African labour law

2.5.1 Introduction

The importance of contextualising "discrimination" in terms of the South African workplace is to gain an understanding of what is meant precisely by the term on account of the material role it has played and continues to play in our jurisprudence. It is important to understand the term as employed in its legal sense and the significance of its evolution to the concept "unfair discrimination".

2.5.2 The concept of "unfair discrimination"

South Africa's colonial and political history translated into social, economic and legal disenfranchisement of the majority of the country's population.³⁵⁵ This domination was characterised by blatant discrimination³⁵⁶ on the basis of race.³⁵⁷ The system of racial segregation galvanised under the mantra of apartheid endured until the ushering in of a new constitutional dispensation with the interim Constitution of the Republic of South Africa³⁵⁸ (hereafter the interim Constitution) which brought with it the hope and promise of a society in which the aspirations of all citizens within the Republic could be realised. No longer is parliament supreme. Parliament, together with the executive and judiciary and all laws, are all subject to the supremacy of the Constitution and the rule of law.³⁵⁹ The abhorrence of apartheid was, *inter alia*, the fact that persons were differentiated against solely on the basis of external physical innate features, namely the colour, hue or complexion of their skin. On this basis

³⁵⁵ Fredman 2013 http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1320950747192/8260293-1320956712276/8261091-1348683883703/WDR2013_bp_Anti-Discrimination_Laws.pdf 8; Kloppers and Pienaar 2014 *PER* 680-687; Jacobs 2006 *PILR* 414-423; Nagan 1988 *FILJ* 404-405.

³⁵⁶ In the historical international arena, discrimination has contributed significantly to shaping the course and destiny of many countries. An example is used simply of slavery – which can be traced back to Ancient Rome – which sanctioned the trade in human beings as objects akin to property. The practice continued to take place in countries that are today considered to be forerunners of governments upholding the rule of law and democracy, namely the United Kingdom (hereafter UK), France and the United States of America (hereafter US).

³⁵⁷ Dugard *Human Rights and the South African Legal Order*; Mathews *Freedom, State, Security and the Rule of Law*; Cameron *Justice: A Personal Account* 36-44 58-61; De Vos and Freedman *South African Constitutional Law in Context* 5-15; Currie and De Waal *The Bill of Rights Handbook* 2-3. 200 of 1993.

³⁵⁹ Sections (1)(c), 2 and 165(1) of the Constitution.

alone they were subject to laws which effectively defined and determined how they could live their lives, or rather, which severely impeded the manner in which they could simply move; with whom they could associate; where they could study and the careers or education they could pursue. There was no objective rationale or basis for treating persons of a different race differently save to fulfil the party-political mandate of the ruling party.

The notion "discrimination" *per se* piques one's senses as having to do with conduct associated with unequal treatment. It is on account of the inequality of the treatment that conduct is viewed as objectionable and hurtful.³⁶⁰ However, "discrimination" in the legal sense of the term must be unpacked and understood in its constituent parts for it to constitute "unfair discrimination".

In an appeal against the decision by a chief labour inspector not to interfere with an employer's desegregation of sanitary facilities, Ehlers P in *SA Iron, Steel and Allied Industries Union v Chief Inspector, Department of Manpower*³⁶¹ referred to a decision by the Appellate Division (by which name it was then known) in *Minister of Posts & Telegraphs v Rasool*³⁶² where the following was stated:

Now to "differentiate", in its primary meaning, is to distinguish one thing from another; it does not connote attaching more, or less, importance, or more, or less, weight to the one thing than to the other. One may differentiate a red rose from a yellow by colour, but this does not mean that one rose is more beautiful or smells sweeter than the other ... Giving this meaning to the word "differentially", it seems to me that administration affects Asiatics differently when it places them in a position different from that of other inhabitants of the Union. It is differential if it puts the Asiatics in a worse position than that of the Europeans: it is differential if it puts them in a better position. It is differential also if it puts them in an equal position but yet not the same position.³⁶³

Based on the aforesaid *dictum*, Ehlers P reasoned that essential to an enquiry of "discrimination" is not merely or simply differentiation but differentiation with "the

³⁶⁰ *Brink v Kitshoff* 1996 4 SA 197 (CC) para 42; Dugard 2013 *EJIL* 868; Mswela and Nothling-Slabbert 2013 *SAJBL* 238; Weiwei 2004 www.corteidh.or.cr/tablas/r08121.pdf 8.

³⁶¹ 1987 8 *ILJ* 303 IC 307 311.

³⁶² 1934 AD 167.

³⁶³ At 186.

element of 'inequality'".³⁶⁴ Although a tendency may be to conceive of "discrimination" at first blush as being objectionable, it is the qualification of "discrimination" as being "unfair" which makes it untenable in the legal sense of the word.

Discrimination in South African labour law is premised on the notion of unfair discrimination.³⁶⁵ Historically, "unfair discrimination" as a generic term was introduced into our labour law jurisprudence with the 1988 amendments to the previous Labour Relations Act³⁶⁶ which sought to codify the concept of "unfair labour practices" which was defined as "the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed".³⁶⁷ This has devolved into a tiered test of determining firstly whether there has been differentiation, namely treatment on a basis that is different to how others are treated, and secondly whether the nature of such treatment can be said to be unjust, arbitrary, capricious, hurtful and therefore unfair.³⁶⁸ Du Toit has argued that the concept of "unfair" discrimination is a consequence of the development of the unfair labour practice jurisprudence within the South African legal system since the 1980s.³⁶⁹

2.5.3 The ILO notion of "discrimination" in the workplace and "unfair discrimination"

Article 1 of the International Labour Organisation Convention Concerning Discrimination in Respect of Employment or Occupation³⁷⁰ (ILO Convention 111) provides that, for purposes of the Convention, the term "discrimination" includes:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin, which has the effect

³⁶⁴ See Du Toit 2006 /LJ1318-1319.

³⁶⁵ The extent to which the notion is dealt with by our legislative and constitutional framework is expanded on in Chapter 3.

³⁶⁶ 28 of 1956.

³⁶⁷ Para (i) of the definition of s 1 of the LRA 28 of 1956 per Du Toit *et al Labour Relations Law: A Comprehensive Guide* 571 fn 9.

³⁶⁸ Van Niekerk *et al Law@work* 126.

³⁶⁹ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 1.

³⁷⁰ 111 of 1958.

of nullifying or impairing equality of opportunity or treatment in employment or occupation.³⁷¹

However,

any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.³⁷²

What emerges from the wording of article 1(a) is a connectivity between the notions "distinction" (difference), "exclusion" or "preference" and a basis, namely race, colour, sex or which has an outcome (result) that is adverse in that it nullifies (makes nugatory) or impairs equality of opportunity or treatment in employment or occupation. Accordingly, distinction, exclusion or preference cannot be taken in isolation. The enquiry must extend to looking at the basis on which a difference (distinction) was made and the effect thereof, namely whether it nullified or impaired equality of something. It is only in this sense that the term "discrimination" must be understood for it to constitute "discrimination" in the legal sense of the word. Distinguishing between discrimination that is fair and unfair is premised on the fact that not all forms of discrimination translate into something that is unfair. Put differently, differential treatment does not *per se* conduce to an act or an omission against another person which is hurtful, arbitrary or capricious.

South Africa ratified this Convention on 5 March 1997³⁷³ which, together with other ILO conventions,³⁷⁴ is regarded as one of the "core conventions".³⁷⁵ ILO Convention 111 and the Equal Remuneration Convention³⁷⁶ are the most widely ratified ILO Conventions.³⁷⁷ Underscoring the concern in relation to discrimination is the fact that by 2011 the ILO reported that new ombudsman offices had been established in six

³⁷¹ See art 1(a).

³⁷² See art 1(2).

³⁷³ Smit and Van Eck 2010 *C/LSA* 48; Kalula "Beyond borrowing and bending: Labour market regulation and the future of labour law in Southern Africa" 275.

³⁷⁴ Such as the Freedom of Association and Protection of Rights to Organise Convention, 1948; the Right to Organise and Collective Bargaining Convention 1949 (both ratified by South Africa in 1996).

³⁷⁵ The eight conventions which have been earmarked by the ILO Governing Body are listed on www.ilo.org.

³⁷⁶ 100 of 1951.

³⁷⁷ International Labour Organization (ILO) 2011 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_166583.pdf 1-86 x.

European countries dealing specifically with discrimination on several grounds. One such ground is religious discrimination.³⁷⁸ As pointed out by Erasmus and Jordaan, the status and significance of the ILO Conventions is that once having been ratified by a state, the latter remains bound thereby in terms of the ILO constitution even in the event of the state's membership of the ILO being terminated.³⁷⁹ It is argued that the aforementioned Conventions are relevant to South African equity jurisprudence and in particular religious unfair discrimination. The relevance of ILO Convention 111 is the extent to which the purpose and interpretive sections of our legislation and Constitution give effect to its provisions.³⁸⁰

2.5.4 Universal and African notion of "discrimination" contextualised alongside "unfair discrimination"

The Universal Declaration of Human Rights³⁸¹ (the UDHR) which sought to address, *inter alia*, the banality of human suffering as a result of gross human rights violations during the course of the Second World War, consists of 30 articles. The most relevant one for purposes of this section provides as follows:

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 incitement to such discrimination.³⁸²

³⁷⁸ International Labour Organization (ILO) 2011 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_166583.pdf 1-86 x.

³⁷⁹ 1993 *SAYL* 84-85. The relevance of the ILO Conventions to South African labour law is evidenced by the fact that the Preamble of the Labour Relations Act 66 of 1995 (the LRA) acknowledges the need to give effect public international law obligations, the Preamble of the Employment Equity Act 55 of 1998 (the EEA) confirms the need to give effect to the obligations of the Republic as a member of the ILO, as does the Preamble of Basic Conditions of Employment Act 75 of 1997 (the BCEA). In addition, the Preamble of the PEPUA also acknowledges South Africa's obligations under international human rights law and in particular with reference to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination.

³⁸⁰ Which is expanded on in Chapter 3. Also see *SANDU v Minister of Defence* 2007 5 SA 400 (CC) para 84; *NUMSA v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) paras 26 29-36; *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) paras 42 45-48.

³⁸¹ Adopted by the United Nations General Assembly on 10 December 1948.

³⁸² Article 7.

The ILO Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief³⁸³ (the DEFIRB) provides that:

Discrimination between human beings on grounds of *religion* or belief constitutes an affront to human dignity ...³⁸⁴

Closer to home, the Freedom Charter³⁸⁵ sets forth the following provisions relating to "discrimination":

We, the people of South Africa, declare for all the country and the world to know: ...

... that only a democratic state, based on the will of all the people, can secure to all their birth right without *distinction*, of colour, race, sex or *belief*.³⁸⁶

A noticeable feature of the aforesaid United Nations instruments is absence of the term "unfair" when describing "discrimination". The definition, however, makes clear that it is nevertheless referring to conduct which impacts negatively on the right to equality of treatment or at the very least "an affront to human dignity". The Freedom Charter does not employ the term "unfair" either, nor does it use the term "discrimination". Its use of the term "distinction" is prescient of what the ILO uses in article 1(a) to describe what constitutes "discrimination".³⁸⁷

2.6 Equality

2.6.1 Introduction

South Africa's past is synonymous with a history of inequality and discrimination.³⁸⁸ This much is noted in the Preamble to the Constitution which states that "[w]e the

³⁸³ Adopted by the United Nations General Assembly on 25 November 1981 and considered as one of the eight core International Labour Organisation conventions establishing a minimum threshold of rights in the workplace. See Van Niekerk *et al Law@work* 25.

³⁸⁴ Article 3. Emphasis added.

³⁸⁵ Adopted at the Congress of the People at Kliptown, Johannesburg on 25 and 26 June 1955. For further reading on the relevance of the Freedom Charter to our constitutional dispensation, see Nthai 1998 *Consultus* 143.

³⁸⁶ Appearing in the Preamble. Emphasis added.

³⁸⁷ The adverse impact of discrimination on "equality" and "human dignity" of persons is reflected on in para 2.2.3 above.

³⁸⁸ See Dugard 1990 *Corn/LJ* 443-445; Van der Vyver 1999 *BYULR* 636-640; McGregor 2007 *Fundamina* 103; Hall and Woermann 2014 *AJBE* 60-61; Keeton 2014 <http://hsf.org.za/resource->

people of South Africa, recognise the injustices of the past". As such, it is no surprise that equality forms a material element of section 1(a) of the Constitution, alongside notions of "human dignity"³⁸⁹ and "human rights and freedoms" to constitute one of the six founding provisions of the Bill of Rights.³⁹⁰ Breslin asserts that the rights in the founding provisions of the Bill of Rights reflect a tone of aspirations akin to the spirit conveyed by the Preamble.³⁹¹ One needs not jettison the thought of such rights conveying aspirations; however, as will be seen later on in this work, for such rights to hold any meaning they must be interpreted in a manner that must improve the lives of South Africans if we are to give effect to notions such as social justice or transformative constitutionalism.

Achieving a more egalitarian society is imperative to the foundation and sustenance of a democratic order.³⁹² In seeking to establish this the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.³⁹³ The right to equality is reinforced with the following provision:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.³⁹⁴

Protection against the violation of equality is demonstrated with reference to the prohibition against unfair discrimination by the state which provides as follows:

centre/focus/state-and-nation/5.inequality-in-south-africa-g-keeton.pdf/view; Kruger "Equality" 75-84.

³⁸⁹ Considered in subparagraph 2.7.2 below.

³⁹⁰ Section 2 establishes the supremacy of the Constitution, which is echoed in s 1(c) which lists the supremacy of the Constitution and the rule of law; section 3 deals with citizenship; section 4 deals with the national anthem; section 5 deals with the national flag, and section 6 with languages.

³⁹¹ Breslin *From Words to Worlds: Exploring Constitutional Functionality*.

³⁹² See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 9; comments made by Mahomed DP in *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 1; *Brink v Kitshoff* 1996 4 SA (CC) para 40; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 36 and *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26. See also Fessha "The right to human dignity"; Dugard *Human Rights and the South African Legal Order*, Mathews *Freedom, State, Security and the Rule of Law*, Lenta SAJHR 241.

³⁹³ Section 9(1).

³⁹⁴ Section 9(2).

The state may not unfairly discriminate directly or indirectly³⁹⁵ against anyone on one or more grounds including ... *religion*, conscience, belief, culture ..."³⁹⁶

Unfair discrimination is also prohibited in the case of non-state entities, as becomes clear from the following provision:

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.³⁹⁷

2.6.2 Substantive and formal approaches to equality

Our law does not adopt a formal approach to the interpretation of the equality provision contained in section 9 of the Constitution, namely that people who are equal are equally treated and those who are unequally placed receive unequal treatment. This test is also otherwise known as an Aristotelian approach to equality.³⁹⁸ Instead, we have come to embrace a substantive approach to equality where allowance may be made for differentiation between persons on various grounds embracing a host of factors. A substantive approach to equality³⁹⁹ demands that we take account of and celebrate the diversity of individuals our society presents, except where the accommodation of such diversity would be out of kilter with the IROJ, or accommodation of the diversity would work an undue hardship.

Dealing with equality in a formal manner would in essence require that "like be treated alike" and "unlike be treated unlike". This is a narrow-minded approach which purports to address a situation of unfairness by seeking to resolve situations of inequality with limited reference criteria, namely by extending a standard form of treatment to everyone – a so-called across-the-board approach. What such approach lacks is a point of departure that takes into account that different persons require different forms of treatment due to the nature of the circumstances in which they

³⁹⁵ The concepts of direct and indirect discrimination are expanded on in Chapter 3.

³⁹⁶ Section 9(3). Emphasis added.

³⁹⁷ Section 9(4).

³⁹⁸ See *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 60; Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 77; Albertyn 2007 *SAJHR* 257-258; Fredman 2005 *SAJHR* 168-169; Wesson 2007 *JurInt*; Van Niekerk *et al Law@work* 121.

³⁹⁹ A more detailed aspect of this approach is examined in Chapter 3.

find themselves. To address the inequality that would otherwise arise from adopting a formal approach to equality, it is reasonable to expect that our courts have instead endorsed and adopted a substantive approach to equality.⁴⁰⁰ The substantive approach to equality is to be welcomed since instead of the focus of equality being placed on persons being treated equally, persons are treated on the basis of individuality based on their needs, circumstances and context in which the merits of their case must be assessed. This is especially helpful in a country like South Africa that does not have a homogenous citizenry. South Africa is a pluralistic society in which different individuals live who have different needs.

The substantive approach to equality is evident from decisions of our constitutional court. In this regard it is apposite to refer to *President of the Republic of South Africa v Hugo*⁴⁰¹ in which the following was stated:

We need ... to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.⁴⁰²

Moreover, the substantive approach to equality also finds expression in the wording of section 9(2) of the Constitution which provides that:

... equality includes the full and equal enjoyment of all rights and freedoms.

The focus area of this study extends to exploring and demonstrating how our courts, through the manner in which they have adjudicated general equality disputes and particularly religious discrimination workplace-related disputes,⁴⁰³ have given effect to equality in the substantive sense of the term. In other words, given that each case is decided within the context of its unique set of facts and circumstances, individuals' interests in the cases in question are not treated identical in terms of general policy

⁴⁰⁰ See Albertyn "Constitutional equality in South Africa" 77 and authorities cited at fn 16; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 60; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 62. Also see Albertyn 2007 *SAJHR* 257-258; Fredman 2005 *SAJHR* 168-169. Cf Wesson 2007 *JurInt* 74-82.

⁴⁰¹ 1997 4 SA 1 (CC).

⁴⁰² Para 63.

⁴⁰³ As expanded on in Chapter 5.

but are treated deserving of their merits which are accounted for and assessed with reference to the relevant values and principles of the Constitution.

2.7 Human dignity

2.7.1 Introduction

All human beings have intrinsic worth recognised as being valuable – which is referred to as human dignity.⁴⁰⁴ On account of this very fact they are worthy of treatment not as mere objects but as members who contribute in their own specific ways, with their unique qualities and attributes, to our society and global world order. As explained herein, dignity constitutes an inexorable element of equality. Unequal treatment or unfair discrimination is unacceptable and frowned upon not because it is politically incorrect, but because of the adverse impact it has on the dignity of a human being, making him or her feel less worthy than another person. This paragraph seeks to firstly outline the normative understanding of human dignity by virtue of its express inclusion as a protected right in the Constitution. It goes on to look at the central role human dignity assumes in equality jurisprudence and then its significance with reference to religious discrimination.⁴⁰⁵ Because human dignity has to do with the recognition of self-worth and esteem it is also appropriate to examine the role of religious observances and or symbols in the workplace in this regard.

2.7.2 A normative understanding of the constitutionally protected right to human dignity

It was Mahatma Gandhi who remarked that "the greatness of a nation and its moral progress can be judged by the way its animals are treated".⁴⁰⁶ Francis of Assisi, who died in Assisi on 3 October 1226 and was canonised as a saint just two years later by Pope Gregory IX, has been regarded in Christianity as the greatest of all saints and is

⁴⁰⁴ See Düwell "Human dignity and human rights" 218-219; Ackermann *Human dignity: Lodestar for Equality in South Africa; Affordable Medicines Trust v Minister of Health of RSA* 2006 3 SA 247 (CC) para 59.

⁴⁰⁵ This latter aspect is expanded on in Chapter 5.

⁴⁰⁶ See Singer 2011 www.aljazeera.com/indepth/opinion/2011/07/20117159193612442.html.

remembered not least for his love of animals and their care.⁴⁰⁷ There is a crucial link between kindness to animals and human dignity. It stems from the fact that as stewards and overseers of our global community, countries, communities, societies and our homes it matters that we show kindness and compassion toward all living things. All life has intrinsic value, is deserving of respect and should not be subject to exploitation or cruelty at our hands.⁴⁰⁸ As any society evolves it does so with the aim of developing and advancing itself from its former self to something that is better.⁴⁰⁹

The founding provision of the Constitution provides as follows:

The Republic of South Africa is one sovereign, democratic state founded on the value of *human dignity*, the achievement of equality and the advancement of human rights and freedoms⁴¹⁰

Section 10 of the Constitution reiterates the value of human dignity in providing that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". The inner worth placed on dignity as a degree of measure appears from the word "inherent" thereby making the right inalienable.⁴¹¹

With reference to the constitutional order, dignity has been earmarked as one of the essential imperatives as is apparent from the statement by former Chief Justice Chaskalson who said the following:

⁴⁰⁷ See Robinson "The Writings of St Francis of Assisi".

⁴⁰⁸ See address by Pope Francis on 24 September 2015 to the American House of Congress (Libreria Editrice Vaticana 2015 http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html). Also see Pope Francis' Encyclical Letter of 24 May 2015 and especially paras 32-42 on loss of biodiversity) (Libreria Editrice Vaticana 2015 http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html). In para 6 of this document reference is made to an address by Pope Benedict given on 22 September 2011 in Berlin when the latter stated that "creation is harmed 'where where we ourselves have the final word ... The misuse of creation begins when we no longer recognize any higher instance than ourselves, when we see nothing else but ourselves.'"

⁴⁰⁹ See Langa 2009 *NTM* 37-38; Barroso 2012 *BCICLR* 337-340.

⁴¹⁰ Section 1(a). Emphasis added.

⁴¹¹ See Barroso 2012 *BCICLR* 354.

The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War.⁴¹²

Albie Sachs has also elaborated as follows:

Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal ... An open and democratic society acknowledges the foundational character of the principle of human dignity, and aspires to accept people for who they are. It presupposes diversity and welcomes and treats everyone with equal concern and respect.⁴¹³

In a sense it would be foolhardy to even begin to articulate notions of a democratic dispensation before we fully acknowledge and recognise the value to be accorded the most basic of rights, namely human dignity. This is especially significant given South Africa's history of inequality which was a direct affront to human dignity.⁴¹⁴ By doing so we are forced to account for the fact that everyone, without exclusion, has the potential to be a role-player in our society on account of the inherent worth they have to offer in terms of human capital: their worth and value as human beings irrespective of their ethnic, cultural, sociopolitical or religious backgrounds and inclinations. Respect for the inner worth of individuals in society holds the promise that all are deserving of treatment in accordance with the values and principles of a better life as promised by the Constitution. Although not a central focus of this study, it must be pointed out that the role played by dignity in law is not uncontentious. Weinrib argues that human dignity as a constitutional norm can be criticised on account of it being vague and lacking any real meaning, being referred to as a

⁴¹² Chaskalson *SAJHR* 193 196; Currie and De Waal *The Bill of Rights Handbook* 272. For further reading on dignity, see Rosen *Dignity: Its History and Meaning*; Hepple *Equality: The New Legal Framework* 14-16; Dworkin *Justice for Hedgehogs* 191-218; Sulmasy "Human dignity and human worth" 9 10-16.

⁴¹³ Sachs *The Strange Alchemy of Life and Law* 213-214.

⁴¹⁴ See Ackermann *Human Dignity: A Lodestar for Equality in South Africa* 9; comments made by Mahomed DP in *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 1; *Brink v Kitshoff* 1996 4 SA (CC) para 40; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 36 and *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26. See also Moseneke 2015 <http://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/>; Dugard *Human Rights and the South African Legal Order*; Mathews *Freedom, State, Security and the Rule of Law*; Lenta 1994 *SAJHR* 241; Swart 2013 *SAPL* 73.

"vacuous concept"⁴¹⁵ especially in relation to a constitutional setting.⁴¹⁶ On the other hand, dignity has been lauded for advancing the autonomy of the individual worth capable of making self-informed choices and decisions – denoting freedom.⁴¹⁷ More notably for purposes of this study, other scholars indicate that dignity contributes meaningfully to the manner in which constitutional texts are interpreted on account of its undeniable nexus with notions of morality and equality.⁴¹⁸ The debate as to the relevance of dignity to jurisprudence is one that may never be exhausted. From an examination of our equality jurisprudence and religious discrimination in particular,⁴¹⁹ there can be no doubt that within the South African context the notion of dignity will continue to play an elemental role. The reason for this is twofold. Firstly, we have a history that showcases times when basic human rights were not only disregarded but were in fact abused. This was mainly along race discrimination lines, the effect of which was to denigrate human beings on grounds that were arbitrary and capricious. Secondly, our Constitution acts as an effective mandate of a promise of a better life for all persons living in South Africa. Substantive effect can only be given to the true spirit and purpose thereof by recognising the individual worth and integrity of every person. This is achieved, *inter alia*, by placing a premium on human dignity. Its pride of place in our equality jurisprudence has best been described in the *dictum* of Sachs J⁴²⁰ in *National Coalition for Gay and Lesbian Equality*, which reads as follows:

⁴¹⁵ See Bagaric and Allan 2006 *JHR* 268; Pinker *The New Republic*; Waldron 2014 http://lsr.nellco.org/nyu_plltwp/496 4-6, Macklin 2003 *BMJ* 1419.

⁴¹⁶ See Weinrib *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* 3. For further reading see Berlin "Two concepts of liberty" 122-132, in which the author describes the practical consequences derived from dignity in terms of "negative" and "positive" freedoms.

⁴¹⁷ See Hume "Of the dignity or meanness of human nature" 80-82. Immanuel Kant explained that "[m]an regarded as a person ... possesses, in other words, a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational things in the world" (Kant *Grounding for the Metaphysics of Morals* 41. Also see the reasoning by Boethius in 1593: "Let us therefore raise ourselves, if so be that we can, to that height of the loftiest intelligence" (Boethius *The Consolation of Philosophy* 68; Jordaan 2009 *JPSL* 3-4; McCrudden 2008 *EJIL* 660-665. Also see *South African Revenue Services v CCMA* 2016 ZACC 38 paras 6, 45-47.

⁴¹⁸ See Dworkin *Taking Rights Seriously*; Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 1; Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*; Chaskalson 2003 *IJCL*; Chaskalson 2000 *SAJHR*; Wacks 1984 *SALJ*; Mureinik "Dworkin and apartheid" 207-210; Glensy 2016 *ColHRLR* 65-67, 68-73; Rao 2011 *NotreDLR* 207-210; Shulztiner and Carmi 2014 *AJCL* 473-483; Albertyn and Fredman 2015 *AJur* 435-436.

⁴¹⁹ Which appears from Chapter 5.

⁴²⁰ Delivering a separate but concurring judgment, see paras 107-138.

Once again, it is my view that the equality principle and the dignity principle should not be seen as competitive but rather as complementary. Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim.

One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably – there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.⁴²¹

In this sense, human dignity acts as an interpretive guide to the implementation of the supporting values and principles of the Constitution. As such, human dignity is crucial to the realisation and advancement of other fundamental values in the Constitution, such as freedom and equality, especially in relation to freedom of religion.

2.8 The rule of law

2.8.1 Introduction

A constituent founding provision of the Constitution⁴²² is the so-called rule of law. John Locke's statement "Where-ever law ends, tyranny begins"⁴²³ explains the essential need for the rule of law. The principle of rule of law must be understood as capable of contributing richly to the manner in which religious discrimination in the workplace is addressed within the framework of South African labour law. The regulation of this framework is examined in greater detail later in this study.⁴²⁴ The purpose of this paragraph is to establish a conceptual and normative understanding

⁴²¹ Paras 125-126.

⁴²² As referred to in subparagraph 2.6.1 above.

⁴²³ Locke "Of tyranny".

⁴²⁴ Under Chapter 3.

of the role played by the principle of rule of law with reference to religious unfair discrimination in the South African workplace. The rule of law is effectively what governs and determines how the right to religious freedom in the workplace is ultimately exercised – it is the ultimate overseer thereof. As such it is important that we obtain a normative and conceptual understanding of the rule of law to inform our understanding of the dynamics of unfair discrimination on the basis of religion in the workplace.

*2.8.2 Distinguishing between "rule by law" and "rule of law"*⁴²⁵

Coinage of the phrase "rule of law" has been attributed to the nineteenth-century lawyer Albert Dicey⁴²⁶ who advocated the supremacy of parliamentary sovereignty based on the rule of law. For Dicey, the rule of law comprised certain core values, namely: nobody is above the law – meaning that all persons, civilians and government officials alike, were equal before the law;⁴²⁷ no person can suffer punishment save for breaching the law which breach and punishment is determinable and imposed respectively by the ordinary courts of the land;⁴²⁸ and that a constitution, written or unwritten, is "pervaded by the rule of law" given that it is reflective of the judicial pronouncements on "personal liberty" and the "rights of persons", in other words, a "judge-made constitution".⁴²⁹

For Dicey, if the rule of law were to have meaning, its values had to be realised in the actual workings of the legal system and not be a mere adornment of a written constitution.⁴³⁰ Whilst a legitimate concern about Dicey's theories may have been protection of citizens against undue governmental interference,⁴³¹ the overarching

⁴²⁵ The contents of this paragraph draw on the following article by the author: Henrico 2014 *TSAR*.

⁴²⁶ Dicey *Introduction to the Study of the Law of the Constitution* 187.

⁴²⁷ Dicey *Introduction to the Study of the Law of the Constitution* 194.

⁴²⁸ Dicey *Introduction to the Study of the Law of the Constitution* 193. Expressed in the Latin maxim *nulla poena sine culpa* or *nullum crimen sine lege*. See Hallevy *A Modern Treatise on the Principle of Legality in Criminal Law* 8.

⁴²⁹ Dicey *Introduction to the Study of the Law of the Constitution* 195-196; Sampford *Retrospectivity and the Rule of Law* 42-43.

⁴³⁰ Sampford *Retrospectivity and the Rule of Law* 44.

⁴³¹ See Mathews *Freedom, State, Security and the Rule of Law* 15-16 where Dicey is criticised for his "liberty of the individual" concern as being aligned too closely to "basic civil rights" and not sufficiently liberal to lend expression and support to socioeconomic and political justiciable rights.

concern for Dicey was "parliament's right to make or unmake any law whatever. Moreover, no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."⁴³² Regrettably, Dicey's legal positivism, borne out by the principle that judges were charged with merely interpreting the will of parliament by stating what the law was and should not concern themselves with policy considerations,⁴³³ contributed to galvanising draconian legislation in our apartheid legacy.⁴³⁴ The rule of law, to have meaningful value in a legal system, as allegedly contended by Dicey, without the ability of appropriate judicial review, subject to reasonable constraints of *trias politica*,⁴³⁵ was predisposed to being used as a tool for endorsing an unjust legal system in which the law of parliament, as regulated by a minority electorate,⁴³⁶ could be upheld and applied regardless of consequential moral considerations. Such a system would be anathema to a democratic legal order.⁴³⁷ Embracing the rule of law in this sense cannot be equated with justice;⁴³⁸ this is "rule by law" rather than "rule of law". Law used to sustain the holocaust, apartheid or a system of governance like those currently manifesting themselves in places like Zimbabwe or the Democratic Republic of the Congo is fundamentally incompatible with the basic principles of freedom, equality and fairness. In this sense, the rule of law may be steeped in regulations but sorely lacking in justice.⁴³⁹

For further reading see Dyzenhaus, Ripstein and Reibetanz Moreau *Law and Morality: Readings in Legal Philosophy* 190.

⁴³² Dicey *Introduction to the Study of the Law of the Constitution* 406-414. At 408 Dicey refers to the supremacy of law being of such a nature that it requires parliament to be sovereign in the sense that it "no doubt often does give a certain narrowness to the judicial construction of statutes. It contributes greatly, however, both ... to the authority of the judges and to the fixity of the law." See also Stewart 2004 *MacqLJ*.

⁴³³ Hoexter *Administrative Law in South Africa* 131; Burns and Beukes *Administrative Law under the 1996 Constitution* 21.

⁴³⁴ Moseneke 2008 *SAJHR* 346-347.

⁴³⁵ For further reading on the doctrine of *trias politica*, see Irving 2004 *MacqLJ* 6.

⁴³⁶ Davis 2006 *AJur* 25.

⁴³⁷ De Ville 2006 *PER* 32-33, 37; Evans 2003 *SALJ* 329.

⁴³⁸ De Ville 2006 *AJur* 69 ff.

⁴³⁹ Murphy 2005 *Law and Philosophy* 260-261; Tamanaha *On the Rule of Law: History, Politics, Theory* 93.

In Germany, the rule of law has been described as "*Rechtsstaat*", readily translated into Afrikaans as "*regstaat*"⁴⁴⁰ or "just state".⁴⁴¹ The notion of the *Rechtsstaat* has undergone a jurisprudential metamorphosis.⁴⁴² It proved a dexterous vehicle in advancing the repressive powers of Nazi Germany from 1933 to 1945.⁴⁴³ Today, the rule of law in Germany is expressed as the *Rechtsstaatsprinzip*⁴⁴⁴ and finds itself enshrined in the constitution of Germany⁴⁴⁵ which recognises human dignity⁴⁴⁶ as the most fundamental of all rights. In *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*⁴⁴⁷ reference was made to the Supreme Court of Canada in *Reference re Secession of Quebec*⁴⁴⁸ where the following was held:

Simply put, the constitutionalism principle requires that all governmental action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution ...

Requiring government action to comply with the law *inclusive* of the constitutional prerequisites appears somewhat tautological. However, *the law* as referred to in the *Fedsure* case is, it is submitted, law in the notional, open-ended sense embrative of, yet not limited to, the judiciary taking an informed and collective account of all fundamental values and norms of a legal system that inform the fairness and justice aspects of law; not merely the positivistic aspect of law expressing and asserting law for the sake of law *per se*. What bodes well for the posterity of future jurisprudential development has been the ongoing recognition our courts have given to the invaluable role of the rule of law in our constitutional democracy.⁴⁴⁹

⁴⁴⁰ Blaau 1990 *SALJ* 79-80.

⁴⁴¹ Baxter *Administrative Law* 79.

⁴⁴² Cornel "Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity".

⁴⁴³ Dyson *The State Tradition in Western Europe* 36.

⁴⁴⁴ 1999 1 SA 374 (CC) para 56.

⁴⁴⁵ Article 20(3).

⁴⁴⁶ For a contention equating human dignity to the *Grundnorm* of the totality of all other values, especially equality, see Wood 2007 web.stanford.edu/~allenw/webpapers/keynote2007.doc.

⁴⁴⁷ Para 56.

⁴⁴⁸ [1998] 2 SCR 217 53.

⁴⁴⁹ See for example *Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA* 2000 2 SA 674 (CC) paras 17, 35, 40, 85; *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) para 62; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC) para 29.

2.8.3 The effectiveness of the rule of law in advancing religious freedom

The rights and freedoms given to citizens as set out in the Bill of Rights remain empty and hollow vestiges unless capable of being given effect to in terms of individuals living out the rights they have. Individuals must be at liberty to live their lives as they wish in a manner they wish, subject to the exercise of such rights not being in violation of any law, alternatively unduly interfering with the rights of other persons.⁴⁵⁰

Whilst the rule of law has been advocated as a means to "govern the governors",⁴⁵¹ Lon Fuller asserts that the rule of law comprises moral values that inform the way in which a legal system is optimally politically governed.⁴⁵² For Joseph Raz, the importance of the rule of law rests on the extent to which subjects obey the law as well as legal enforcement mechanisms available to the state. It is easier for law to be understood in a positivistic sense and serve as a guide and thereby be obeyed if it is seen for what it is, merely as the law, as opposed to legal rules imbued with moral values. But others contend strongly that the rule of law can serve as much a virtuous as a malevolent purpose.⁴⁵³ The inexorable link between morals and law is such that for Dyzenhaus the rule of law imposes an ethical and principled duty on judges to openly reject any law – even one passed by parliament – which is an affront to the underpinning principles and values of the common law of a legal system.⁴⁵⁴ Dworkin argues that the rule of law is consistent with "intellectual" as opposed to "political discipline" in which we constantly strike, as best we can, a balance for law being grounded on integrity, consequently translating into the imperative that judges should merely act with greater integrity⁴⁵⁵ and inherently underscoring the power of

⁴⁵⁰ The limitation of rights in terms of s 36 of the Constitution is expanded on in Chapter 3.

⁴⁵¹ From "Sed quis custodiet ipsos custodes" (but who will govern the governors), a quotation by Decimus Junius Juvenalis (Juvenal) (1st century AD), the Roman satirist. See *South African Broadcasting Society Ltd v Democratic Alliance* 2016 2 SA 522 (SCA) para 1; Dixon, Goodwin and Wing *Responses to Governance Governing Corporations, Societies and the World* xi; *Department of Transport v Tasima* 2016 ZACC 39 paras 148-149.

⁴⁵² Cf Luban 2010 <http://scholarship.law.georgetown.edu/facpub/369>.

⁴⁵³ Luban 2010 <http://scholarship.law.georgetown.edu/facpub/369>.

⁴⁵⁴ Dyzenhaus, Ripstein and Reibetanz Moreau *Law and Morality: Readings in Legal Philosophy* 2-3; De Ville 2006 *PER* 10-11.

⁴⁵⁵ Dworkin *Freedom's Law* 82-83.

judicial review. For the past two decades of our democracy our law reports are testimony to a judiciary capable of delivering the principled judicial reasoning that invokes the rule of law necessary for the realisation of civilian rights⁴⁵⁶ in a constitutional democracy.⁴⁵⁷

The Constitution provides that the judicial authority of the Republic is vested in the courts who are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.⁴⁵⁸ Underscoring the independence of the judiciary is the Oath or solemn affirmation of Judicial Officers⁴⁵⁹ in terms of which it is sworn or affirmed to "uphold and protect the Constitution and the human rights entrenched in it ..."⁴⁶⁰ An attempt at reaching a decision sustained by relevant value-laden principles which does not usurp the functions of the other two democratically elected arms of government calls for a balance to be struck by means of the principle of proportionality as articulated by David Beatty who states the following:

Making proportionality the critical test of whether a law or some other act of state is constitutional or not separates the powers of the judiciary and the elected branches of government in a way that provides a solution to the paradox that has confounded constitutional democracy for so long.⁴⁶¹

By adopting such a test, due regard is had to not only deferring to the doctrine of *trias politica* but also to the fact that proportionality⁴⁶² proximates an approach to arriving at a decision that is neutral insofar as it is able to give effect to constitutional imperatives with regard to notions of "rationality" (legitimacy) and "necessity" which

⁴⁵⁶ For example, see *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 39-40; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) paras 33-34, 114; *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2006 All SA 175 (E) para 78; *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) paras 25, 43; *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) paras 58-64.

⁴⁵⁷ This is discussed further and expanded on in Chapter 5.

⁴⁵⁸ Section 165(1).

⁴⁵⁹ The Constitution, Schedule 2, Item 6.

⁴⁶⁰ Item 6(1).

⁴⁶¹ Beatty *The Ultimate Rule of Law* 160 ff.

⁴⁶² Proportionality as it comes into play when invoking the provisions of s 36 of the Constitution together with considerations of reasonableness are dealt with in greater detail under Chapter 5.

are the constituent parts of proportionality.⁴⁶³ Stripped to its simplest form, it is a test in terms of which a law will not be countenanced if it cannot pass muster by lacking in legitimate reason(s) and hence cannot be justified. Such a law would also be lacking in necessity where to impose same would cause an unwarranted "infringement of a person's constitutional rights". Hence, such a test would ensure that government would need compelling and strong reasons for decisions or the exercise of public power or functions imposing irrational and or unnecessary burdens on the rights of individuals.⁴⁶⁴

The judiciary has been pointed out by former State President Nelson Mandela as a solitary forum in South Africa where the rule of law applies.⁴⁶⁵ Mandela defines this law as one which is inclusive of equal protection of all groups of society with the purpose of establishing an intact, united South Africa.⁴⁶⁶ In contrast, President Jacob Zuma, whilst addressing a joint sitting of Parliament bidding farewell to former chief justice Ngcobo, stated the following:

The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given [to the executive] by the people in a popular vote.⁴⁶⁷

In a divergent view, a parliamentary representative for the Democratic Alliance, Mr Mosiuoa Lekota, has been resolute in referring to the judgments handed down by the Constitutional Court, albeit against the government,⁴⁶⁸ as evidence of "South African

⁴⁶³ Beatty *The Ultimate Rule of Law* 163.

⁴⁶⁴ Beatty *The Ultimate Rule of Law* 164-165. See discussion on importance of rationality, reasonableness and proportionality in subparagraph 2.6.2 above.

⁴⁶⁵ Fitzpatrick 2006 *LD&D* 5.

⁴⁶⁶ Fitzpatrick 2006 *LD&D* 5. See also Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1995).

⁴⁶⁷ See Hartley *Business Day* 1 on Zuma's statement about superiority of executive. *Cf* counterargument raised by opposition Democratic Alliance parliamentary leader Lindiwe Mazibuko that the Constitution was drafted to "limit power abuse" and prevent a "recurrence of tyranny" by making sure that "the law would never again be used by the strong to oppress the weak".

⁴⁶⁸ With reference to the Hugh Glenister challenge to the abolition of the Scorpions and opposition to attempt by Mr Zuma to reappoint former chief justice Sandile Ngcobe. Mr Mosiuoa Lekota's view has been fortified more recently in the Constitutional Court judgment of *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC), which also endorses the effective role played by Chapter 9 state institutions in supporting democracy. See paras 45-56; 67-71; 72-75. Also see *Department of Transport v Tasima (Pty) Ltd* 2016 ZACC 39 paras 148-149.

democracy at work" in a system in which a law which is not aligned with the Constitution will be declared invalid irrespective of the frustration thereof for government.⁴⁶⁹

It is submitted that labour law, viewed through the prism of the labour law statutes and constitutional provisions germane to labour law imperatives, does provide a means of addressing religious discrimination in the workplace. However, it cannot do so without the involvement of the relevant courts, tribunals and fora charged with the enforcement of the relevant labour laws giving effect to the constitutional guarantees prohibiting discrimination on the basis of religion. Whether this is optimally achieved through the vehicle of labour law *per se* is arguable given the fact that tolerance on the part of an individual in respect of another individual's religious belief is not realistically something in respect of which there can be any legislative regulation. Such tolerance must and should come from within. For it to be genuine it must be informed by spontaneity. In the formal sense, however, some comfort can be taken from knowing that the exercise of freedom and right does not take place *in vacuo* but within the prescribed limitations of a dispensation in which the rule of law is recognised as fundamental to the South African democratic order.

2.9 Transformative constitutionalism

2.9.1 Introduction

A new constitutional dispensation in South Africa brought with it hopes and aspirations for all South Africans of a life of change – a change for something better. This paragraph looks firstly at what is meant by transformative constitutionalism. It then examines the relevance of transformative constitutionalism as an imperative for addressing religious unfair discrimination in the workplace.

⁴⁶⁹ Hartley *Business Day*. Also see speech delivered on 27 October 2016 by Chief Justice Mogoeng at the OR Tambo memorial lecture in which he warned to be "afraid of any leader who is prepared to do anything to become a leader" and that "positional leaders ... are only after the privileges that come with positions they hold or are to hold". He warned: "Please stop this insatiable hunger for money and position. It will draw you to kill and we won't hesitate to lock you up." See Jordaan 2016 <http://www.timeslive.co.za/local/2016/10/28/%E2%80%98Please-stop-this-insatiable-hunger-for-money%E2%80%99---Chief-Justice-Mogoeng>.

2.9.2 Defining transformative constitutionalism

In 1994, Etienne Mureinik questioned the effect of a Bill of Rights on South Africa.⁴⁷⁰ More significantly, he pointed to the fact that the legal metamorphosis South Africa was undergoing was a change from a culture of authoritarianism⁴⁷¹ to a culture of justification which he described in the following way:

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which leadership given by government rests on cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion.⁴⁷²

This article is seminal due to the academic debate it brooked.⁴⁷³ More importantly, it essentially captures the spirit that would come to inform our democratic dispensation: firstly, that all conduct impacting on the rights of individuals must be held accountable; secondly, if our society is to move from a culture of authority to a culture of justification such move requires a change, alternatively a transformation from what we "were" to what we "want to be".

Transformative constitutionalism⁴⁷⁴ is a term attributed to Klare.⁴⁷⁵ He described it to mean the following:

... a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to *transforming* a country's political and social institutions and *power relationships* in a democratic, *participatory* and *egalitarian*

⁴⁷⁰ See Mureinik 1994 *SAJHR* 31.

⁴⁷¹ In terms of state and government actions which were based in the main on coercion and enforcement of a legal system by means of effective positivism which constituted the bulwark underpinning the apartheid regime in terms of which parliament remained supreme and could through its legislative framework give effect to the political mandate of the executive without such legislation falling within the review power of the courts except for procedural irregularities. Mureinik 1994 *SAJHR* 32.

⁴⁷² See Dyzenhaus 1998 *SAJHR* 11; De Vos 2001 *SAJHR* 10; Mbazira *Litigating Socio-Economic Rights in South Africa: A choice Between Corrective and Distributive Justice* 81; Cockrell 1996 *SAJHR* 1; Criddle 2010 *NWULRC* 318; Du Plessis 2015 *PER* 1345.

⁴⁷³ For purposes of this study, transformative constitutionalism will be referred to as an imperative given its overall importance in South African jurisprudence.

⁴⁷⁴ Klare 1998 *SAJHR* 146; Van Marle 2009 *Stell LR* 288-289; Davis and Klare 2010 *SAJHR* 408-412; Christiansen 2010 *JGR&J* 581-591; Roux 2009 *Stell LR* 259. Also see Honore 1962 *McGill LJ* 77 and further authority below on social justice.

direction. Transformative constitutionalism connotes an enterprise of inducing large-scale *social change* through non-violent political processes *grounded in law* ... In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes...⁴⁷⁶

This imperative was quick to gain traction in South African legal discourse⁴⁷⁷ giving rise to what can only be described as a wide variety of views, reflections and debate on the fuller meaning and extent of transformative constitutionalism. The transformative nature of the Bill of Rights has been acknowledged and even emphasised by our Constitutional Court.⁴⁷⁸ It is not the purpose of this study to critically examine the arguments in this regard.⁴⁷⁹ The status of transformative constitutionalism in our law has been cogently summed up as follows:

... South African scholars and jurists agree that transformative constitutionalism describes the constitutional commitment to establish a society based on social justice, human rights and democracy – as evident from the Preamble to the Constitution – and that it translates into a constitutional/legal mandate, albeit elusive, which must be pursued by the state. In addition it appears that the pursuit of social justice is the central (although only one) objective of transformative constitutionalism.⁴⁸⁰

The Preamble to the Constitution provides, *inter alia*, that the Constitution was adopted as the supreme law of the Republic so as to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the

⁴⁷⁶ Klare 1998 *SAJHR* 150. Emphasis added.

⁴⁷⁷ See for example Davis *Democracy and Deliberation: Transformation and the South African Legal Order*; Roederer "Transitional/Transformative Jurisprudence: Law in a Changing Society"; Albertyn and Goldblatt 1998 *SAJHR* 248-276; Davis 2010 *SAJHR* 85-100; Langa 2006 *Stell LR* 351-360; Liebenberg 2006 *Stell LR* 5-36; Moseneke 2002 *SAJHR* 309-319; Pieterse 2005 *SAPL* 155-166.

⁴⁷⁸ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 73-74; *Road Accident Fund v Mdeyide* 2011 SA 26 (CC) para 125; *Hassam v Jacobs* 2009 SA 572 (CC) para 28; *Biowatch v Registrar, Genetic Resources* 2009 6 SA 232 (CC) para 17 as pointed out in Socio-economic Rights Institute of South Africa (SERI) 2015 www.raith.org.za/docs/Seri_Pils_report_Final.pdf. Also see Ray 2014 *CCR* 173-232.

⁴⁷⁹ For a replete analysis of these arguments see Fuo *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 27-35. Also see Corder and Federico *The Quest for Constitutionalism: South Africa Since 1994* 84; Van Marle 2003 *TSAR* 549; Van der Walt 2006 *Fundamina* 1; Van Marle 2007 *Stell LR* 194; Le Roux "Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism" 59.

⁴⁸⁰ Fuo *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 34 (footnotes excluded).

people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person and build a united and democratic South Africa ...⁴⁸¹

Account must also be had of the Postamble to the interim Constitution,⁴⁸² the relevant part of which provides as follows:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.⁴⁸³

There can be no doubt that the aforesaid texts as read with the imperative of transformative constitutionalism resonate with a sense of a commitment on the part of all. What matters most is to encourage increased role-playing by all members of our society⁴⁸⁴ and giving optimal effect to the values and principle enshrined in the Bill of Rights, meaning that the aspirations therein contained are realised, the effect of which is to create a better and more equal society for everyone.⁴⁸⁵ Transformative constitutionalism also assists in the interpretation of our Constitution text in a manner that advances our jurisprudence.⁴⁸⁶ The extent to which our courts, legal interest practitioners⁴⁸⁷ and/or public interest groups⁴⁸⁸ should be involved as

⁴⁸¹ See Fuo *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 26 and authority cited at fn 134.

⁴⁸² Of 1993.

⁴⁸³ See Fuo *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 26 and authority cited at fn 133.

⁴⁸⁴ Various role-players in our society include persons such as government, business, labour, educators, civic organisations. See Van der Westhuizen 2008 *SAHRJ* 251; Vorster 2012 *Scriptura* 133; Davis and Le Roux "Changing the role of the corporation: A journey away from the adversarialism" 323-325.

⁴⁸⁵ Currie and De Waal *The Bill of Rights Handbook* 150; Meyerson *Jurisprudence* 139-141; Ackermann *Human Dignity: A Lodestar for Equality in South Africa* 24; Du Plessis 2011 *PER* 94; O'Regan 2012 *MLR* 1-72; Klare 1998 *SAJHR* 171 ff; Cooke "The road ahead for the common law" 691; Bilchitz and Williams 2012 *SAJHR* 159; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 1 SA 545 (CC); Bishop and Brickhill 2012 *SALJ* 711; Wallis 2010 *SALJ* 690; Budlender 2005 *SALJ* 718; Henrico 2015 *TSAR* 784-803; Henrico 2014 *TSAR* 742.

⁴⁸⁶ In this regard see *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) in which Skweyiya J, for the majority, used the concept of a "special cluster of legal relationships" to find that administrative law operates to govern relationships beyond the narrow confines of the law of contract. By doing so, he found that the poor tenants who were the claimant applicants had a procedural right under administrative law to receive a pre-termination notice from City Power. See paras 25-43. Also see *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 80.

⁴⁸⁷ Such as human rights litigators or public interest legal advocates.

catalysts in bringing about social change through transformative constitutionalism is and will in all likelihood always be the subject of criticism and debate.⁴⁸⁹ Such criticism should be discounted on the following basis. First, our Constitutional Court has demonstrated its ability and aptitude of engaging with socioeconomic rights disputes as evidenced in the judgments handed down.⁴⁹⁰ So too has it handed down judgments which express a concern for the vulnerable, poor and those in need and in this way demonstrated a concern about social change and equality.⁴⁹¹ Second, the positive and relevant contribution to be made by interested role-players should not be dismissed.⁴⁹² Irrespective of how we wish to interpret or label transformative constitutionalism, as an imperative it translates into the notion that "we live in a world we ourselves create"⁴⁹³ which underscores century-old humanist theories that the success of society depends on its social development, enlightenment and "transforming human thought".⁴⁹⁴ Surely the advancement of our jurisprudence, as read against the values and principles of our Constitution, would be meaningless if it cannot be said that it is actually making a difference in the lives of the people of our country. To this end, it means that freedoms are guaranteed and realised. It also

⁴⁸⁸ Such as NGOs.

⁴⁸⁹ See Socio-economic Rights Institute of South Africa (SERI) 2015 www.raith.org.za/docs/Seri_Pils_report_Final.pdf especially authorities cited at fnt 20-23 and 24-25.

⁴⁸⁷ See for example *Government of the RSA v Grootboom* 2001 1 SA 1 46 (CC) para 23; *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) paras 46-48; *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) para 38.

⁴⁹¹ See for example *President of the RSA v Hugo* 1999 3 SA 191 (CC) paras 32-52; *Zondi v MEC for Traditional and Local Affairs* 2006 3 SA (CC) paras 40 55 76-78 82; *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) paras 25-30; *Minister of Public Works v Kyalami Ridge Environment Association* 2001 3 SA 1151 (CC) paras 34-41, 55-57, 99-112; *Allpay Consolidated Investment Holdings v CEO of the South African Social Security Agency* 2014 1 SA 604 (CC) (No. 1) paras 47, 52-55; *Allpay Consolidated Investment Holdings v CEO of the South African Social Security Agency (No. 2)* 2014 4 SA 179 (CC) paras 32-34, 47, 50, 55-60, 64-67, 71 77.

⁴⁹² See Chief Justice Mogoeng's sentiments in his OR Tambo memorial lecture to the effect that "all South Africans can make a contribution to improve the situation in our country" (Jordaan 2016 <http://www.timeslive.co.za/local/2016/10/28/%E2%80%98Please-stop-this-insatiable-hunger-for-money%E2%80%99---Chief-Justice-Mogoeng>; Albertyn and Goldblatt 1998 *SAJHR* 249, 253-254.

⁴⁹³ A quotation by Johann Herder referred to by Berlin "Herder and the enlightenment" 359.

⁴⁹⁴ See Berlin "Herder and the enlightenment" 360; Garvey and Stangroom *The Story of Philosophy: A History of Western Thought* 62; Dworkin *Law's Empire* 189; Lavine *From Socrates to Sartre: The Philosophic Quest* 9-13; in this regard we must also recall the profound effect that the writings on liberty, equality and fraternity by Jean Jacques Rousseau had on the French Revolution.

means that effect is given to social justice,⁴⁹⁵ in other words social transformation by providing the realisation for the people of South Africa of a new society in which the rights to equality, freedom and human dignity are upheld by addressing, *inter alia*, the socioeconomic needs of the underprivileged, poor, uneducated and vulnerable.

2.9.3 Transformative constitutionalism and ubuntu

Since traditional African religions form an integral part of the religious landscape of South Africa⁴⁹⁶ it is important that regard is also had to customary law which is recognised by the Constitution as part of South African law.⁴⁹⁷ Our courts must develop it so as to bring it in line with the common law.⁴⁹⁸ The Zulu proverb *umuntu ngumuntu ngabantu* "a person is a person because of people" (*ubuntu*)⁴⁹⁹ has been pointed out as encapsulating a "sense of community and the interdependence of the members of a community".⁵⁰⁰ More particularly, *ubuntu* – or the obligation to care for family members and a sense of community responsibility – is "[a] vital and fundamental value in [the] African social system" recognised in the African Charter on Human and Peoples' Rights⁵⁰¹ Inexorably linked to *ubuntu*, as stated in the death

⁴⁹⁵ It falls outside the purview of this research to focus on theories of "social justice". For purposes of this research "social justice" is taken to mean a sense of addressing what is fair and just in our society and in the labour context, particularly the disparities of power with reference to normative concepts of equality, freedom and human dignity. For further reading see Smit 2013 *IJCLLR* 390 and especially the description accorded to social justice at fn 71; Du Toit 1997 *LD&D* 39-40; Gericke 2014 *PER* 2603; Twyman 2001 *CWRJIL* 324-330; Makhubele and Ford 2015 <https://c.ymcdn.com/sites/apso.site> 18-25.

⁴⁹⁶ See subparagraph 2.4.1 above.

⁴⁹⁷ *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 148 (hereafter the *Bhe* case).

⁴⁹⁸ *Alexkor Ltd v Richterveld Community* 2003 (12) BCLR 1301 (CC) para 56; s 39(3) of the Constitution.

⁴⁹⁹ As referred to by Langa J in *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 53 who, it is submitted, by necessary inference aligned the concept "we are not islands unto ourselves" with the more familiar notion coined by John Donne's famous line that "No man is an island.." as it appears in his 1624 poem *Devotions upon emergent occasions and several steps in my sickness Meditation XVII*.

⁵⁰⁰ Per Ngcobo J in *Bhe* case para 163. Also see the interesting argument referred to in Winks 2011 *AHRLJ* 452 in which authors Cornell and Muvangua contend that *ubuntu* includes a social bond whereby through an "engagement and support of others ... we are able to realise a true individuality and rise above our biological distinctiveness into a fully developed person whose uniqueness is inseparable from the journey to moral and ethical development".

⁵⁰¹ Per Ngcobo J in *Bhe* case para 166. The Charter, also known as the Banjul Charter, was adopted in Nairobi on 27 June 1981 and came into effect on 21 October 1986. It is an international human rights instrument that was duly signed and ratified by South Africa on 9 July 1996.

penalty case of *S v Makwanyane*,⁵⁰² are notions of respect for life and human dignity in the observation that the life of another is "at least as valuable as one's own".⁵⁰³ *Ubuntu* was earmarked in *Makwanyane* as "permeating the Constitution generally ... and specifically the fundamental human rights".⁵⁰⁴ Madala J observed the following:

In contrast to the apartheid legal order, in which parliamentary sovereignty demanded conservative and literal statutory interpretation by the judiciary, the post-apartheid order of constitutionalism requires *courts* to develop and interpret entrenched rights in terms of a cohesive set of values, ideal to an open and democratic society ... [T]his interpretation should be *inclusive* of South Africa's indigenous value systems, which relate closely to the constitutional goal of a society based on dignity, freedom and equality. While acknowledging that a function of the Constitutional Court is to protect the rights of *vulnerable minorities*.⁵⁰⁵

Most recently, the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*⁵⁰⁶ (*City of Tshwane*) highlighted the importance of *ubuntu* in the following dicta by Mogoeng CJ:⁵⁰⁷

All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of "ubuntu". "Motho ke motho ka batho ba bangwe" or "umuntu ngumuntu ngabantu" (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interests. South Africa no longer "belongs" to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised.⁵⁰⁸

City of Tshwane had to do with matters relating to the re-naming of street names in Pretoria. It had nothing to do with religious discrimination. The relevance of the case

⁵⁰² 1995 3 SA 391 (CC).

⁵⁰³ Para 217.

⁵⁰⁴ Para 237.

⁵⁰⁵ Para 306. Emphasis added.

⁵⁰⁶ 2016 9 BCLR 1133 (CC).

⁵⁰⁷ Moseneke DCJ, Bosielo AJ, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring.

⁵⁰⁸ Para 11.

to this study is the extent to which Constitutional Court highlighted notions that are not only important for our overall constitutional dispensation but crucial to the underlying success of transformative constitutionalism. Apart from *ubuntu*, as pointed out above, the following notions, *inter alia*, were emphasised: tolerance;⁵⁰⁹ substantive equality;⁵¹⁰ unity in diversity;⁵¹¹ protection of cultural identities;⁵¹² and the need to transform society.⁵¹³ An interesting aspect of the judgment is the extent to which there was a difference of approach by the Constitutional Court between the majority⁵¹⁴ and the dissenting view⁵¹⁵ in the protection to be afforded cultures.⁵¹⁶ The Constitutional Court found that Afriforum had a *prima facie* right as a cultural association under section 31 of the Constitution.⁵¹⁷ However, the irreparable harm Afriforum alleged they were and would continue to be subjected to, namely "toxicity that apparently comes with looking only at the names linked to other racial groups"⁵¹⁸ was rejected by the Constitutional Court. The basis for doing so was a finding by the majority that whilst Afriforum had a right, like all other residents, to participate in a consultative process with the municipality on the issue leading up to the change of street names,⁵¹⁹ they had no right to have the old street names they treasured to be displayed indefinitely.⁵²⁰ Moreover, whatever sense of irreparable harm Afriforum stood to endure as a result of the change to street names was

⁵⁰⁹ Paras 5, 11, 15-16, 22 per Mogoeng CJ. See also paras 103 and 159 per Froneman and Cameron JJ; para 175 per Jafta J.

⁵¹⁰ Para 18, 41 per Mogoeng CJ, para 157 per Froneman and Cameron JJ; paras 166, 175 per Jafta J.

⁵¹¹ Paras 6-7, 11, 14, 17-18, 22, 63, 65 per Mogoeng CJ, paras 123, 126 per Froneman and Cameron JJ; para 176 per Jafta J.

⁵¹² Paras 8, 16 per Mogoeng CJ; 126-129, 134 per Froneman and Cameron JJ; 169, 174 per Jafta J.

⁵¹³ Paras 8-9, 12, 19 per Mogoeng CJ; 161 per Froneman and Cameron JJ; para 171 per Jafta J.

⁵¹⁴ Per Mogoeng CJ and Jafta J who at paras 163-194 gave a separate but concurring judgment.

⁵¹⁵ Per Froneman and Cameron JJ from paras 79-162.

⁵¹⁶ In *City of Tshwane*, Afriforum relied partly on s 31 of the Constitution as a cultural community of Afrikaans people who depended for their sense of being and belonging on the old names of the streets in Pretoria as a historical treasure and heritage being preserved (see paras 25-28 and 50). S 31 was relied upon by Afriforum as a means of seeking enforcement of a restraining order against the Municipality preventing the Council from removing old street names in Pretoria (associated with the apartheid era and colonialism) and replacing them with names of persons symbolising South Africa's pursuit of justice, peace, unity and reconciliation (see para 22).

⁵¹⁷ Para 50 per Mogoeng CJ.

⁵¹⁸ Para 58.

⁵¹⁹ Para 60.

⁵²⁰ Para 60.

"neutralised" by the "equally important sense of belonging of the previously disadvantaged".⁵²¹ Essentially a world-view of *ubuntu* was articulated to which all South Africans must subscribe.⁵²² In granting the appeal in favour of the Council and dismissing Afriforum's ultimate relief for an interdict, the Constitutional Court also admonished Afriforum for acting precipitously by launching proceedings against the Council in relation to a policy-related matter.⁵²³

The dissenting judgment raised concerns about the overall implication of the majority judgment for associations insisting upon a cultural identity.⁵²⁴ Froneman J⁵²⁵ stated it thus:

That brings us to the second reason for this dissent. This is the implication that any reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history finds no recognition in the Constitution, because that history is rooted in oppression.

Is culture inevitably tainted by historical injustice?

The broad premise of the first judgment is that the time has come to stop objections to name changes based on a cultural heritage that is rooted in a history of colonialism, racism and apartheid.

Afriforum may protest at the first judgment's characterisation of their historically rooted sense of place and belonging as "highly insensitive to the sense of belonging of other racial groups". It will jib at the suggestion that it "is divisive, somewhat selfish and does not seem to have much regard for the centuries-old deprivation of 'a sense of place and a sense of belonging' that black people have had to endure".⁵²⁶

The dissenting judgment points out that Afriforum had a view of history⁵²⁷ which appeared to be closer aligned with racism as opposed to culture under section 31 of the Constitution.⁵²⁸ However, the dissenting judgment proceeded to find that just because "we disagree so profoundly with Afriforum's view of history"⁵²⁹ and it is

⁵²¹ Para 64.

⁵²² Paras 11-15-18. *Cf* paras 123-137.

⁵²³ Paras 71-75. See also para 101.

⁵²⁴ In terms of s 31 of the Constitution.

⁵²⁵ Cameron J concurring.

⁵²⁶ Paras 117-119.

⁵²⁷ As expressed in their founding affidavit.

⁵²⁸ Para 122.

⁵²⁹ Para 123.

better for them (Afriforum) to find their "sense of place and belonging"⁵³⁰ not in the past but under the Constitution in a shared future "united in diversity",⁵³¹ is insufficient to deny Afriforum their sense of belonging and protection under the Constitution.⁵³² The rationale for this view is captured by the following observation:

What does concern us is the broad statement in the third judgment that embraces the implication of the first judgment, that any reliance by white South Africans, particularly white Afrikaner people, on any historically-rooted cultural tradition finds no recognition in the Constitution, because that history is inevitably rooted in oppression.

What does that mean in practical terms? Does it entail that, as a general proposition, white Afrikaner people and white South Africans have no cultural rights that pre-date 1994, unless they can be shown not to be rooted in oppression? How must that be done? Must all organisations with white South Africans or Afrikaners as members now have to demonstrate that they have no historical roots in our oppressive past? Who decides that, and on what standard?

This will be of concern not only to white South Africans, or to Afrikaners. It may also be of concern to those who take pride in the achievements of King Shaka Zulu, despite the controversy about his reign, and those who nurture the memory of Mahatma Gandhi's struggles in South Africa, despite some repugnant statements about black Africans. Our country has a rich and complex history. It has meaning for each of us, in diverse ways, which the Constitution accommodates and respects. The complexities of history cannot be wiped away, and the Constitution does not ask that we do so.

What is more, no case was made that Afriforum was a racist organisation, or that its members are all racists. They were never called to defend that accusation on the papers, nor in oral argument. The first and third judgments appear to assume that they are. Does this entail that, from now on, Afriforum and its members are branded as racist? If they are, they have not been given an opportunity to contest that allegation.

There are many cultural, religious or associational organisations that have roots in our divided and oppressive past. Are they all now constitutional outcasts, merely because of a history tainted by bloodshed or racism? If that is what the Constitution demands, we would wish to see a longer, gentler and more accommodating debate than happened here.⁵³³

In support of the above reasoning, it is important to note what the dissenting judgment observes in relation to *ubuntu*, namely:

⁵³⁰ Para 123.

⁵³¹ Para 123.

⁵³² Para 123.

⁵³³ Per Froneman and Cameron JJ paras 130-134, footnotes excluded.

With much of this we agree. But from a perspective of constitutional rights and values, these assertions are highly problematic. The Constitution allows the Executive and Legislature at national, provincial and local levels to formulate policies, legislate them into law, and execute and administer them when so done. They may choose to do so by changing the names of cities, towns and streets to reflect our diversity. Or they may decide not to do so. The Constitution allows them to make their own choice; it does not prescribe what choice to make. And the Constitution certainly does not allow the Judiciary to prescribe those choices.

Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the ubuntu world-view, or otherwise. And, again, the Constitution does not allow the Judiciary to impose that obligation generally, least in the naming of streets, which falls within local authorities' constitutional competence.

There are other portions of the first judgment that suggest that the national project of attaining inclusivity, unity in diversity and reconciliation makes suspicious or doubtful the kind of sense of space and belonging that Afriforum claims. We have already pointed out that the Constitution generally does not mandate the imposition of a particular conception of this national project by the courts, and particularly not in relation to a local government competency to rename streets. But, on its own terms, this conception also carries within it the destruction of its objective of inclusivity.

Consider this. What is the effect of a failure to embrace ubuntu, by evincing appreciation of and respect for others? Does the person lose his or her constitutional protections? The first judgment seems to suggest Yes. This lies in its finding that even if Afriforum members had the kind of right they claimed – a sense of historic belonging and space – their loss of that sense can never qualify as irreparable harm. But this denial of that kind of possibly irreparable harm is not extended in our law to other infringements of rights whose loss cannot be quantified in material terms.⁵³⁴

Many complex, difficult issues and concerns arise from the *City of Tshwane* judgment. What is clear from the judgment is that at no stage was Afriforum accused of being racist. Notwithstanding, essentially the majority decision of the Constitutional Court articulated the view that Afriforum's cultural rights were of such a nature as not to warrant protection under section 31 of the Constitution. Broadly interpreted, the majority judgment appears to interpret Afriforum's right very narrowly in the sense that because of its associational interests with values that are shared by a small minority, these must give way to the greater interests of *ubuntu* and transformation under the Constitution. It is contended that the view of the

⁵³⁴ Paras 136-139.

dissenting judgment that *ubuntu* should be applied more circumspectly is more cogent.

There can be no argument against the need for transformative constitutionalism. A change for the better is necessary. It is only through appropriate change that social justice can and must be delivered for our constitutional dispensation and the Constitution to be guaranteed legitimacy and stability. However, the manner in which such change is to be realised needs to be properly and carefully considered. If we contend that differences are to be tolerated in the interests of achieving the so-called "unity in diversity"⁵³⁵ then ultimately our commitment to toleration needs to be tested in terms of the extent to which even unpopular cultures, beliefs or opinions can be accommodated. Surely tolerance of something which is different cannot and should not automatically translate into a difference that is merely "mainstream" and popular. Tolerance requires, more importantly, accepting the fact that certain differences will be less popular and perhaps shared by a very small minority of persons. Ultimately, tolerance must translate into accepting at the very most that which is least popular, but at the very least not accepting that which will be harmful to the extent that it impacts adversely on human dignity.

Courts play an integral part in ensuring the realisation of the ideals promised in the text of the Constitution. The extent to which this has taken place in relation to religious freedom in the workplace is focused on later.⁵³⁶ *Ubuntu* insofar as it notionally expresses the sense of togetherness and hence a collectiveness of inclusiveness, as opposed to exclusiveness, is integral to transformative constitutionalism.⁵³⁷ There can be no doubt that *ubuntu* gives impetus to transformative constitutionalism in that it demands one to have regard to the imperatives of the Bill of Rights addressing the advancement of the sense of community and social cohesiveness – notions axiomatic to the success of a

⁵³⁵ Para 79, *City of Tshwane*.

⁵³⁶ As expanded on in Chapter 5.

⁵³⁷ For further reading see Himonga, Taylor and 2013 *PER* 69; Metz 2011 *AHRLJ* 540-542; Schoeman 2012 *Phronimon* 20-21.

democratic order. Mokgoro⁵³⁸ makes the point that it behoves all responsible role-players in South Africa to take responsibility to ensure that the values of the Constitution are not merely empty and hollow words and sentences that appear in writing in the Bill of Rights, but are "swung into action" or "activated" through "creative law reform programmes, methods, approaches and strategies that will enhance adaptation" to aligning our society with the precepts of the values and principles of the Bill of Rights.⁵³⁹ The greater the number of sources informing the subject matter, the greater the chances of developing a more matured and reflective view enriched by a wealth and depth of insight.⁵⁴⁰ Important role-players concerning the dimension of religious freedom in the workplace are the worker and employer respectively. As already alluded to,⁵⁴¹ their voices taken as a dialogue in constructively addressing a problem as and when it arises in the workplace would obviate the need for formal intervention in the form of official adjudication by a court. Should there be no constructive dialogue, or in the event of a stalemate, our workplace permits the parties to turn to the courts as arbiters of what would be a suitable solution to what may appear to be an intractable problem. What needs to be heeded, at least from the dissenting judgment in *City of Tshwane* is that however small or minor the view in our society may be, and even if one does not necessarily endorse such view,⁵⁴² it too needs to form part of the dialogue that contributes to building a future and better society.⁵⁴³

2.9.4 Transformative constitutionalism as an imperative for addressing religious unfair discrimination in the workplace

At its bare minimum, transformative constitutionalism envisages a change that must be brought about lawfully and peacefully not just by government but by everyone

⁵³⁸ A judge of the Constitutional Court from 1994 to 2009.

⁵³⁹ Mokgoro 1998 *PER* 14-26.

⁵⁴⁰ Hoexter "Chief Justice Langa and the importance of dissent"; Langa 2007 *SAJHR* 362.

⁵⁴¹ See discussion in subparagraph 2.9.2 above.

⁵⁴² Subject to the condition that there is no expression of harm, hate or violence to others.

⁵⁴³ This is underscored by Chief Justice Mogoeng's sentiments in his OR Tambo memorial lecture to the effect that "all South Africans can make a contribution to improve the situation in our country" (Jordaan 2016 <http://www.timeslive.co.za/local/2016/10/28/%E2%80%98Please-stop-this-insatiable-hunger-for-money%E2%80%99---Chief-Justice-Mogoeng>).

who should participate in promoting the lifeblood of a growing and developing democratic system. In this sense it seeks to establish the realisation of social justice. The latter phenomenon is expressly recognised by our constitutional and statutory framework.⁵⁴⁴ The establishment of social justice serves as the end-product of transformative constitutionalism.⁵⁴⁵ In the labour context, the disparity which exists is the inherent imbalance of power which can and will be aggravated in instances of unfair discrimination on the basis of religion. On the one hand, it may be said that it is incumbent on the parties to the employment relationship, as role-players in our "participatory democracy" to take up the challenge of addressing unfair discrimination on the basis of religion through dialogue. On the other hand, the inherent imbalance of power in the employment relationship is by its very nature not conducive to dialogue. Consequently, our South African legislative and constitutional regime, together with our courts play a significant role in addressing religious unfair discrimination in the workplace.⁵⁴⁶

2.9.5 The importance of tolerance to facilitating transformative constitutionalism

As previously pointed out, great benefits can be derived from toleration as opposed to intolerance.⁵⁴⁷ Clark and Corcoran refer to the fact that for tolerance (from Latin

⁵⁴⁴ See Chapter 3.

⁵⁴⁵ The realisation of socioeconomic rights in terms of our Constitution is the effective granting of social justice to address the imbalance of power between the impoverished dispossessed and the constitutional duty on the part of government to progressively realise its socioeconomic obligations towards its citizens.

⁵⁴⁶ Which is dealt with in Chapters 3 and 5 respectively.

⁵⁴⁷ See para 1.1 above. One needs only to reflect on the American presidential campaign at the time of writing (2016) and the then Republican candidate nominee Donald Trump's conservative and publicly declared views toward immigrants, current US foreign policy, liberal abortion legislation, and females as examples of intolerance which has been the subject matter of extensive debate. For further reading see S.M. *The Economist*; Walker *Business Insider*; *State Times* 2016 www.news.statetimes.in/priyanka-chopra-slams-donald-trumps-anti-muslim-comments. Trump's views are in stark contrast with those articulated by Hillary Clinton's Vice President elect Tim Kaine expressed at the Florida International University on 23 July 2016 to the effect that liberal Republicanism pursues a policy of inclusivism of all people comprising the "rich tapestry of diverse American society", pointing out that he himself was an adherent of the Catholic faith and Hillary Clinton of the Methodist Faith but that they were united in their goal, which was to do good unto others. Also see Fike's commentary on "intolerance toward religious minorities on the rise. Donald Trump ... has repeatedly called for a ban on Muslims entering our country. And he has promised to surveil Muslim neighbourhoods in cities and suburbs across the United States"

tolerare)⁵⁴⁸ to be effective as a notion in a pluralistic secular society, it is important that one has a conception of "thick tolerance". This demands that persons have religious and moral convictions.⁵⁴⁹ The rationale for their argument is that where someone is committed to a certain religious or moral view⁵⁵⁰ which they uphold and endorse for whatever reason, they themselves are inculcated with an element of respect regarding the view they hold. Due to this fact, they are more inclined to agree to respect, yet not necessarily agree with, the views held by another person or persons which differ from their own view. The only limit to such tolerance is where conduct is harmful. There are instances where certain forms of conduct will universally be accepted as being harmful.⁵⁵¹ Other instances are less obvious, and would warrant debate.⁵⁵² Whether or not conduct is harmful would need to be assessed with regards to the facts and circumstances of each case – it is case specific. Since harm implies treatment which is negative or adverse and/or taking away or diminishing something, it would be reasonable to have regard to notions of equality, freedom and human dignity. The latter does have a significant role to play because of its relevance to self-worth.⁵⁵³

Tolerance should be conceived of in the sense of the adage "agreeing to disagree". It is essential that one applies the above theory to the South African context and in particular the workplace. For the first quarter of 2016, statistics show that more than half of employed Black African and coloured populations had an educational level of less than matric, compared to 48,8 percent employed White persons and 32,1% Indians who had tertiary qualifications.⁵⁵⁴ Disparity in education does raise a

(Fikes 2016 <http://www.usnews.com/opinion/articles/2016-06-22/donald-trumps-intolerance-of-muslims-is-the-antithesis-of-christian-values> www.usnews.com/opinion/articles/2016-06-22; see also George 2016 *IJC* 2956-2959. In similar vein, the recent ban by France of the *burkini* (a headscarf and leggings worn by women of the Muslim faith whilst swimming) has raised controversial debate that France is imposing unduly harsh secular regulations which are intolerant of the Muslim faith. See Amrani *The Guardian*; Garahan 2016 *OxJLR* 1-7.

⁵⁴⁸ In Latin, meaning "to put up with" or "endure", see Clark and Corcoran 2000 *R&PA* 629.

⁵⁴⁹ See Clark and Corcoran 2000 *R&PA* 628.

⁵⁵⁰ Which can be non-religious, such as atheistic or agnostic.

⁵⁵¹ For example, murder, human or animal cruelty, rape, genocide, hate speech.

⁵⁵² For example, abortion.

⁵⁵³ See Clark and Corcoran 2000 *R&PA* 628-638.

⁵⁵⁴ See Stats SA 2016 www.statssa.gov.za/publications/PO2111/PO2111stQUARTER2016.pdf.

potential issue regarding informed views and opinions. The fact is conceded that formal education is not a prerequisite to holding profound religious or even moral convictions. However, formal education and the level thereof can (at least in some instances) have the propensity to expose an individual to a wide variety of views, the benefit of which is to enable and empower a person to make a more informed decision and even reflect more critically on formerly held views in comparison to other beliefs, opinions, thoughts and religions. Formal education is certainly not a *sine qua non* for being able to engage with other individuals, share different views on beliefs or religions and even agree to differ fundamentally with each other yet engage in constructive dialogue. However, it cannot be denied that it goes some distance in facilitating a more informed dialogue and constructive exchange of ideas between individuals, which has the potential of avoiding hostility and particularly disputes in the workplace.

Practising tolerance as a notion is not simply a mere abstract concept. Elemental to such practice is that there are consequences to be gained from tolerance. A system such as a workplace where there is harmony between religious freedom and the operational requirements of the employer and the interests of co-employees, however difficult such balance may be to maintain from time to time, as a microcosmic view of society in which freedom of religion is granted without undue interference from the state from a macrocosmic perspective is conducive to the common good and the maintenance of peace and justice, and the pursuit of social justice.⁵⁵⁵ Studies have revealed how religious freedom within the workplace has had the positive effect of contributing to profit turnover of the employer. This is so on account of the fact that workplace disputes relating to religious freedoms attract costs in terms of the dispute resolution mechanisms required to resolve such disputes. These costs are increased exponentially when the dispute remains unresolved and culminates in formal adjudication involving the courts. As such, the spin-off effect of tolerance in relation to religious freedom in the workplace is that it

⁵⁵⁵ See Ferrari 2011 *IJRF* 34-35; Benson 2008 *CCR* 303.

contributes positively to the economic wellbeing of the employer, the industry and ultimately the economy.⁵⁵⁶

The ability to put up with a belief or religion which is different from one's own is the hallmark of inclusivism in a multicultural democracy in the process of change to accommodating a plurality of people. In this sense tolerance, as opposed to intolerance, is significant to the success of transformative constitutionalism. Change can only be achieved and realised through acceptance that we are all different and allowing those who have different religious beliefs and faiths to be free to practise their beliefs subject to such practice not being hurtful in respect of human dignity, equality and freedom.⁵⁵⁷

Tolerance is seen as the means by which harmony can ultimately be the dividend of diversity in our multicultural society. However, the need to tolerate, or to put up with something, must be conceptually distinguished from the notional idea of celebrating something. The former denotes a sense of endurance, discomfort and even negativity. Celebrating differences and diversities brings to mind a sense of positivity and felicity. The Preamble to the Constitution emphasises the need of unity in diversity. It also emphasises the improvement of quality of life. Is unity through diversity and quality of life thus envisaged not served better through a sense of celebration rather than a notion of toleration? The question is posed in relation to the question of happiness. This notion is not addressed in our Bill of Rights. The value of happiness cannot be overemphasised. Whether at work or within the intimate domain of our domestic lives we all strive for happiness – it is an inescapable part of being human. Happiness translates into well-being and a condition of satisfaction, contentment and peace of mind.⁵⁵⁸ Consequently, it is argued that whilst tolerance is important to facilitating transformative constitutionalism it should be kept in mind that what ultimately matters more is the realisation of the need to celebrate our

⁵⁵⁶ See Grim, Clark and Snyder 2014 *IJRR* 5-7; Grim 2008 *RFIA* 3-7; Gunderson 1992 *CanLLJ* 309.

⁵⁵⁷ This is discussed in greater detail in subparagraph 3.2.3 below.

⁵⁵⁸ See Veenhoven "Freedom and happiness: A comparative study in forty-four nations in the early 1990s" 268.

diversity. This is because celebration is notionally more closely aligned with happiness than a mere sense of having to put-up with something.

Whether we conceive of our differences in the sense of having to merely tolerate or celebrate them may be the subject of ongoing debate. The reality is that differences of belief, culture, ways of life and – most importantly – religion have far-reaching consequences upon our existence as human beings in society.

2.10 Conclusion

This chapter attempts to give an explanation of such terms and concepts which form the fundamental framework of the subject matter of this work. Words and sentences are the stalwart of our understanding of concepts. So too is the terminology we use in order to unravel the meaning of concepts in order to interpret and gather an understanding thereof. Certain terms may be replete in their definition. An example is the term "hatred" which at once can be taken to mean something which is negative, hurtful, disdainful and mean. "Religion" on the other hand, as we have seen, is more conceptually flexible given its close association with concepts of "faith", "conscience", "belief" and even "culture". The value and relevance to be placed on specific terms and concepts relate largely to the context in which they are employed. For purposes of the research sought to be advanced in this study it is important that the terms employed throughout are viewed in the context of supporting the overall framework in which the subject topic of the thesis is analysed and discussed.

CHAPTER 3:

THE SOUTH AFRICAN CONSTITUTIONAL AND STATUTORY FRAMEWORK PERTAINING TO EQUALITY IN THE WORKPLACE

3.1 Introduction

The South African Constitution is recognised not only as the supreme law of our country but also as the embodiment of the key values and principles crucial to the success of our democracy.⁵⁵⁹ A right to fair labour practices is granted to everyone, both worker and employer alike, as is the right to equality in terms of the Constitution. The manner in which the guarantee to equality is set out creates the inevitable sense that the prime mischief against which freedom is offered is unfair discrimination. However, as with all protected rights and freedoms, there will come moments and times where conflicts arise. It would be naive to think that all fundamental rights served the same interests. When these rights, as fundamental as they are, seek to serve competing interests, how are they to be effectively dealt with and balanced? A democracy which serves the interests of the people it purports to represent must strive to balance such conflicting interests. This issue is confounded when matters of policy are taken into account. Whilst seeking to protect the interests of all concerned, in the appropriate balancing of fundamental rights the court, as the ultimate adjudicator of such rights, must also pay due caution not to usurp the role of the official electorate body, namely the legislature and not to interfere unduly in matters of policy. Accordingly, all rights in the Bill of Rights are subject to a general limitation clause which permits the right to be limited where to do so is considered reasonable and justified in a society based on equality, freedom and human dignity. Collectively considered, the Constitution and legislation giving effect to its relevant provisions, together with the judiciary and the body of jurisprudence it creates⁵⁶⁰ is

⁵⁵⁹ See Van Heerden 2007 *Politeia* 37; Lewis 2005 *ACur* 12-14; Gross 2004 *Stan/LJ* 54-55; De Vos and Freedman *South African Constitutional Law in Context* 4; Currie and De Waal *The Bill of Rights Handbook* 14-16.

⁵⁶⁰ See Chapter 5.

what formally regulates unfair discrimination on the basis of religion in the workplace.

The purpose of this chapter is to focus on the significance of the South African constitutional and legislative framework pertaining to equality in the workplace. On account of South Africa's history which was steeped in marked inequality, equality assumes a special place in our constitutional jurisprudence. It is within this context that issues of fairness and unfairness relating to religious discrimination must be examined.

The importance accorded to equality is evidenced by the fact that there is a constitutional and legislative framework addressing ways in which to avoid unfair discrimination and establish a more egalitarian society. This chapter aims to show that equality in the workplace must be understood as a phenomenon⁵⁶¹ fraught with complexities. For it to be properly understood, it must be considered in the context of how to optimally address fundamental rights pertaining to equality. This in essence requires a balancing of such fundamental rights with reference to factors such as rationality, reasonableness and what must ultimately distil to a proportionality exercise.

This chapter also aims to show that South African labour law has in place a highly regulated framework seeking not only to prevent unfair discrimination but also to promote equality in the workplace. It will be seen how the right to equal treatment as contained in the Constitution translates into the right an employee has not to be unfairly discriminated against by the employer on the basis of religion. It will further be examined how the aforesaid national legislation gives effect to relevant ILO standards. In addition, given the various values extolled in the Preamble to the Constitution, this chapter will also consider the extent to which the legislative framework gives effect to such values. The aforesaid effect given to the equality values in the Constitution by the national legislative framework depends for its

⁵⁶¹ This term is used on account of the complexities associated with "equality" as they appear from the content of this chapter.

success on the manner in which such legislation is interpreted by our courts when called upon to adjudicate religious discrimination disputes. This chapter looks at the imperative of our courts drawing on legislation not specifically aimed at the employment relationship to be used nevertheless as a helpful interpretive tool and source when adjudicating labour matters. Whilst the judicial arm of government plays an active role in enforcing the regulated legislative framework, there is nothing to suggest that government plays an active role in influencing the manner in which the right of religious freedom is exercised. A *caveat* to this is that the legislative regime for the suitable resolution of religious discrimination disputes arising in the workplace is provided by government in the form of an appropriate framework.

The argument is also advanced in this chapter that there are inherent limitations to the regulated system of the legislative framework. Although its aim and purpose may be to address and eliminate unfair discrimination, this would be obviated in the event of greater constructive dialogue between material role-players in disputes involving religious discrimination in the workplace, namely worker and employer. By so doing, effect can be given to the participatory dimension of transformative constitutionalism and the realisation of social justice.

3.2 The constitutional provision of equality

3.2.1 The conceptual importance of equality

Nationally and globally the strife is constant to eradicate and address conduct the effect of which results in unequal treatment of human beings in general and workers or employees specifically.⁵⁶² This is especially relevant in respect of religious discrimination in the workplace. In 2010 *Ius Laboris*⁵⁶³ reported and noted the prohibition against religious discrimination in the workplace as an increasing

⁵⁶² See Hepple *Equality: The New Legal Framework* 13; Meyerson *Jurisprudence* 310; McGregor 2013 *IJLSS* 81; Cowen 2001 *SAJHR* 35-38; Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 1; Dworkin *A Matter of Principle* 211.

⁵⁶³ An alliance of Global Human Resources Lawyers.

challenge between religious freedom and secularised societies.⁵⁶⁴ The link between the notion of equality and discrimination is inflexible on account of the fact that *prima facie* discrimination is anathema to equality. Embroidered into this link is also the close association between equality and human dignity. Put differently:

[e]very human being has an absolute inner worth. Because this worth is absolute all human beings are equal to one another with regard to this absolute worth. This absolute worth is dignity.⁵⁶⁵

Our legal understanding of discrimination, however, has taught us to distinguish between discrimination (differentiation)⁵⁶⁶ in the pejorative and non-pejorative sense. In the pejorative sense discrimination is understood to mean a differentiation (distinction) made on a basis that is hurtful, bad, arbitrary, unfair, capricious or objectionable, whereas in the non-pejorative sense discrimination is understood to mean differentiation (distinction) made on a basis that is fair, reasonable, justifiable, objective or non-objectionable.⁵⁶⁷ The very notion of equality and what constitutes unfair discrimination may *prima facie* appear to be seemingly obvious. When one is treated in a manner that is different to someone else for a reason that is arbitrary and the consequence is hurtful it is readily understood as unfair discrimination. However, notions of equality and unfair discrimination are steeped in contentious issues as appears from this chapter.

⁵⁶⁴ See Perles 2010 www.globalhrlaw.com/resources/religion-in-the-workplace. See also *The Economist* 12 April 2014, an article in terms of which bosses across the Western world are warned to take measures to accommodate religious beliefs or run the risk of facing expensive law suits.

⁵⁶⁵ Ackermann *Human Dignity: A Lodestar for Equality in South Africa* 56. Also see *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 1; Malherbe 2007 *TSAR* 132-134; Albertyn and Fredman 2015 *AJur* 435-438; McConnachie 2014 *OxJLS* 611-615; Mubangizi 2004 *JJS* 63-65; Chaskalson 2000 *SAJHR* 200-202; Henrico 2014 *Obiter* 26-27.

⁵⁶⁶ See Du Toit and Potgieter *Unfair Discrimination in the Workplace* 18, 79-82 who argue correctly, it is submitted, that "discrimination" can be used interchangeably with the term "differentiation". In the aforesaid work, the learned authors (at 9) point to the fact that the notion of discrimination without the qualification of "unfair" was first introduced into South African jurisprudence in the early 1980s in *Raad van Mynvakbonde v Minister van Mannekrag* 1983 4 *ILJ* 202 (T). In this case the applicants claimed the employer had discriminated against trade union members by offering them less favourable conditions of service than had been offered to other officials.

⁵⁶⁷ See Cachalia *et al Fundamental Rights in the New Constitution* 28-30; Kentridge "Equality" 14-19; Cameron 1988 *ILJ* 163-164; Rycroft and Jordaan *A Guide to South African Labour Law* 167-168.

In neither the Constitution nor national legislation is the notion of discrimination defined. A definition is, however, provided in terms of ILO Convention 111 which we have seen refers to "discrimination" as a "distinction, exclusion or preference ...".⁵⁶⁸ This definition does not fall outside the parameters of equality as conceived of in terms of section 9 of the Constitution.⁵⁶⁹ Moreover, it is also one which is and ought to be given effect to by the EEA and the LRA in discharging the ILO obligations.⁵⁷⁰ Prior to the coming into operation of the LRA and the EEA the aforesaid definition was used in the interpretation of the interim Constitution's⁵⁷¹ prohibition on unfair discrimination as pointed out by Du Toit⁵⁷² in the matter of *Association of Professional Teachers v Minister of Education*⁵⁷³ where the following was stated:

Where the criteria for a differentiation or classification are reasonably justifiable and objective, such differentiation will not necessarily constitute discrimination. Put differently, where the ... differentiation is not based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms, it would constitute discrimination.⁵⁷⁴

The role played by the industrial court in the adjudication of discrimination disputes and the jurisprudence on unfair labour practices in the 1980s was a precursor for the development of the term "discrimination" being extended to include unfair discrimination.⁵⁷⁵ This was galvanised when the definition of an "unfair labour practice" was amended to include "unfair discrimination by an employer against an employee solely on the grounds of race, sex or creed".⁵⁷⁶ The term "unfair discrimination" was used by the drafters of the interim Constitution⁵⁷⁷ and

⁵⁶⁸ Article 1(a). See discussion in subparagraph 2.5.3 above.

⁵⁶⁹ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 18.

⁵⁷⁰ Sections 3(d) and 1(b) of the EEA and LRA respectively.

⁵⁷¹ 200 of 1993.

⁵⁷² Du Toit and Potgieter *Unfair Discrimination in the Workplace* 18.

⁵⁷³ 1995 16 *ILJ* 1048 (IC).

⁵⁷⁴ At 1050.

⁵⁷⁵ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 9 and the authorities cited at fn 3; Van Niekerk *et al Law@work* 183-182; Grogan *Employment Rights* 91.

⁵⁷⁶ In terms of s 1 of the Labour Relations Act 28 of 1956 (LRA), as amended by the Labour Relations Amendment Act 83 of 1988. For further reading see Du Toit and Potgieter *Unfair Discrimination in the Workplace* 10; Du Toit "The prohibition of unfair discrimination: applying s 3(d) of the Employment Equity Act 55 of 1998" 142.

⁵⁷⁷ As it appeared in s 8(2).

subsequently adopted in section 9 of the Constitution. It has been pointed out that since the word "discrimination" has both a pejorative and benign meaning, express steps were taken to ensure that by inserting the adjective "unfair" the intention was to assert a prohibition in respect of differential (discriminatory) acts that are objectionable.⁵⁷⁸ Essential to the concept of unfair discrimination is the role it plays in enforcing the right to equality and human dignity.⁵⁷⁹ This is due to the fact that a person required to suffer the hurtfulness of being treated differently or discriminated against on the mere basis of his or her religion in a manner that is capricious or arbitrary suffers the impunity that such conduct has upon his or her dignity and self-worth as an individual.⁵⁸⁰ Due to the fact that human dignity is an inalienable aspect of equality, so too does it become an essential aspect of religious discrimination. The reason is that as long as an employee is treated less advantageously than a fellow employee on account of his or her religion, such treatment is not only unequal but is objectionable on the basis that it effectively means the employee is less deserving of respect as an individual and hence his or her inherent worth is less meaningful.⁵⁸¹

Section 9(3) of the Constitution specifies certain grounds upon which if discrimination is shown to have taken place it is presumed to be unfair unless the respondent can establish that the discrimination was fair.⁵⁸²

⁵⁷⁸ This is understandable in the context of South Africa emerging as a country from a society with a history of racial discrimination and intolerance which gave impetus to socioeconomic and political conflict and disharmony. See Dugard *Human Rights and the South African Legal Order*, Mathews *Freedom, State, Security and the Rule of Law*, Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 56; Currie and De Waal *The Bill of Rights Handbook*; Du Toit and Potgieter *Unfair Discrimination in the Workplace* 244.

⁵⁷⁹ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 20. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 326; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31; *Brink v Kitshoff* 1996 4 SA 197 (CC) para 42; *Harksen v Lane* 1998 1 SA 300 (CC) para 49; *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 73-75; Albertyn "Equality" 105.

⁵⁸⁰ For further reading see Henrico 2014 *Obiter* 24; Malherbe 2007 *TSAR* 127, 132; Albertyn and Goldblatt 1998 *SAJHR* 248, 256; *Government of the Republic South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

⁵⁸¹ See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 97, 106-110, 182-188, 251; Venter *Fundamental Rights in South Africa: An Introduction* 27-28; De Vos and Freedman *South African Constitutional Law in Context* 426-429; Albertyn and Kentridge 1994 *SAJHR* 152-156; Botha 2009 *Stell LR* 175-178; Arieli "On the necessary and sufficient conditions for the emergence of the doctrine of the dignity of man and his rights" 1.

⁵⁸² See s 9(5).

The importance given to the right to equality which the Constitution protects is foreshadowed in the Preamble which provides that "every citizen is equally protected by law".

Equality as a notion, which is evidenced in the right to equality, is expressly guaranteed.⁵⁸³ It appears as a thematic thread throughout the Bill of Rights. It is stated that the Republic of South Africa is one sovereign, democratic state founded on, *inter alia*, "the achievement of equality".⁵⁸⁴ Admittedly, one needs to distinguish between what is highlighted as a value and what is guaranteed as a right. What appears in section 1(a) of the Constitution is the value, *inter alia*, as a benefit derived from the achievement of equality.⁵⁸⁵ It is this value, namely equality, and its achievement, which must inform the interpretation and limitation of all the rights in the Bill of Rights.⁵⁸⁶

Moreover, this principle is more fully set out as follows:

[The] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.⁵⁸⁷

Lastly, we know that a material element of the enquiry into the limitation of rights in the Bill of Rights is whether such limitation can be permitted with reference to a democratic society based on equality.⁵⁸⁸

⁵⁸³ In terms of s 9.

⁵⁸⁴ Section 1(a).

⁵⁸⁵ An analogy can be drawn in this regard with the contents of section 195(1) of the Constitution which has to do with basic values and principles governing public governance. The content of section 195(1)(a)-(j) does not give rise to any rights. Their merit is in the assistance offered by the values highlighted in section 195(1) which offer guidelines to public administration on best methods of good governance. See *Chirwa v Transnet Limited* 2008 4 SA 367 (CC) paras 74-76 and esp the authorities cited in fns 63 and 65.

⁵⁸⁶ See Kruger "Equality" 75. Moreover, in *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) the following was stated per Moseneke J at para 22: "Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."

⁵⁸⁷ Section 7(1).

⁵⁸⁸ Section 36(1).

The right to equality is a self-contained right embodied in section 9 which provides the following:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

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

No person may *unfairly discriminate directly or indirectly* against anyone on one or more grounds in terms of subsection (3). *National legislation must be enacted* to prevent or prohibit unfair discrimination.

Discrimination on one or more of the grounds listed in subsection (3) is unfair *unless it is established that the discrimination is fair*.⁵⁸⁹

From the above it is clear that all persons are equal before the law and entitled to the protection and benefit provided thereby.⁵⁹⁰ A parallel can be drawn between this guarantee and the other Constitutional guarantee that "everyone is entitled to fair labour practices".⁵⁹¹ Providing that everyone is equal before the law together with equal protection and benefit of the law is notionally understandable in light of South Africa's history of unequal treatment. It is also understandable, and undeniable, that a prerequisite of a democratic dispensation is a society in which everyone is equal before the law. Equality is an imperative on account of its importance.

In workplaces across South Africa, for example, it is taken for granted that workers are given leave on 25 December of every year as this day is an officially recognised public holiday on account of it being Christmas. Workers of the Christian faith may

⁵⁸⁹ Emphasis added. For consideration of the vertical and horizontal application of the Bill of Rights see s 8(2); for further discussion on the topic see *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 8; *AAA Investments v Micro Finance Regulatory Council* 2007 1 SA 343 (CC). For further reading see De Vos and Freedman *South African Constitutional Law in Context* 331-338; Currie and De Waal *The Bill of Rights Handbook* 41-42.

⁵⁹⁰ Section 9(1).

⁵⁹¹ Section 23(1).

find favour with this celebration and generally workers of other faiths may have no objection since it is time off, even if in recognition of another faith. What of the case, however, of those workers who object to such observance and insist that Deepavali (Maha Lakshmi Pooja)⁵⁹² should also be observed on 30 October as this day is a significant Hindu⁵⁹³ holiday. Can they not allege unequal treatment, benefit and protection under the law? In similar vein, could Jewish workers not claim that their holiest day, namely Yom Kippur (Day of Atonement) should be observed on 12 October?⁵⁹⁴ If we were to follow a literal interpretation of what the Constitution provides it would mean that all workers throughout South Africa are entitled to the "full and equal treatment" of their religious rights in terms of section 15(1) of the Constitution. This needs only to be stated in order for it to be immediately rejected as being unrealistic and impractical. If all the workers in a particular workplace were entitled to take paid leave on days that were designated holy days in accordance with their respective religious beliefs, notionally an untenable situation could prevail.⁵⁹⁵ Hence it is understandable, that whilst the achievement of equality is a value to be cherished, the reality is that the right to equal treatment and protection under the law must take into account notions of fairness, rationality, reasonableness, and human dignity. In this context, and with reference to the aforesaid factors, the approach to equality under the Constitution must be one which seeks to achieve equality through means of substantive as opposed to formal equality.⁵⁹⁶

⁵⁹² Colloquially known as the Festival of the Lights.

⁵⁹³ Also celebrated by Sikhs, Jains and Buddhists.

⁵⁹⁴ In point of fact, neither of the aforesaid Hindu nor Jewish holy days are actually reflected or indicated on the pages of most diaries. Yet reference is made in the preface of most diaries to public holidays and to Christian, Jewish, Islamic and Hindu holy days. See Purchasing Consortium Southern Africa *Diary 2016*.

⁵⁹⁵ The complexity of the given example is dependent upon the nature and size of the employer's business, the extent to which individual workers insist on taking off specific holidays as holy days in accordance with their beliefs, the industry in which the business operates and the extent to which, if at all, the employer is able to optimally manage reaching operational production targets notwithstanding the fact that at any one time there is a varying degree of employees who are not at work.

⁵⁹⁶ See subparagraph 2.6.2 above.

Decisions of our constitutional court are testimony to the adoption of a substantive approach to equality.⁵⁹⁷ This is underscored by the decision of the Constitutional Court in *President of the Republic of South Africa v Hugo*⁵⁹⁸ where the following was stated:

We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth ... we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.⁵⁹⁹

The aforesaid *dictum* articulates the importance of celebrating the differences that everyone in a plural society like South Africa can bring to the cultural diverse make-up which constitutes the rich tapestry of our society. It is through our differences that we are unique and should be united in that everyone has a place and potential to contribute as a role-player to creating a better society, beginning with themselves and expanding their influence to local communities, broader society and greater South Africa.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities⁶⁰⁰ (CPRRC) is a juristic entity comprising a state institution supporting constitutional democracy.⁶⁰¹ Aside from the issuing of media statements⁶⁰² CPRRC has played a rather muted role in the dynamic of religious discrimination disputes in the workplace.⁶⁰³ In order to "deepen the culture of

⁵⁹⁷ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC). Also see Du Toit *et al Labour Relations Law: A Comprehensive Guide* 655-657.

⁵⁹⁸ 1997 4 SA 1 (CC).

⁵⁹⁹ Para 112.

⁶⁰⁰ Established in terms of ss 185-186 of the Constitution.

⁶⁰¹ As envisaged in terms of Chapter 9, s 181 of the Constitution. Also see discussion in subparagraph 2.8.3 above.

⁶⁰² See the media statement issued condemning COSAS's offensive actions relating to the "pig's head" incident because it impacted adversely on the religious rights of individuals or communities who expressly exclude pork from their diet (Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 2014 <http://www.gov.za/cultural-religious-and-linguistic-rights-commission-condemns-pig-head-incident>).

⁶⁰³ The role that the CPRRC appears to play as a public platform in commenting upon prohibitive and offensive acts is nevertheless welcome as it is providing ongoing participatory dialogue on a topic of social interest.

democracy established by the Constitution, parliament may adopt charters of rights consistent with the provisions of the Constitution".⁶⁰⁴ It was pursuant to this provision that the SACRRF was adopted.⁶⁰⁵ Both the CPRRC and the SACCRF have a role to play in our equality jurisprudence as role-players and establishing a framework for addressing religious discrimination in particular. Thus far, however, the fact that the SACCRF has not been incorporated into any official Code of Conduct⁶⁰⁶ does tend to dissipate from its overall effectiveness and actual relevance – this is particularly true considering that it has not been referred to by any reported case on religious unfair discrimination.

3.2.2 Equality and rationality

Equality is not a vacuous notion. Couched as it is in section 9 of the Constitution, it is clear that there are a multiplicity of factors and measures required to be taken into account with reference to equality and in particular in order for equality to be promoted. Its promotion and achievement is not serendipitous. The drafters of the Constitution provide peremptorily that legislation must be enacted to prevent and prohibit unfair discrimination.⁶⁰⁷ Moreover, whilst grounds are set out as the basis upon which unfair discrimination can take place,⁶⁰⁸ all of this is subject to the general proviso that a defence to a claim of unfair discrimination is effective where a person is able to establish⁶⁰⁹ that the discrimination is fair.⁶¹⁰

The enactment of legislation that will prevent and prohibit unfair discrimination in addition to the provision of a defence in respect of unfair discrimination both speak

⁶⁰⁴ Section 234.

⁶⁰⁵ See subparagraph 2.3.2 above.

⁶⁰⁶ Akin, for example, to the Code of Good Practice on Dismissals contained in Schedule 8 of the LRA.

⁶⁰⁷ Section 9(4).

⁶⁰⁸ On the basis of direct or indirect unfair discrimination in terms of s 9(3).

⁶⁰⁹ On a balance of probabilities.

⁶¹⁰ Section 9(5).

to the principle of rationality.⁶¹¹ Three instances supporting the principle of rationality in this regard must be considered.

In the first instance, it is important to have a legislative framework giving effect to the Constitutional rights on account of the fact that rights in the Constitution which are not self-executing depend on national legislation for their realisation. Where legislation gives effect to basic Constitutional rights such legislation cannot be bypassed by relying directly on the Constitution. This would be a breach of the principle of subsidiarity (avoidance) meaning that resort must first be had to a measure of greater specificity (such as legislation) before resorting to a broader measure (such as the Constitution).⁶¹²

In the second instance, the defence that discrimination is fair is premised on a fundamental principle of our law finding sustenance from the rule of law which holds that for conduct, in the form of the exercise of a decision or a power, to be legitimate, it must be lawful. A decision or conduct that is arbitrary is illegitimate and therefore unlawful; moreover, it is irrational. In this regard Currie and De Waal have referred to the case of *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the RSA*⁶¹³ in which the following was observed in relation to the exercise of public power:

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does

⁶¹¹ Used in the sense of meaning something which is reasonable, agreeable and understandable and resounding in logical sense. For further reading see Kruger 2010 *PER* 467-484; Pieterse-Spies 2013 *TSAR* 676; McGregor 2013 *SAMLJ* 223.

⁶¹² *S v Mhlungu* 1995 3 SA 867 (CC) para 95; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 73; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 248; *SANDU v Minister of Defence* 2007 5 SA 400 (CC) para 51; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) para 437. An exception would be where the statute in question is constitutionally challenged; see Hoexter *Administrative Law in South Africa* 119. Also see Du Plessis 2007 http://www.chr.up.ac.za/chr_old/closa/chapters/Subsidiarity.pdf; De Vos and Freedman *South African Constitutional Law in Context* 338; Quinot *et al Administrative Justice in South Africa: An Introduction* 112-115.

⁶¹³ 2000 2 SA 674 (CC).

not, it falls short of the standards demanded by our Constitution for such action.⁶¹⁴

One may be quick to point out that the above excerpt has to do with the vertical application of the Bill of Rights in that it holds to account the exercise of governmental public power. However, the Bill of Rights also has an express horizontal application⁶¹⁵ provision. The requirement of rationality or that decisions are rationally related to the purpose for which the power is exercised, for example a decision by an employer to promote a specific employee rather than another employee informed by reasons related to the religious belief of the employee, can be as much applied to private entities⁶¹⁶ as to public entities.⁶¹⁷

In the third instance, rationality dictates that mere differentiation is insufficient to constitute unfair discrimination. The fact that an employer decides to prefer or distinguish between employee X and employee Y is neutral in that it warrants no intervention by the law since in exercising such preference or distinction the employer has not acted in a manner that impacts negatively on the rights, interests or human dignity of either X or Y. However, when the employer prefers employee X

⁶¹⁴ Para 85.

⁶¹⁵ In terms of s 8(2) which provides that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

⁶¹⁶ Referring in this context to employers. With reference to the mere imposition of a penalty when it comes to an employer disciplining an employee, our labour law jurisprudence has made it clear that although there is no "reasonable employer test" that should be adhered to, the imposition of an appropriate penalty is not a matter which must be determined solely from the employer's view point. Inherent and implicit in the setting of such standard is that it must be reasonable and rational, failing which it would be an infringement of an employee's right to fair labour practices under s 23(1) of the Constitution and his or her right not to be subjected to any unfair labour practice under s 185(b) of the LRA. See *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) paras 70, 73, 173.

⁶¹⁷ See *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1991 4 SA (W) 364H-465A; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC) paras 40-50; *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency (No. 1)* 2014 1 SA 604 (CC) para 52. The inclusion of exercise of a public power or performing a public function on the part of a natural person or juristic person in the definition of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is conceivably sufficient to include non-public entities within the definition of administrative action by focusing upon the nature of the function as opposed to the institution. This is, however, a matter that would need to be assessed on a case-by-case basis to ensure whether the other definitional requirements of PAJA, alternatively the principle of legality, are met. See Quinot *et al* *Administrative Justice in South Africa: An Introduction* 82.

(who is a member of the Hindu faith) to employee Y (who is a member of the Muslim faith) on the basis that in the employer's view co-employees who are predominantly Hindu will get on better with X than Y may lack a rational basis. This is so for the simple reason that, in the absence of evidence to the contrary, co-employees in the workplace have never shown a particular preference for only Hindu employees to be appointed. The decision upon which the employment of X is premised is irrational because the reason, namely advantaging Hindu employees over Muslim employees, is not justified in relation to the reasons advanced. There is no evidence to support the employer's view that Hindu co-employees will only be collegiate with other Hindu employees.⁶¹⁸

Differentiation by one person against another can also be premised on a view which, to the holder of such view, appears to be sound and logical. An employer, may for example hold the view that all Muslims are loyal to ISIS and are terrorists. Such a view is arbitrary and unacceptable on account of it being based on stereotyping.⁶¹⁹ It also lacks rationality and impacts adversely on the human dignity of an employee.

The importance of the principle of rationality and its link with mere differentiation was emphasised in *Prinsloo v Van der Linde*.⁶²⁰

In regard to differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked

⁶¹⁸ The example has by design excluded from the scenario any evidence of history to suggest intolerance on the part of Hindu co-employees to members of the Muslim faith. In reality one cannot select the facts and circumstances in seeking a solution. One must seek an appropriate solution to the facts and circumstances at hand. Realistically, even co-employees of the same religious faith may manifest intolerance, fundamental disagreement of views and opinions which can lead to disharmony and conflict. The recent ruling by Jappie JP in the Durban High Court is a case in point. The ruling effectively determined the leadership succession of the Nazareth Baptist Church after the death of Vimbeni Shembe. It came after a five-year legal battle and deep rifts between church members marked by physical violence and acrimony. See *The Citizen* 2016 www.citizen.co.za/news/-national/1318256.

⁶¹⁹ Stereotyping has the propensity to draw general presumptions and perceptions from groups of people or even just individuals concerning their characteristics, behaviour, conduct and what their predispositions would be, where such presumptions and perceptions are lacking any empirical foundation and effectively constitute conscious (advertent) or unconscious (inadvertent) discrimination. Examples are assumptions that all people without a university qualification are unintelligent or that women who work cannot also be good mothers due to their work commitments. For further reading, see Hepple *The New Legal Framework* 55.

⁶²⁰ 1997 3 SA 1012 (CC).

preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premise of a constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner ... In the absence of such rational relationship the differentiation would infringe s 8.⁶²¹

Once again, the extent to which the aforesaid *dictum* may appear to apply only to public powers may be deceiving. This is not the case given the horizontal application of the Bill of Rights. Hence, differential acts on the part of employers falling short of acting in a rational manner by exercising decisions that constitute "naked preferences" which serve no legitimate interests and which decisions impacts adversely upon the religious freedoms of an employee will contravene the equality provision of the Bill of Rights. De Vos makes the point that rationality "is part of accountability and justification in a democratic state".⁶²² Moreover, in *Minister of Finance v Van Heerden*⁶²³ Ngcobo J, in a separate concurring judgment, makes the following observation in relation to rationality:

The proper approach to the question whether the impugned rules violate the equality clause involves three basic enquiries: first, whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose; and if so, second, whether the differentiation amounts to unfair discrimination; and if so, third, whether the impugned rules can be justified under the limitations provision. If the differentiation bears no such rational connection, there is a violation of section 9(1) and the second enquiry does not arise. Similarly, if the differentiation does not amount to unfair discrimination, the third enquiry does not arise.⁶²⁴

Differentiation cannot be considered in isolation. When looking at the purpose for which a distinction or difference was made, the question is asked whether a legitimate purpose was sought to be achieved in making such distinction. In the interests of ensuring equality, the enquiry must extend to establishing whether, in seeking to advance a legitimate purpose through making a distinction, such

⁶²¹ Para 25. The reference to s 8 is the equality provision of the interim Constitution, now s 9 of the Constitution. Also see comments by Currie and De Waal *The Bill of Rights Handbook* 219-220; De Vos and Freedman *South African Constitutional Law in Context* 431-432, especially the authorities cited at fn 59.

⁶²² De Vos and Freedman *South African Constitutional Law in Context* 432; Govender 2013 *AHRLJ* 89-90; Hoexter 2004 *MacqLJ* 165; Kohn 2013 *SALJ* 810; Rycroft 1999 *ILJ* 1413-1415; Fredman 2005 *SAJHR* 164.

⁶²³ 2004 6 SA 121 (CC).

⁶²⁴ Para 111.

distinction resulted in unfair discrimination. However, to complete the enquiry regard must be had to whether the distinction can be justified in terms of the limitations provision.

In this sense rationality constitutes an essential ingredient in the overall analysis of the general limitation of a Constitutional right.⁶²⁵ Rationality also plays a crucial role with reference to the exercise of public power and holding accountable decisions of such functionaries. However, as previously pointed out, by reason of the horizontal application of the Bill of Rights, this requirement with reference to rationality must also pertain to employers in respect of decisions they make in the workplace with reference to fundamental rights and freedoms of employees. The emphasis on rationality and justification is a requirement that notionally links back to the principle that in the South African democratic system all role-players are subject to the supremacy of the Constitution and the rule of law.⁶²⁶ Moreover, such decisions, although perhaps pertaining to the IROJ, must be rational and justified to pass muster where the effect thereof impacts upon the religious freedoms of employees. Underscoring this imperative of rationality and justifiability is also the notion of effect being given to the mutual trust imperative of the employment relationship. The success or failure of the employment relationship is premised on mutual trust.⁶²⁷ Building on this relationship is the King Report on Corporate Governance for South Africa (King III) and the King Code of Corporate Governance for South Africa (King III).⁶²⁸ The relevance of King III is the premium it places on human capital in

⁶²⁵ See subparagraph 3.2.3 below. See Kruger "Equality" 83.

⁶²⁶ See Mendes "The crucible of the Charter" 34; Bingham *The Rule of Law* 76-78.

⁶²⁷ See *Murray v Minister of Defence* 2008 ILJ 1369 (SCA); *Mogothle v Premier of the Northwest Province* 2009 ILJ 605 (LC); *Nedcor Bank Ltd v Frank* 2002 7 BLLR 600 (LAC) para 603G-I; Bosch 2006 ILJ 47; Clark "Towards a sociology of labour law: an analysis of the German writings of Otto Kahn-Freund" 83-85; Brodie 2008 ILJ (UK) 329; Cohen 2004 SAJHR 485; Thompson 2003 ILJ 1795.

⁶²⁸ The Institute of Directors in Southern Africa September 2009. King III came into operation in March 2010.

encouraging greater constructive dialogue between role-players in the employment relationship.⁶²⁹

3.2.3 Equality and the general limitation of rights clause

Before considering the basis upon which discrimination is considered fair⁶³⁰ it is the purpose of this paragraph to obtain a conceptual understanding of the relevance of the general limitation of rights clause of the Constitution. Rationality has already been considered as a necessary and helpful means of assessing the extent to which conduct can be deemed to be justified. To the extent that reasonableness and justification form material elements of the limitation of rights enquiry they require closer inspection. This is also true of the principle of proportionality which is a necessary element in the balancing of conflicting rights and interests. The rationale for the limitation of rights clause is that in any system geared toward the protection of rights and freedoms in a democratic order it is inevitable there will be a conflict of interests. Employees' right to religious freedom and thus their choice not to work on a specific day which may be a day of religious observation for them may conflict directly with the employer's right to protect the interests of the business by operating on specific days which may include one of the aforesaid religious observance days. How does one reconcile such conflicts of interests?

Individual rights to religious freedom⁶³¹ often have to be balanced against associational rights to religious freedom.⁶³² Whilst both rights share common identities in terms of their substance, namely religion, they differ in terms of the interests sought to be protected. Religious associational rights usually manifest themselves in instances where organisations seek to protect their religious identity and make-up and require that their employees share the same religious belief as the

⁶²⁹ The acknowledged limitation of King III is that it pertains only to corporate entities. For further reading see Cohen "The relational contract of employment" 98-100.

⁶³⁰ In terms of s 9(5).

⁶³¹ Section 15(1).

⁶³² Section 31(1)(a) and (b) as read with s 31(2).

organisation.⁶³³ Whilst both rights may on the surface be worthy of protecting, a balanced view and assessment of the situation requires that effect be given to the advancement of a substantive meaning of equality.⁶³⁴ This means that one fundamental right must be limited in favour of another right. The assessment of where the appropriate balance of interests rests in terms of which right should be advanced in favour of the other can never be a simple issue to decide. The reason for this is the fact that cogent reasons must be advanced for why one right should trump another, alternatively how to accommodate both interests with the least detriment to either party.

Section 33(1) of the interim Constitution provided for the general limitation of rights as follows:

The rights entrenched in this chapter may be limited by law of general application, provided that such limitation—

shall be permissible only to the extent that it is – (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and

shall not negate the essential content of the right in question ...

However, decisions relating to what is reasonable and justifiable cannot be made without taking into account notions of rationality and proportionality given that both lend sustenance to such a finding.⁶³⁵

In support of the aforesaid, due account must be had of what was stated by the Constitutional Court in *S v Zuma*.⁶³⁶

⁶³³ A Catholic diocese who appoints staff at specific church locations to give Sunday school lessons to children would conceivably have as an IROJ that the person who is appointed is a member of the Catholic faith as opposed to a person who is an atheist, agnostic or member of the Hindu faith believing in a religion that is out of kilter with the Catholic tenets of faith and doctrines. See Bilchitz 2011 *SAJHR* 228-230; Lenta 2009 *SALJ* 827-860; Woolman 2009 *SAJHR* 283-285; Bilchitz and Williams 2012 *SAJHR* 163-166.

⁶³⁴ See *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 60; Smith 2014 *AHRLJ* 612 and the authority cited at fn 17; Smith 2008 *IJD* 201-249.

⁶³⁵ See Dworkin *Religion Without God* 139-143.

⁶³⁶ 1995 2 SA 642 (CC).

There, [in Canada] if the statutory violation is to be justified it must also pass a "proportionality" test, which the courts dissect into several components ... These criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required. But section 33(1) itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern.⁶³⁷

The apparent reluctance on the part of the Constitutional Court toward the proportionality test⁶³⁸ applied in Canadian law diminished significantly later in the same year as is apparent from *S v Makwanyane*,⁶³⁹ where Chaskalson P said the following concerning proportionality:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for "an open and democratic society based on freedom and equality" means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."⁶⁴⁰

The general limitation of rights clause makes no reference to any notion of proportionality and in point of fact the term does not appear anywhere in the Constitution.⁶⁴¹ However, proportionality has come to characterise the way in which our courts have approached a limitation of rights enquiry in terms of the Constitution.⁶⁴² In the *Makwanyane* case reference was made, in support of interpreting the general limitation of rights clause under section 33(1), to the

⁶³⁷ Per Kentridge AJ para 419. The reference to s 33(1) in the excerpt is to the limitation clause as it appeared in the interim Constitution.

⁶³⁸ See Woolman and Botha "Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices" 155-160; Rautenbach 2014 *PER* 2236-2238; Du Plessis 1994 *SAPL* 2-8.

⁶³⁹ 1995 3 SA 391 (CC). The reference to s 33(1) in the excerpt is to the limitation clause as it appeared in the interim Constitution.

⁶⁴⁰ Para 104. The reference to s 33(1) in the excerpt is the limitation clause as it appeared in the interim Constitution.

⁶⁴¹ De Vos and Freedman *South African Constitutional Law in Context* 363.

⁶⁴² See Petersen "Proportionality and the incommensurability challenge – some lessons from the South African constitutional court" 2-5; Iles 2007 *SAJHR* 70-72. Also see *Prince* where at para 155 Sachs J states: "Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by section 36."

Canadian Supreme Court in *R v Oakes*⁶⁴³ in which Dickson CJC, when referring to the general limitation of rights clause in the Canadian Charter of Rights,⁶⁴⁴ described proportionality as follows:

There are, in my view, three important components of the proportionality test. First, the measure adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".⁶⁴⁵

As previously stated, proportionality has, in essence to do with a balancing and assessment of competing rights and interests. The analysis of proportionality as a notion in the *Oakes* case appears to give a more distilled "broken-down" understanding of proportionality whereby it must be understood with reference to not a mere balancing of rights and interests, but also to notions of rationality, fairness, objectives, and consequences.⁶⁴⁶ The unpacking of each and every concept constituting the notion of proportionality is and must form a necessary part of any value-laden decision that is to be made into an enquiry as to how to effectively balance conflicting rights and interests. This becomes therefore an exercise of interpretation; a matter simply of how the court is to interpret the test of the general limitation clause of the Bill of Rights.

Whilst the *Oakes* formulation of proportionality appears to have merely been referred to, it was not formally adopted or endorsed by the court in *Makwanyane*.

The general limitation of rights in the Constitution did little to change the essential requirements of how rights were to be limited. The essential difference now appeared in a tabulated list of factors that the court would have to take into account in making a determination with reference to any limitation of a right.

⁶⁴³ (1986) 19 CRR 308.

⁶⁴⁴ Which also provides, under s 1 thereof, for a general limitation of rights.

⁶⁴⁵ See *S v Makwanyane* 1995 3 SA 391 (CC) para 105.

⁶⁴⁶ See Pretorius 2010 *SAJHR* 553-554; Govender 2009 *MichLRFI* 122.

Section 36 of the Bill of Rights also pertains to a general limitation of rights.⁶⁴⁷ It provides as follows:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided for in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In neither the interim nor the final Constitution's general limitation provisions is proportionality expressly mentioned. The absence of its mention does not detract from its significance. Rationality, which is an essential ingredient to determination of both reasonableness and justifiability, may not be expressly mentioned, but plays an important role in any exercise pertaining to the balancing of conflicting rights and interests.

A so-called bifurcated or two-stage approach is said to have been endorsed by the court in *Ex Parte Minister of Safety and Security: In Re S v Walters*⁶⁴⁸ meaning that the Court first looks whether there has been a limitation of a right, such as the right to life, and then, secondly, considers whether there are justifiable reasons or grounds in terms of which the right to life can be limited. Even in this enquiry, regardless of whatever approach one labels the court as having adopted, it is clear

⁶⁴⁷ As opposed to specific limitation of rights such as, for example, s 49(2) of the Criminal Procedure Act 51 of 1977 as amended, which sets out the legal basis for justifiable homicide permitting a person to take the life of another person but only in circumstances where it is necessary, reasonable and no other alternative(s) were available. Another specific limitation of rights is found in s 6(2) of the EEA, the relevance of which is discussed below. A further example of a specific limitation of rights is s 31(2) of the Bill of Rights.

⁶⁴⁸ 2002 4 SA 613 (CC).

that the court is considering a balance of interests. On the one hand it is the right to life which must be protected. On the other hand, it is the right to defend oneself or one's property and using such force that is reasonable and justified in circumstances where it may even be necessary to take the life of another individual when there is no other option available to the victim or complainant.

De Vos has pointed out, however, that there has not been a slavish approach on the part of our courts to follow a two-stage approach.⁶⁴⁹ Reference is made to the decision of *Christian Education South Africa v Minister of Education*⁶⁵⁰ in which the court stated the following:

I shall adopt the approach most favourable to the appellant and assume without deciding that appellant's religious rights under sections 15 and 31(1) are both in issue. I shall also assume, again without deciding, that corporal punishment as practised by the appellant's members is not "inconsistent with any provision of the Bill of Rights" as contemplated by section 31(2).⁶⁵¹

Even where a court merely assumes a right is in issue, without deciding or making a firm finding in this regard, it is significant to note that account is still taken, albeit notionally and in a somewhat less formal sense, of the "two-stage" enquiry approach of the substantive right. This has to be factored into the analysis since it is an essential feature of deciding the extent to which, if any, the exercise of such right should be limited and, if so, whether the limitation is reasonable and justified.

Assessing whether a fundamental right, such as freedom of religion (on the part of the employee) should be limited may, with reference to the requirements of section 36, appear to be a mere formal analysis. However, divergent conflicting interests flow from a potential limitation, such as the nature of the right to be limited, the extent, if at all, to which it should be limited, the purpose to be served by its limitation and the interest advanced by the limitation. Whether the limitation should be permitted is a matter for interpretation relating to the content and scope of the relevant right and any conflicting interests. It can only be determined with reference

⁶⁴⁹ De Vos and Freedman *South African Constitutional Law in Context* 355.

⁶⁵⁰ 1999 2 SA 83 (CC).

⁶⁵¹ Para 27. Also see the matter of *Veldman v DPP* (WLD) 2007 3 SA 210 (CC).

to the facts of a particular case. Limiting rights in accordance with what is considered to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom calls for an analysis of fundamentally conflicting rights and essentially how to balance such rights taking into account a variety of factors. The conceptual balance involved in the determination of how to give more effect to one right by curtailing the full exercise of another right calls for an exercise in proportionality or a balance of interests that must be determined subject to a standard of reasonableness. In other words, which interest in question outweighs another competing interest or interests to the extent that it is deserving of greater protection? Whether these are actually questions which our judges should be called upon to adjudicate given that they call for decision making which is value laden with decisions as to what should be permitted in terms of the exercise of fundamental rights has been the focus of extensive academic debate.⁶⁵²

Proportionality exercises, as interpreted by our courts in many instances, manifest in the realm of public law due to potential infringements made by the exercise of public powers on the part of organs of state on the fundamental rights of individuals. When exercises of proportionality require a judge to enter into the terrain of policy, the objection to judicial engagement is understandable. This is on account of deference⁶⁵³ to the elected executive and legislative branches of government which the judiciary is required to show.⁶⁵⁴

However, when courts are called upon to consider a balance of competing rights and interests and a basis for finding that one interest warrants greater protection than another due to the nature of the right, circumstances and less restrictive means

⁶⁵² See Petersen "Proportionality and the incommensurability challenge – some lessons from the South African Constitutional Court" 1-24; De Vos and Freedman *South African Constitutional Law in Context* 371-374; Klatt and Meister *The Constitutional Structure of Proportionality* 11; Rautenbach 2001 *TSAR* 617-641; Currie and De Waal *The Bill of Rights Handbook* 163 and the authorities referred to at fn 59; Rautenbach 2014 *PER* 2236-2243; Woolman 1997 *SAJHR* 114-116.

⁶⁵³ Judicial deference has been defined as the duty the court "owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case." See *National Coalition for Gay and Lesbian Equality* para 66.

⁶⁵⁴ See Mojapelo 2013 *Advocate* 36-46; Dyzenhaus 2012 *RCS* 102-106; Moseneke *GeorgLJ* 764-765.

having to be adopted, it cannot make such evaluation in isolation. The decision to limit a right must be reasonable and justifiable with reference to all the factors listed in section 36. In order to arrive at an informed decision in this regard, the decision maker must take into account factors which are relevant to rationality, in other words, whether the result is rationally connected to the reason for the decision. In addition, there is a fundamental balancing or weighing of competing rights and interests at stake which must be objectively assessed. What are the advantages to be gained compared to the disadvantages to be suffered by favouring the one right as a result of limiting another right? In this sense proportionality, as pointed out by Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd*,⁶⁵⁵ is always an essential ingredient of reasonableness.⁶⁵⁶

Proportionality as a notionally flexible concept continues to play a role in South African constitutional jurisprudence relating to the general limitation of fundamental rights.⁶⁵⁷ The criticism against the role played by proportionality is not the notion of proportionality *per se*. It is argued that the factors which a court is enjoined to consider as set out in subparagraphs (a)-(e) of subsection 1 of section 36 constitute a "global singular enquiry"⁶⁵⁸ of factors to be taken into account in determining whether a right should be limited as well as the extent of the limitation. Such an approach differs from the so-called "sequential" approach set out in the *Oakes* case. The sequential approach tends to focus entirely on proportionality in the determination of a limitation of rights, whereas the "global singular enquiry" takes a host of factors into account which includes, but is not limited to a sequential analysis on proportionality. The "global singular enquiry" supports the reasoning called for by Kentridge AJ in the *Zuma* case. Irrespective of the narrative associated with proportionality and to what extent it should or should not be applicable in a general limitation of rights exercise from the cases constituting the jurisprudence on religious

⁶⁵⁵ 2006 2 SA 311 (CC).

⁶⁵⁶ Para 637.

⁶⁵⁷ See Woolman and Botha "Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices" 155; Iles 2007 *SAJHR* 68-92.

⁶⁵⁸ See De Vos and Freedman *South African Constitutional Law in Context* 363; Fergus and Rycroft "Refining review" 192-194.

discrimination in the workplace in South Africa,⁶⁵⁹ it will become more apparent that proportionality is crucial to a determination of limiting a fundamental right in favour of the exercise of another interest.

Moreover, from specific legislative provisions aimed at providing defences to unfair discrimination claims,⁶⁶⁰ it is clear how proportionality has been factored into our jurisprudence in an attempt to address a conflict of interests in the workplace, namely the potential exercise of a right to religious freedom on the part of the employee and the claim by the employer that such right needs to be limited on the basis of an IROJ. This serves as a further example and a clear instance of proportionality where both employee and employer interests are sought to be optimally balanced in a way that is least detrimental for either party. The general limitation of rights clause should also be seen in the context of the way in which the right to religious freedom is and can be limited in terms of specific defences afforded employers by national legislation. An example is a workplace rule which limits an employee's religious freedom which can be held to be permissible on grounds that it is justifiable. Whilst it is a statutory defence, it is actually a specific limitation on the employee's religious freedom. It can even be argued that the basis upon which the EEA⁶⁶¹ is premised⁶⁶² serves as an example of addressing general equality and specifically religious discrimination in the workplace in a way that gives effect to the balancing of competing interests in a rational and justifiable manner. An additional factor that should be taken into account when considering the extent to which a limitation of a religious freedom in the workplace may be justified is the extent to which the employer was in the first place in fact aware of the religious belief in the part of the employee. Awareness on the part of the employer is important for assessing the extent to which reasonable steps were, or ought to have been, taken, in seeking ways to address accommodation of the religious belief with reference to

⁶⁵⁹ Examined in Chapter 5.

⁶⁶⁰ See subparagraph 3.2.3 below.

⁶⁶¹ 55 of 1998.

⁶⁶² As dealt with in subparagraph 3.4.3 below.

the IROJ.⁶⁶³ As will appear from an analysis of South African jurisprudence⁶⁶⁴ the manner in which courts adjudicate such defences in ultimately deciding whether the discrimination is fair or unfair is with reference to various factors, including, but not limited to, balancing and weighing the respective competing rights of the parties in the employment relationship. The conceptual difficulties and challenges that may arise from proportionality should be used effectively in a way that informs the notion of substantive equality.⁶⁶⁵

3.2.4 Equality and the differentiation between direct and indirect discrimination

The prohibition against unfair discrimination, either "directly" or "indirectly", in section 9 is aimed at various grounds listed under subsection (3).⁶⁶⁶ Furthermore, in terms of subsection (5), discrimination on a ground listed in subsection (3) is deemed unfair unless it is established that the discrimination is fair.⁶⁶⁷ Hence, once discrimination is shown to have taken place on a listed ground, the unfairness thereof is presumed until the contrary is proved by the respondent.

A reading of the grounds that are listed makes it clear that the drafters intended covering, as expansively as possible, bases upon which discrimination can take place. However, the significance of the emphasis on "direct" or "indirect" discrimination is to throw the ambit of protection against discrimination wider. Discrimination in many instances manifests itself in a direct manner. Religious discrimination in the workplace on the part of the employer is unlikely to manifest itself on grounds that are expressly hostile. For example, an employer may stereotype all members of the Muslim faith as ISIS members or as sympathisers of religious fundamentalism and even terrorism. Without manifesting his prejudice in this regard, he nevertheless gives expression thereto when interviewing Muslim job applicants by stating another reason, e.g. that the applicants lack relevant experience required for the job.

⁶⁶³ See further discussion in this regard in subparagraphs 5.4.4 and 5.4.5 below.

⁶⁶⁴ Expanded on in Chapter 5.

⁶⁶⁵ See Fagan 1998 *SAJHR* 242-247; Fredman 2005 *SAJHR* 174-180; Kok 2008 *SAJHR* 169-170.

⁶⁶⁶ Namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁶⁶⁷ Section 9 of the Constitution.

Less obvious and more subtle forms of discrimination occur where differentiation is *prima facie* non-discriminatory or neutral but the effect or its consequence is aimed at a specific category of persons. An example would be an employer who advertises a position in the company but only for employees with specific qualifications,⁶⁶⁸ which qualifications are not required for the performance of the job. It may even arise without the employer being aware thereof⁶⁶⁹ on account of the corporate culture of the organisation that has evolved over a period of time which establishes itself as "qualities required for particular positions"⁶⁷⁰ when in fact this is not the case. Alternatively, an employer may never be alerted to and/or be made aware of an employee's religious beliefs and his or her need to express these in a particular manner so that the employee finds him- or herself limited and restricted due to the IROJ.

This latter form of discrimination is known as indirect discrimination.⁶⁷¹ It is therefore a less obvious basis of discriminating against someone given that on the face of it the discrimination appears to be neutral or benign, whereas the effect of the discrimination is in fact unfair.⁶⁷² In legal terminology, we have come to conceive of indirect discrimination as meaning that it is a neutral criterion or action which "has a disproportionate impact upon a particular group of employees that is definable in terms of a [listed or unlisted] ground of discrimination" and "cannot be justified in

⁶⁶⁸ For further reading see the US case of *Griggs v Duke Power Co* 401 US 424 (1971) in which black employees challenged a requirement by the employer in respect of promotion that required all applicants to have high school diplomas. Since the majority of black employees did not have the required qualification it was deemed to constitute an indirect discriminatory practice against them. See Currie and De Waal *The Bill of Rights Handbook* 238.

⁶⁶⁹ The significance of lack of knowledge on the part of the employer is dealt with in subparagraphs 3.4.3 and 5.4.6 below.

⁶⁷⁰ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 27.

⁶⁷¹ Which has also been referred to as disparate discrimination. The term is more closely associated with American jurisprudence given its first usage in the US Supreme Court matter of *International Brotherhood of Teamsters v United States* 431 US 324 (1977) 335 fn 15. See Thompson and Benjamin *South African Labour Law* Vol II CC 1-32 fn 206.

⁶⁷² A further example of indirect or disparate discrimination would be where the first impression is that the employer is treating all the workers equally by providing a food canteen at the workplace. However, insofar as the canteen fails to cater for halaal food to accommodate Muslim workers the end result is that such failure has the potential to indirectly discriminate against such workers. See *Mvumvu v Minister of Transport* 2011 2 SA 473 (CC) paras 30-33.

terms of objective employment-related requirements".⁶⁷³ Whether discrimination has taken place on a direct or indirect basis, the onus is on the applicant to prove, on a balance of probabilities, that differentiation took place⁶⁷⁴ on a listed ground.⁶⁷⁵ The evidential onus of proving⁶⁷⁶ the fairness of the discrimination,⁶⁷⁷ which may relate to the IROJ⁶⁷⁸ or that it did not take place as alleged⁶⁷⁹ or is otherwise justifiable,⁶⁸⁰ alternatively any other factor,⁶⁸¹ rests on the employer as respondent.

By looking at whether unfair discrimination has taken place albeit on what appears to be neutral or *prima facie* non-discriminatory grounds, the rationale of indirect discrimination underscores what has been previously stated about the importance of addressing substantive equality.⁶⁸² This much appears from the judgment on behalf of the majority of the court in *City Council of Pretoria v Walker*,⁶⁸³ where the following is stated:

The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that ... it constituted discrimination, albeit indirect, on the grounds of race.⁶⁸⁴

Various cases dealing with equality disputes alleging unfair discrimination have been adjudicated, albeit with dissenting views, on the basis of indirect discrimination.⁶⁸⁵

⁶⁷³ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 666. Also see Currie and De Waal *The Bill of Rights Handbook* 260.

⁶⁷⁴ See *Pillay v Krishna* 1946 AD 946 at 951-952; *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC) 289 G-H 292, 293 A; *Lukie v Rural Alliance CC t/a Rural Development Specialist* 2004 8 BLLR 769 (LC).

⁶⁷⁵ See subparagraph 3.4.3 below where unlisted grounds in addition to grounds provided by section 11(2) of the EEA are discussed.

⁶⁷⁶ On a balance of probabilities.

⁶⁷⁷ Section 9(5) of the Constitution.

⁶⁷⁸ Section 187(2)(a) of the LRA or section 6(2)(b) of the EEA.

⁶⁷⁹ Section 11(1)(a) of the EEA.

⁶⁸⁰ Section 11(1)(b) of the EEA.

⁶⁸¹ In terms of section 14(3), as read with ss (2) and (1) of PEPUDA.

⁶⁸² See discussion in subparagraph 3.2.1 above.

⁶⁸³ 1998 2 SA 363 (CC).

⁶⁸⁴ Para 105.

⁶⁸⁵ See for example *Democratic Party v Minister of Home Affairs* 1999 3 SA 254 (CC); *S v Jordan* 2002 6 SA 642 (CC); *Association of Professional Teachers v Minister of Education* 1995 16 ILJ 1048 (LC) 1048 at 1083; *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC) 292; *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) para 32; *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) para 29;

Unfair discrimination on grounds of religious discrimination is often included under the grounds of direct discrimination due to the fact that its manifestation can be more obvious and apparent; however, as stated above, from workplace reported cases it manifests itself as a form of indirect discrimination. The rationale for providing that discrimination is taken to be unfair,⁶⁸⁶ whether it is direct or indirect, is that any conduct which impacts on or impairs the fundamental human right and dignity of another human being in a democratic society is regarded as being unjust and unacceptable.⁶⁸⁷ We have been sensitised to the notion that we are all subjects of a diverse pluralistic society with a heritage of past injustices based on intolerance of differences and that we must now embrace our differences. It is understandable that general expressions of intolerance toward others on the grounds listed in subsection (3) are unacceptable. These grounds can also be referred to as explicit or obvious grounds upon which a person has been discrimination against.⁶⁸⁸ To expect such person to discharge an onus of proving that the discrimination is unfair, would be inequitable. Put differently, the *prima facie* nature of the discrimination is of the type which detracts from the inherent fibre of human dignity, and is also a basis upon which persons who fall into such categories have in the past been the object of oppression, marginalisation or exclusion from our society. In this regard the following *obiter* statement from *Harksen v Lane*⁶⁸⁹ is relevant:

What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalize and often oppress persons who have had, or who have been associated with, these attributes or characteristics.⁶⁹⁰

The description of unfair discrimination as either direct or indirect discrimination casts the net broad enough to essentially facilitate a claim in respect of unfair

POPCRU v Department of Correctional Services 2010 10 BLLR 1067 (LC); *Department of Correctional Services v POPCRU* 2011 32 ILJ 2629 (LAC).

⁶⁸⁶ In terms of s 9(5).

⁶⁸⁷ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 19-27, 28, 117-121; *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) paras 25-27.

⁶⁸⁸ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 665.

⁶⁸⁹ 1998 1 SA 300 (CC).

⁶⁹⁰ Para 49.

discrimination – whether the act is express or seemingly neutral, the consequences remain the same for the complainant. They detract from the right to equal protection and impair human dignity. It must be noted that discrimination on one any of the grounds listed in subsection (3) is unfair unless it is established by the defendant⁶⁹¹ that the discrimination is fair.⁶⁹²

Religious freedom, and the expression thereof as a fundamental right, is protected not only as a constitutional guarantee but as a normative concept within a culture of justification as demanded by transformative constitutionalism.⁶⁹³ In other words, any interference with a fundamental right can only be permitted if it is justified. The right to fair labour practices under section 23 of the Constitution is also a fundamental right enjoyed by employee and employer alike. Similarly, they are both entitled to protection afforded under the equality of rights provisions of section 9 of the Constitution. In spite of the aforesaid rights, the imbalance of power characteristic of most employment relationships continues to play itself out in most workplaces.⁶⁹⁴ Serious problems may arising from this imbalance of power. Such imbalance of power is compounded when the expression of freedom of religion on the part of an employee conflicts with the IROJ on the part of the employer. Conversely, an organisation seeking to protect its religious interests under section 31 of the Constitution may be faced with a claim of unfair discrimination when it refuses to employ a job applicant. However, its reasons may relate to the IROJ.⁶⁹⁵ In most workplace-related cases, discrimination on the part of the employer, alternatively the religious association, is sought to be justified for reasons related to the IROJ. But

⁶⁹¹ On a balance of probabilities.

⁶⁹² A claim of unfair discrimination could be based on direct or indirect discrimination which would be premised on any of the grounds listed under subsection (3). Effectively it matters not whether the discrimination takes place on a direct or indirect basis. Whether or not the ground or basis upon which the discrimination took place is listed or unlisted has an impact on the evidence required to be discharged to show that the discrimination was not unfair. Once discrimination is shown to have taken place on one of the listed grounds, the employer or respondent is burdened with having to establish that the discrimination is fair. Onus of proof issues in relation to national equity legislation, namely the EEA; PEPUA and LRA, are dealt with in further detail under subparagraphs 3.4.3, 3.4.4 and 3.4.5 below.

⁶⁹³ See discussion in subparagraph 2.9.2 above.

⁶⁹⁴ See subparagraph 2.9.4 above, in addition to subparagraphs 3.4.3 and 5.4 below.

⁶⁹⁵ See subparagraphs 3.4.3 and 3.4.5 below.

depending on the circumstances, an employer may even claim that the manifestation of religious freedom on the part of the employee must be restricted due to the operational requirements of the business.⁶⁹⁶ On the other hand, an employer may seek to discriminate against non-religious job applicants or seek to employee applicants of a particular religion due to the operational requirements of the business.⁶⁹⁷

The above scenario demonstrates the reality that the exercise of fundamental rights and freedoms may, in certain circumstances, be subject to limitations.⁶⁹⁸ Protecting the right of one person by limiting the right of another is fraught with difficulties and complexities.⁶⁹⁹ An effective, proper and fair balancing of fundamental rights which are both competing for protection in the workplace should ideally be resolved between the interested parties themselves. However, in the absence of this being realised, there is a legislative and constitutional framework in place that seeks to address this tension.⁷⁰⁰

3.3 Interpretive sources

3.3.1 Introduction

The purpose of this paragraph is to look at the significant role played by our Constitution as an interpretive instrument in relation to the development of our law. By this is meant the following: firstly, as the supreme law of our country, what does the Constitution provide regarding the interpretation of the Bill of Rights and all other sources constituting the corpus of law (referred to hereafter as law sources) Secondly, what role is played by our courts⁷⁰¹ regarding their interpretation of law

⁶⁹⁶ See subparagraphs 5.4.5 and 5.4.6 below.

⁶⁹⁷ See discussion in subparagraphs 2.3.1 and 2.3.2 above.

⁶⁹⁸ See subparagraph 3.2.3 above.

⁶⁹⁹ See Foster 2016 *OxJLR* 3, 42-44.

⁷⁰⁰ See discussions in paragraphs 3.3 and 3.4 below.

⁷⁰¹ This study has focused on the jurisprudence of the Constitutional Court, with a few exceptions where decisions of the Supreme Court of Appeal or Labour Appeal Court are analysed. The ambit of this study has been confined to Constitutional Court decisions on equality jurisprudence and religious discrimination in the South African workplace in particular (as appears more fully in Chapter 5) since this is the extent of the focus of the study.

sources? This latter analysis will focus on general principles dealing with interpretation, keeping in mind that specific cases dealing with religious unfair discrimination in the workplace and the relevant tests applied in their adjudication is focused upon below. Moreover, the conceptual notion of equality, as set out above is fraught with complexities. In common parlance there is a general sense of what is considered to be fair or unfair, but in terms of legal jurisprudence, equality is a notion complicated by the fact that it is charged with issues of rationality, reasonableness, justifiability and proportionality. This all conduces to making the interpretation of equality as a constitutional imperative difficult but highly relevant.⁷⁰²

3.3.2 Constitutional imperatives

The Constitution provides as follows regarding interpretation:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) Must consider international law; and
 - (c) May consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.⁷⁰³

The verb "interpret" means to decipher; decode; define; elucidate; explain; expound; solve; unfold; unravel; construe; render; translate or clarify.⁷⁰⁴ The right to freedom of religion⁷⁰⁵ is expressly stated and granted to everyone. The exercise of such right, like all rights in the Bill of Rights, is subject to the general limitation of rights clause.

⁷⁰² See Alexy 2003 *RJur* 131-135; Ackermann 2006 *SAJHR* 599-560; Baer 2009 *UTorLJ* 418-420; McAllister 2003 *NJCL* 36; Hepple *Equality The New Legal Framework* 12-20; Albertyn and Goldblatt 1998 *SAJHR* 250-253.

⁷⁰³ Section 39(1)(a)-(c), (2) and (3).

⁷⁰⁴ See *English Thesaurus* 2001 190.

⁷⁰⁵ As an individual right under s 15(1) or an associational right under s 31(1).

The aforesaid right is guaranteed in the normative sense of the word. This means that, on a clear reading of the provision of the Bill of Rights the right is what it purports to be as understood from its ordinary grammatical common-sense meaning of the word as contained in the text of the Constitution. However, from the mere diverse meanings that can be attached to the word "religion"⁷⁰⁶ the explanation, elucidation or clarification of what otherwise appears to be a simple word gives rise to a multiplicity of divergent meanings and opinions. This raises potential complexities, as evidenced by extensive scholarly and judicial debate on the subject matter of what is meant by the term "religion".⁷⁰⁷

Section 39(1)(a) refers to the fact that when interpreting a right it must be done in a manner which promotes the values underlying an open and democratic society based on human dignity, equality and freedom. All rights as guaranteed in terms of the Bill of Rights have inherent values. The right to equality and freedom of religion is charged with the value of self-worth as a human being which can also translate into dignity. Human dignity, although being a constituent dimension of fundamental human rights, is also a substantive right.⁷⁰⁸ Values, however, although important, are not expressly articulated as self-contained or substantive matters in the Bill of Rights. This comes as no surprise given that a value is the *raison d'être* of the Bill of Rights. The rationale of the Bill of Rights (and the rights therein contained) and interpreting such rights is to give expression to the hopes and aspirations of South Africans that our society will be transformed to a more egalitarian society in which all differences can be accommodated, all acts (whether public or private) must be justified and where social justice is realised.⁷⁰⁹

⁷⁰⁶ See subparagraphs 2.2.1 to 2.2.3 above.

⁷⁰⁷ See subparagraphs 2.2.3 to 2.2.8 above. Also see Dworkin *Religion Without God* 6-7.

⁷⁰⁸ In terms of s 10 of the Constitution.

⁷⁰⁹ As discussed in subparagraphs 2.9.1 to 2.9.5 above.

3.3.3 Interpreting the text of the Constitution

Crucial to the interpretation of the Bill of Rights is the judiciary in whom is vested the necessary judicial authority.⁷¹⁰ Our courts are independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice.⁷¹¹ The law unto which courts are subject, and even the Constitutional Court as the supreme guardian of the Constitution, is the rule of law in particular which requires necessary judicial deference from the courts in relation to matters of policy. Our courts are ever-cautious not to interfere unduly in matters in which the electorate have given the other two arms of government, namely the executive and legislature, a mandate to formulate policies on their behalf.⁷¹²

With the aim of clarifying rights and obligations under the Constitution, much can be gained from a mere examination of the text of the Constitution. The aim is to gather as much information from what the text permits as is possible whilst also having regard to the overall purpose sought to be achieved by the Constitution as a whole. The importance of value being placed on the text appears in the first judgment by the Constitutional Court in *S v Zuma*⁷¹³ in which Kentridge AJ, writing for the majority, observed the following:

Whilst we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a *written instrument*. I am well aware of the fallacy of supposing that *general language* must have a single "objective meaning". Nor is it easy to avoid the influence of one's personal intellectual preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but "divination" ... I

⁷¹⁰ Section 165(1) of the Constitution.

⁷¹¹ Section 165(2) of the Constitution. See Howie 2003 *SALJ* 680-682; Lewis *Business Day*, Maduna 2003 *SALJ* 664-665; Mahomed 1998 *SALJ* 108-110; Christiansen 2010 *JGR&J* 580; Moseneke 2015 <http://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/>.

⁷¹² See Motala 1995 *SALJ* 505-508; Moerane 2003 *SALJ* 710-712; Raine 2013 *NELR* 99-103; Davis 1994 *SAJHR* 107-110; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 178; *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC) para 137.

⁷¹³ 1995 2 SA 642 (CC).

would say that a constitution embodying fundamental principles should as far as its language permits be given a *broad construction*.⁷¹⁴

References to "written instrument" and "general language" tend to bring to mind a reference to the text of the document in question, hence the reference to a textual interpretation. On the other hand, a "broad construction" would be consistent with construing something in a manner that is not narrow or parsimonious, but rather wider so as to support a greater or more expansive understanding of a concept.⁷¹⁵ It is in this sense that the term purposive interpretation should be understood and accepted. Both these concepts, namely textual and purposeful interpretation, were referred to in terms of how religion has been interpreted. Moreover, although the SACCRF has not as yet been referred to by any court, it is submitted that the terms of the SACRRF would, if subject to interpretation, benefit greatly by a similar approach being applied thereto.⁷¹⁶

The value accorded to purposeful interpretation of the Bill of Rights was emphasised in *S v Makwanyane*⁷¹⁷ in the following *dictum*:

... whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] "generous" and "purposive" and "give ... expression to the underlying values of the Constitution".⁷¹⁸

Interpreting according to the values of the Constitution would, in effect, be giving effect to the will of the people of South Africa whose diverse interests are represented, articulated and captured by the fundamental provisions. This underscores the so-called value-laden approach to interpretation advocated by Dworkin. This is an approach which is "designed to discover the fundamental principles on which the character of society is predicated".⁷¹⁹ Whilst a textual interpretation is a literal objective means of ascertaining the intention of drafters of the Bill of Rights by analysing the language, it must be borne in mind that the words

⁷¹⁴ Para 17. Emphasis added.

⁷¹⁵ Cf Coniglio 2009 *BostU/LJ* 511-515.

⁷¹⁶ See discussion in subparagraphs 2.2.2, 2.2.3, 2.3.2 and 3.3.1 above, in addition to 5.4.1 and 5.4.3 below.

⁷¹⁷ 1995 3 SA 391 (CC).

⁷¹⁸ Para 9.

⁷¹⁹ See Dworkin *Life's Dominion* referred to by Davis 1994 *SAJHR* 107.

of any particular text will remain merely words unless interpreted within a particular context. This context is the constitutional mandate which calls for a value judgment that seeks to advance in the most optimal manner the values underlying a constitutional democracy. The interpretation must be conducive to these values inasmuch they must not only support the democratic ideal, but must seek also to advance interests in a manner that will "build a united and democratic South Africa".⁷²⁰

Purposeful interpretation is complemented by generous interpretation which is in favour of advancing rather than limiting rights. In *S v Mhlungu*⁷²¹ the Constitutional Court stated the following:

A constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposefully be interpreted so as to avoid [what Lord Wilberforce called] "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.⁷²²

If rights contained in the Bill of Rights were restrictively interpreted it would impede and curtail affording full protection of the interest sought to be advanced as contained or expressed by the specific right. Were the right to freedom of religion under section 15(1) to be interpreted as only meaning something that can be objectively determined by a court of law and which, to qualify for protection under the Constitution, must make rational and logical sense, such interpretation would effectively exclude from the right to freedom of religion many persons whose beliefs are often regarded as being irrational, far-fetched and even illogical. An example is the wearing of nose rings by followers of the Hindu faith as central to their subjective religious beliefs which may seem illogical to an adjudicating court official.

⁷²⁰ These are part of the aspirations taken from the Preamble to the Constitution, but also form an integral component of transformative constitutionalism; see Cornell and Friedman 2011 *Mal LJ* 9; Fagan 1995 *SAJHR* 546-548; Cohen 2014 *NWJIHR* 135; Steinmann 2016 *PER* 17-19.

⁷²¹ 1995 3 SA 391 (CC). Also see Vrancken "Application, interpretation and limitation of the Bill of Rights" 57.

⁷²² Para 8.

When called upon to interpret religious freedom, it is understood that what is brought to play in ascertaining clarity on the full meaning of a particular right and or how to balance conflicting rights and interests is the context of the right within the particular facts and circumstances of the case at hand. Academics may well be divided on the precise status and nature of constitutional interpretation our Constitutional Court has adopted. Cockrell has expressed the view of there being a lack of "substance" underscored by "deep conflicting substantive reasons" given in respect of decisions, hence his argument or expression of a "rainbow jurisprudence".⁷²³ No precise constitutional methods of interpretation have been laid down.⁷²⁴ Du Plessis argues that there has been a lack of consistency of reasons advanced in this regard. Klaaren also points to a lack of consistency in terms of interpretive approaches.⁷²⁵ Our law reports are testament to the fact that decisions are based on real-life experiences and not academic theories put forward before the court as a stated case for adjudication. The method by which a right has been interpreted, namely textual, purposeful or generous, may seldom be stated. However, when viewing the judgment of the case in its entirety as well as the reasons given in support for the finding, it becomes often clear that what the court has attempted to do is give expression to the values infusing the Constitution. In particular, values resonating with freedom, equality and human dignity are given effect to. More importantly, by giving effect to such values these decisions do go far as a basis upon which transformative justice may be said to gain traction as an imperative for the necessary change of our society in its aspiration toward the achievement of social justice.⁷²⁶

3.3.4 Considering international law

When interpreting the Bill of Rights a court is obliged to consider international law.⁷²⁷ This provision must be read in conjunction with Chapter 14 of the Constitution

⁷²³ See Cockrell 1996 *SAJHR* 11, 37.

⁷²⁴ See Du Plessis 1996 *SAJHR* 226.

⁷²⁵ See Klaaren 1997 *SAJHR* 3 5.

⁷²⁶ As referred to in subparagraphs 2.9.2 to 2.9.5 above.

⁷²⁷ The peremptory word "must" as opposed to the discretionary term "may" is used in s 39(1)(b).

regulating international law,⁷²⁸ the most important provisions of which are contained in section 232 which requires the following:

Customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament.

In addition to this is section 233 which provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The fact that South Africa is party to various international legal agreements⁷²⁹ gives impetus to the recognition accorded to the nature and status of international agreements as binding law on the Republic of South Africa. As an actor and role-player on the stage of international relations this is also significant as a means of enhancing the image and global status of South Africa. This has implications in respect of the increasing phenomenon of globalisation in terms of labour relations in general and religious discrimination in particular.⁷³⁰

Moreover, the relevance of international law being used as a means of assisting our courts in interpreting the Bill of Rights and legislation⁷³¹ is apparent from the *dicta* of the following cases. The Constitutional Court in *Makwanyane* observed the following:

International agreements and customary international law provide a framework within which ... [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights ... the European court of Human Rights ... [and] the International Labour Organization may provide guidance as to the correct interpretation of particular provisions.⁷³²

⁷²⁸ Sections 231-233.

⁷²⁹ The term is used generically to refer to all types of legal instruments including, but not limited, to the ILO conventions and the UDHR.

⁷³⁰ See Fernandez 2013 *IJRF* 170-171; Arfat 2013 *AJHSS* 20-21; Langille 2005 *EJIL* 411-415.

⁷³¹ This is considered in greater detail below. Also see *Equity Aviation Services (Pty) Ltd v SATAWU* 2009 30 *ILJ* 197 (LAC) paras 39-42; *Bidvest Food Services (Pty) Ltd v NUMSA* 2015 36 *ILJ* (LC) para 14; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 19-20.

⁷³² Per Chaskalson P para 35.

In *NUMSA v Bader Bop (Pty) Ltd*⁷³³ the Constitutional Court held the following:

.... in interpreting section 23 of the Constitution an important source of international law will be the conventions and recommendations of the ILO.⁷³⁴

In the context of adjudicating religious discrimination arising in the workplace the most apposite international law to take into consideration would be the instruments of the ILO standards as set by their conventions. In this regard, mention has already been made of ILO Convention 111.⁷³⁵ Moreover, it is important to note that the Committee of Experts on the Application of Conventions and Recommendations has called for a broad and purposive interpretation of the definition of discrimination as contained in Articles 1(a) and (b) of ILO Convention 111 that is conducive to the development of the concept of indirect discrimination.⁷³⁶ To this end South African legislation is compliant.⁷³⁷ Other relevant international instruments are:

- the DEFIRB;⁷³⁸
- the ECHR;⁷³⁹
- the UDHR;⁷⁴⁰ and

⁷³³ 2003 2 BLLR 103 (CC).

⁷³⁴ At 117E-F.

⁷³⁵ See discussion in subparagraph 2.5.3 above. See also Hlongwane 2007 *LD&D*; Currie and De Waal *The Bill of Rights Handbook* 574-575

⁷³⁶ See Fredman "Anti-discrimination laws and work in the developing world: a thematic overview" 23. In the most recent Report of the Committee of Experts on the Application of Conventions and Recommendations (International Labour Organization 2016 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_448720.pdf 346) no observations are made relevant to any steps to be taken by government regarding the implementation of any policy or legislation addressing religious discrimination in South Africa.

⁷³⁷ See discussion in subparagraph 3.2.4 above.

⁷³⁸ See discussion in subparagraph 2.2.4 above.

⁷³⁹ See discussion in subparagraph 2.2.7 above. For further reading on the impact and relevance of the ECHR see International Labour Organization 2011 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_166583.pdf 40-42.

⁷⁴⁰ See discussion in subparagraph 2.2.4 above. Article 7 of the UDHR provides as follows: "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 incitement to such discrimination."

- the ILO Declaration on Social Justice for a Fair Globalization (Social Justice Declaration).⁷⁴¹

ILO Convention 111 plays a crucial role in serving as an interpretive aid⁷⁴² to the EEA.⁷⁴³ Of particular interest and relevance is the Social Justice Declaration. In furtherance of its "decent work" mandate, the Social Justice Declaration is premised on employment promotion, social protection, social dialogue and fundamental rights. Whilst not jettisoning the relevance of employment promotion and social protection to South African labour law in general,⁷⁴⁴ it is the two latter themes which pertinently mirror concerns central to religious discrimination in the South African workplace. Firstly, the importance of religious freedom as well as the right to fair labour practices should be recognised. This means that due account must be taken of the employer's interests concerning the business, such as the IROJ. Secondly, attempting to achieve an optimal balance where conflicts of interests arise in the workplace on account of a clash of these rights. Both employer and employee are important role-players in our societal structure. In this context, and against the backdrop of the imperative of *ubuntu*,⁷⁴⁵ constructive dialogue between both parties as a means of resolving workplace conflict in relation to religious disputes is imperative. This will not only facilitate tolerance and greater understanding but also obviate the need to resort to formal dispute resolution mechanisms. In so doing both parties can in their own way contribute to the spirit of transformative constitutionalism.

On the other hand, where social dialogue between employer and employee cannot reasonably be anticipated to take place,⁷⁴⁶ the Social Justice Declaration has an even greater role to play insofar as our courts should take account of such an instrument as a standard of international law valuable as a point of reference in interpreting the Bill of Rights and legislation in general and in particular in the realisation of social

⁷⁴¹ Adopted 10 June 2008.

⁷⁴² See discussion in subparagraph 3.4.3 below.

⁷⁴³ 55 of 1998.

⁷⁴⁴ This is acknowledged, but not focused on since it falls outside the scope of this study.

⁷⁴⁵ In this regard see discussion on normative understanding of *ubuntu* also taking into account the consequences of the *City of Tshwane* judgement discussed in subparagraph 2.9.3 above.

⁷⁴⁶ See subparagraphs 2.9.3 and 2.9.4 above.

justice in terms of the interests that need to be fulfilled under our constitutional dispensation. This is better illustrated and expanded on later in this study.⁷⁴⁷

3.4 The legislative framework in respect of equality

3.4.1 Introduction

As explained at the outset of this chapter, South African labour law has in place a highly regulated legislative framework. This regulation has been the subject matter of extensive criticism.⁷⁴⁸ Some reasons proffered against extensive regulation is the negative impact it has on industry. In certain respects it discourages employment incentives and compliance from small- to medium-sized enterprises. In other respects it increases the exposure of employers to costs in terms of compulsory dispute resolution procedures which can impact negatively and sometimes disastrously on business enterprise survival. On the other hand, in the light of South Africa's legacy of historical inequality there exists a need to address not only discrimination in the workplace but also to eradicate inequality and promote social justice. A demonstrable effort to activate this imperative is by our electorate mandating its representative legislature to enact laws that will realise the aspirations of all the people of South Africa. For such legislation to be relevant it must also contribute to the concept of transformative constitutionalism in its ability to realise social justice. Accordingly, the right to equal treatment, religious freedom and fair labour practices offered as guarantees in the Constitution must be given effect to through necessary national legislation. Such legislation must not only give effect to the aforementioned rights, but must do so in a manner that also gives effect to the underlying values and principles of the Bill of Rights in a democratic society based on human dignity, equality and freedom. As previously discussed, effect is given thereto, in addition to other sources, such as international law,⁷⁴⁹ for example ILO

⁷⁴⁷ In the study of South African jurisprudence on religious discrimination in the workplace in Chapter 5.

⁷⁴⁸ See Van Niekerk *et al Law@work* 3-4 and authority cited at fn 4.

⁷⁴⁹ Expanded on in Chapter 4.

Conventions and recommendations and foreign law, through the process of interpretation by our courts.

Before focusing on each specific legislative measure which gives effect to the relevant constitutional imperatives of equality in general and addresses religious discrimination in particular, some observations are necessary in respect of interpretation of legislation.

3.4.2 Interpretation of legislative provisions

Observations have been made in respect of a "textual", "purposive" and "generous" regarding the Bill of Rights.⁷⁵⁰ The Constitution is the supreme law of our country to which all national legislation is subject. We have also understood conceptually, that in order to give effect to the spirit and purport of the Bill of Rights, those who are vested with the authority to interpret the Bill of Rights and all legislation, namely the courts, must do so in a manner that gives effect to the underlying values upon which our democratic dispensation is based. In other words, the interpretation must be consistent with the recurring transformative constitutionalism leitmotif: seeking to change our society for the better; to transform it in order to attain social justice, and demand that the exercise of all power – whether by public or private entities – is justified. It follows that if all legislation is subject to the Constitution, legislation too is deserving of no less treatment in terms of interpretive constructs, as one would use in interpreting the Bill of Rights. One must always have regard to the intention of the legislature in interpreting a specific legislative provision. However, a further injunction is to interpret such intention also with reference to the Bill of Rights.

Whilst no singular approach to legislative interpretation can be earmarked as having established itself in our law as the precise model employed by our courts all the time in all cases, it is useful and helpful to observe what the Constitutional Court noted

⁷⁵⁰ See subparagraph 3.3.3 above.

regarding the approach to be adopted under the heading "proper interpretive approach" in *NUMSA v Intervolve (Pty) Ltd*,⁷⁵¹ where Nkabinde J stated:

While grammar and dictionary meanings are the primary tools for statutory interpretation, as opposed to being determinative tyrants, context bears great importance. This was underscored by Schreiner JA in *Jaga v Donges*,⁷⁵² a decision often quoted with approval by this Court:

"Certainly no less important than the oft repeated statement that words and expressions used in statutes must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "context", as used here, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpretation may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confirming a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."

This Court has given approval to an interpretive approach that, whilst paying due regard to the language that has been used, is "generous", and "purposive" and gives expression to the underlying values of the Constitution. As such it is important to have regard to the stated purpose of the LRA, in particular *the advancement of social justice and labour peace* in the workplace by fulfilling the primary objects of the Act ...⁷⁵³

The aforesaid *dictum* appropriately captures what is required of a judicial officer charged with interpreting a legislative provision. What is significant in the observation is the reference to the need for an interpretation which will advance the legislative purpose, namely social justice and labour peace in the workplace. These are two vital aspects informing the essence of transformative justice and particularly the need to address religious discrimination in the South African workplace in a manner conducive to maintaining the employment relationship, celebrating diversity

⁷⁵¹ 2015 2 BCLR 182 (CC).

⁷⁵² 1950 4 SA 653 (A).

⁷⁵³ Paras 163-164. Footnotes omitted. Emphasis added.

throughout our society and the workplace as its microcosm and thereby in its own small way advancing social justice.⁷⁵⁴

When using relevant legislation in pursuit of a religious discrimination claim, an applicant is making use of the legislative framework which has been created for the purpose of addressing the adequate resolution or adjudication of such dispute. The dispute is dealt with in accordance with dictates of the legislation. Such legislation is, however, interpreted subject to the imperatives of the Constitution. The obligation to interpret all legislation in a manner that is reasonable and consistent with international law as expressly provided for in the Constitution is underscored by the imperatives contained in the EEA, PEPUDA and the LRA to give effect to the international obligations of the Republic of South Africa as a member of internal bodies such as the ILO. The interpretation of legislation takes place in the context of such legislation being interpreted so as to give effect to the spirit, purport and objects of the Bill of Rights together with any obligations imposed upon the Republic of South Africa as a member state of the ILO. Understandably such an interpretive method encourages an application of the statutory provisions which is generous and purposive but also gives effect to the values of transformative constitutionalism as previously mentioned. It is purposive in the sense that the aim is to apply the legislation taking into account the underlying values and principles of the Bill of Rights and relevant ILO instruments. It is transformative in the sense that it advances our human rights system and in particular the imperative of social justice from a state of a culture of authority to a culture of justification where rights and obligations of interested persons are taken into account with reference to a constitutionally charged social and legal dispensation.

Having considered the approach generally adopted by our courts, and which will also be expanded on later in this study⁷⁵⁵ it is necessary to look at the specific legislative

⁷⁵⁴ In terms of ss 39(2) and 173. See Budlender 2005 *SALJ* 715; Fagan 2004 *AJur* 117; Langa 2006 *Stell LR* 351; Smit 2010 *TSAR* 8, especially authorities referred to at fn 45; *S v Makwanyane* 1995 3 SA 391 (CC) para 451; *Glenister v President of the RSA* 2011 3 SA 347 (CC) paras 189-190; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) paras 38 and 39; Labuschagne and Carstens 2014 *PER* 242-243; Udombana 2005 *AHRLJ* 52-56; Du Plessis 2009 *PER* 13-14.

frameworks regulating and addressing equality in the workplace as these provide the necessary statutory means by which religious unfair discrimination is currently addressed.

3.4.3 The Employment Equity Act

The EEA is considered to be the main statutory measure directed against discrimination in the South African workplace.⁷⁵⁶ The EEA commenced on 9 August 1999 and as noted by Van Niekerk *et al* it replaced what had until then been the only source of statutory law regulating the right to equality in the workplace, namely item 2(1)(a) of Schedule 7 to the LRA.⁷⁵⁷

Section 2 of the EEA expressly states that the purpose of the Act is "to achieve equity in the workplace" by:

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures ...

Section 3 of the EEA deals with the interpretation of the Act by providing the following:

This Act must be interpreted-

- (a) in compliance with *the Constitution*;
- (b) so as to give effect to *its purpose*;
- (c) taking into account *any relevant code of good practice* issued in terms of this Act or any other employment law; and
- (d) in compliance with the *international law obligations of the Republic*, in particular *those contained in the International Labour Organization Convention (111) concerning Discrimination in Respect of Employment and Occupation*.⁷⁵⁸

⁷⁵⁵ In Chapter 5.

⁷⁵⁶ See Van Niekerk *et al Law@work* 119.

⁷⁵⁷ Otherwise referred to as "residual unfair labour practices". See Van Niekerk *et al Law@work* 119; Du Toit and Potgieter *Unfair Discrimination in the Workplace* 11.

⁷⁵⁸ Emphasis added. With reference to "*relevant code of good practice*", there are currently five Codes of Good Practice namely: Preparation, Implementation and Monitoring of Employment

The purpose as expressly stated in the Act, namely to "achieve equity in the workplace" evokes the notional concept of a need, urgency or imperative to address a situation, namely within the workplace, on account of there being a state of inequality and even unfairness – a state of inequality that transcends the imbalance of power inherent and innate to the employment relationship. This imbalance of power may very well be a tension that will forever be infused in the employment relationship, but notions of decent work, good conscience, human dignity, freedom of association and expression all speak to the fact that a state of equity can exist and should exist despite the inherent power imbalance. This state of equity is then at the very least a manifestation of social justice. In this sense, the purpose of the Act supports the contention made earlier that there is an ongoing need and relevance in South African law for all types of issues of equality-related matters in the workplace to be addressed, in particular religious discrimination.

As far as the interpretive provision is concerned, it is clear that the Act must be interpreted in a manner in accordance with the Constitution but also giving effect to the purpose of the legislature. Whilst relevant codes (Codes of Good Practice) must be considered,⁷⁵⁹ with regard to international law it is significant how the Convention has been singled out as the instrument of the ILO to which reference must be had. This injunction has important consequences for the manner in which equality disputes should be adjudicated. As examined later in this study, it is an aspect in respect of which according to Du Toit our courts sometimes go astray in the suitable test to be applied in equality dispute adjudication.⁷⁶⁰

The prohibition of unfair discrimination is dealt with under Chapter II of the EEA under three separate sections. Section 5 deals with the elimination of unfair discrimination and provides as follows:

Equity Plans; Employment of People with Disabilities; Handling of Sexual Harassment Cases in the Workplace; The Integration of Employment Equity into Human Resource Policies and Practices; and HIV and AIDS and the World of Work.

⁷⁵⁹ See discussion in this paragraph below.

⁷⁶⁰ See Du Toit "The prohibition of unfair discrimination: applying s 3(d) of the Employment Equity Act 55 of 1998" 151-152.

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Section 6 deals with the prohibition of unfair discrimination as follows:

- (1) No person may unfairly discriminate, *directly or indirectly*, against an employee, in any employment policy or practice, on any one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, HIV status, conscience, belief, political opinion, culture, language and birth.⁷⁶¹
- (2) It is not unfair discrimination to-
 - (a) ...⁷⁶²
 - (b) Distinguish, exclude, or prefer any person on the basis of an inherent requirement of a job.

The burden of proof in respect of disputes under section 6(1) is contained in section 11⁷⁶³ which provides as follows:

- (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance, that such discrimination-
 - (a) did not take place as alleged; or
 - (b) is *rational* and not unfair, or is otherwise *justifiable*.
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
 - (a) the conduct complained of *is not rational*;
 - (b) the conduct complained of amounts to discrimination; and
 - (c) the discrimination is unfair.⁷⁶⁴

The distinction between unfair discrimination on a direct or indirect basis also finds expression in the EEA⁷⁶⁵ which also makes it clear that discrimination on a listed

⁷⁶¹ All the grounds of unfair discrimination mirror those listed in s 9(3) of the Constitution, save for the fact that family responsibility, HIV status and political opinion have been added to the EEA as additional grounds of unfair discrimination. Emphasis added.

⁷⁶² Section 6(2)(a) deals with affirmative action measures.

⁷⁶³ Amended by the Employment Equity Amendment Act 47 of 2013.

⁷⁶⁴ Portions of statutory section highlighted for emphasis. Section 187(1)(f) of the LRA also provides for a claim to be brought on any other arbitrary ground.

ground will give rise to a presumption that the discrimination is unfair. In such an event the employer is required to prove, on a balance of probabilities, that the discrimination did not take place as alleged or is rational and not unfair or is otherwise justifiable.⁷⁶⁶

The necessity of maintaining the need for unfair discrimination on the basis of either direct or indirect (disparate) discrimination as reflected in section 9(3) of the Constitution is maintained in the provision of section 6(1) of the EEA.⁷⁶⁷ To this end, the wording of the Constitution has apparently been adopted by the EEA as evidenced in section 6(1). On the other hand the wording in section 6(2)(b) echoes the wording of article 2 of ILO Convention 111. PEPUDA, on the other hand, also provides for discrimination on a direct or indirect basis.⁷⁶⁸

An allegation of unfair discrimination on the basis of religion by anyone⁷⁶⁹ against an employee in the workplace results in the employer incurring the duty of proving⁷⁷⁰ that:

- it did not take place as alleged;
- the distinction, exclusion, or preference (discrimination) on the basis of religion took place on the basis of an IROJ; or

⁷⁶⁵ Section 6(1).

⁷⁶⁶ Section 11(1)(a) and (b).

⁷⁶⁷ Although the EEA does not define direct and indirect discrimination, Van Niekerk *et al* have pointed to the fact that the presence of such terms in the EEA has not altered the manner in which direct and indirect discrimination respectively have subsequently come to be viewed by the courts, namely that direct discrimination is where the criteria for differentiation are manifestly unfair whilst indirect (disparate) discrimination is where the criteria may appear *prima facie* to be fair but the outcome or consequences are unfair (Van Niekerk *et al Law@work* 125-126).

⁷⁶⁸ Although express provision of the terms "direct" and "indirect" is not employed, it is clear from the wording of the definition ascribed to "discrimination" in section 1 in addition to the wording employed in section 14(1)-(3) in respect of "determination of fairness or unfairness" that provision is made to protect persons disadvantaged by various discriminatory acts including "persons suffering from patterns of disadvantage or [who] belong to a group that suffers from such patterns of disadvantage."

⁷⁶⁹ This could be conduct on the part of an employer but conceivably could also include conduct on the part of a co-employee, alternatively conduct on the part of a client or customer of the employer. This broad scope of protection afforded employees against unfair discrimination appears from the broad language adopted in s 5 as read with s 6 of the EEA.

⁷⁷⁰ On a balance of probabilities.

- the conduct is rational and not unfair, or is otherwise justifiable.

The 2013 amendments to the EEA introduced new provisions dealing with the burden of proof.⁷⁷¹ Prior to the amendment when unfair discrimination was alleged in terms of the EEA, the employer was required to "establish that the [discrimination] was fair".⁷⁷² In terms of the amendments, and under section 11(1)(a)-(b), the burden is on the employer to "disprove the factual basis of the complainant's claim"⁷⁷³ or "to justify the measure concerned on grounds including but not limited to rationality and fairness".⁷⁷⁴ If however, a claimant alleges discrimination on an arbitrary ground,⁷⁷⁵ it is the claimant who is required to establish, on a balance of probabilities, that the conduct is not rational, amounts to discrimination and is unfair.⁷⁷⁶ Proving an arbitrary ground raises some interesting concerns. The burden of proof imposed on a claimant in this regard is more onerous. In addition to proving that the conduct is not rational and amounts to discrimination, the claimant must also prove that the discrimination is unfair.

As to what constitutes arbitrary discrimination, the notion would arguably be incapable of precise definition. Arbitrary conduct, as the term suggests, constitutes capricious behaviour lacking in an objective basis. However, the mere presence of capricious (arbitrary) conduct does not *per se* constitute conduct that is discriminatory and/or unfair – hence the apparent rationale for imposing the evidential burden on the claimant alleging unfair discrimination on such ground. Some may argue this may increase the potential scope of a claimant's claim, but the counter-effect thereof is the practical difficulty of leading evidence to demonstrate

⁷⁷¹ This section draws on the following article by the author: Henrico 2015 *Obiter* 275.

⁷⁷² Section 11. With reference to the provisions of s 6(1) a ground of fairness would be on the basis of an IROJ.

⁷⁷³ Van Niekerk *et al Law@work* 132.

⁷⁷⁴ Van Niekerk *et al Law@work* 132.

⁷⁷⁵ In terms of s 11(2) of the EEA.

⁷⁷⁶ In terms of s 11(2)(a)-(c); the effect of which may be said is not so much to expand the scope of grounds upon which discrimination takes place as to increase the scope of the employer's defence against a claim brought under section 11(2). The argument of the role played by rationality and justifiability in such a defence is of particular significance. See discussions in subparagraphs 3.2.2 and 3.2.3 above. Also see Du Toit and Potgieter *Unfair Discrimination in the Workplace* 24-25.

that the conduct is capricious, has differentiated against the claimant and has done so in an unfair manner. In the main, the concern is the extent to which an onus is now placed on a claimant in relation to establishing discrimination on an arbitrary ground. These amendments which permit an arbitrary ground to be included as a basis upon which unfair discrimination can take place have been the matter of much criticism⁷⁷⁷ and in fact pose the question as to the merit in this additional ground. Moreover, how these new provisions will be interpreted by our courts is moot⁷⁷⁸ and somewhat controversial; however, a common denominator to a finding that conduct may be arbitrary is the extent to which it impacts upon a complainant's human dignity.⁷⁷⁹ Differential treatment which cannot be justified and impacts adversely upon a person's human dignity is objectionable because of the harm this very hurt causes. However, it is also objectionable due to the fact that it is "simply arbitrary".⁷⁸⁰

A burden of proof⁷⁸¹ is placed on the employer, when faced with an unfair discrimination allegation on a listed ground,⁷⁸² such as religion, of proving that such discrimination did not take place as alleged, or is rational and not unfair, or is otherwise justified. A noteworthy aspect of the recently amended EEA is the extent to which the onus of proof deals with notions of rationality and justifiability. As our courts are called upon to assess claims brought either under section 11(1) or (2) it will be necessary that the scope of the claimant's claim or the employer's defence is adjudicated with reference to precisely what constitutes rationality and justifiability. For reasons already mentioned⁷⁸³ rationality and justifiability will need to also take

⁷⁷⁷ See Du Toit *et al* 2012 <http://www.pmg.org.za/files/130807dutoit.pdf>; Du Toit 2014 *ILJ* 2634; Rautenbach and Fourie 2016 *TSAR* 113-120; Du Toit and Potgieter *Unfair Discrimination in the Workplace* 24-25, 97-98. See Van Niekerk *et al Law@work* 132 esp the authorities cited at fn 87; Rautenbach and Fourie 2016 *TSAR* 113-120.

⁷⁷⁸ See comments by Van Niekerk *et al Law@work* 132; Du Toit and Potgieter *Unfair Discrimination in the Workplace* 17.

⁷⁷⁹ Van Niekerk *et al Law@work* 127.

⁷⁸⁰ See Van Niekerk *et al Law@work* 133 who cite *Kadiaka v Amalgamated Beverage Industries* 1999 20 *ILJ* 373 (LC) where at para 42 Landman J defined "arbitrary" to mean "capricious or proceeding merely from whim and not based on reason or principle".

⁷⁸¹ On a balance of probabilities.

⁷⁸² In terms of s 11(1) of the EEA.

⁷⁸³ See subparagraphs 2.6.2, 2.8.2, 3.2.2 and 3.2.3 above.

account of issues of reasonableness and proportionality. Prior to the amendments whenever unfair discrimination was alleged in terms of the EEA the employer against whom the allegation was made, was required to "establish that the [discrimination] was fair".⁷⁸⁴ In terms of the recent amendment, an employer is granted extended leverage in refuting a claim of unfair discrimination. The complainant, on the other hand, when alleging discrimination upon an arbitrary ground, is saddled with having to show that the measure or action is irrational, discriminatory and unfair. Conceivably a complainant would be ill-advised to pursue a complaint couched in terms of discrimination based on an arbitrary ground due to the onerous burden of proof.

Accordingly, complainants may be encouraged to rather exhaust remedies afforded under the listed grounds of unfair discrimination.⁷⁸⁵ In trying to understand the practical implications of how a complainant would discharge an onus of proof when alleging discrimination on an arbitrary ground there may be some guidance afforded in the arbitration award handed down in the matter of *Williams v T-Systems South Africa (Pty) Ltd*.⁷⁸⁶ The dispute concerned the issue of equal pay for equal work and in particular whether the employer had discriminated against the employee by paying him less.⁷⁸⁷ It transpired during testimony that initially the applicant alleged he was being discriminated against on the basis of race, which was a listed ground under the EEA. His allegation and evidence later was that despite having the same job role and more skills and experience than his colleagues he was earning less than them. In deciding whether the employee was being discriminated against on an arbitrary

⁷⁸⁴ Section 11.

⁷⁸⁵ In terms of s 11(1).

⁷⁸⁶ CCMA (WECT) Case No. 16559-14 12 February 2015 by commissioner M van Rooyen. As to what constitutes an "arbitrary ground" of discrimination under the EEA, see awards by commissioner Madeleine Loyson in *Tarpeh v Full Circle Contact Centre Services t/a Capita SA (Pty) Ltd* CCMA (WECT)(Case No. 2508-15) 23 April 2015 (in which an award was made in favour of the applicant who was an applicant for employment (at a call centre operation) discriminated against on the basis of being an asylum seeker, which discrimination was found to constitute an "arbitrary ground") as well as in *Tani v Epol (a division of Rainbow Farms (Pty) Ltd)* CCMA (WECT) (Case No. 16990 – 14) 26 February 2015 (where it was found that the non-appointment to a position as a recruitment officer for the company on account of the employee's criminal record constituted an "arbitrary ground" of discrimination).

⁷⁸⁷ The applicant employee's claim was based on s 27 of the EEA relating to income differentials (see para 3 of award).

basis,⁷⁸⁸ as defined in the EEA, the commissioner stated that in order to discharge the onus of proof in this regard the employee is required to "establish a link between the arbitrary ground and the differentiation" complained of. Moreover, "in addition, if he establish[es] the aforesaid, the discrimination will amount to unfair discrimination only if the arbitrary ground on which the differentiation is established impairs his dignity and is a barrier to equality".⁷⁸⁹ The basis of the applicant having to establish a nexus between the arbitrary ground and the differentiation complained of is understandable since this appears as an essential criterion of section 11(2)(b). The basis of the unfair discrimination being the cause of impairing dignity seen as a "barrier to equality" cannot and ought not to be faulted since this is after all the basis upon which conduct falls short of being acceptable.⁷⁹⁰

Religion is contained in one of the grounds listed in section 6(1) as a result of which the employee would merely be required to prove⁷⁹¹ the existence of a distinction, preference, or exclusion, namely that he or she was differentiated against on the basis of religion. After this has been established, the evidential onus is on the employer as already pointed out above.

What is important to observe in relation to the highlighted portions of the statutory provisions is the emphasis placed on "rational", "otherwise justifiable" and "not rational". The amendments to the EEA have been the subject of academic criticism.⁷⁹² However, the fact that emphasis is placed on notions of rebutting an unfair discrimination claim by proving that the conduct can be accounted for on one of the aforesaid grounds is far reaching. It lends credence to the fact that tensions arising from conflicting fundamental rights are best determined with reference to

⁷⁸⁸ See *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) where at para 42 "arbitrary" is defined as "capricious" or "not based on reason or principle".

⁷⁸⁹ In support of such view the commissioner at para 17 referred to the following authorities: *Nthai v South African Breweries Ltd* 2001 22 ILJ 214 (LC); *Transport and General Workers Union v Bayete Security Holdings* 1999 20 ILJ 117 (LC) and *Mangene v Fila South Africa (Pty) Ltd* 2010 31 ILJ 662 (LC). See the discussion of these cases in Chapter 5.

⁷⁹⁰ Reference has been made to case law dealing with what is meant by "arbitrary" under the provision of item 2(1) in the Industrial Court, Labour Court and Labour Appeal Court by Du Toit and Potgieter *Unfair Discrimination in the Workplace* 25 fns 51-54.

⁷⁹¹ On a balance of probabilities.

⁷⁹² See Rautenbach and Fourie 2016 TSAR 113-120.

principles based on rationality, reasonableness and proportionality. In other words, given that no fundamental right in the Bill of Rights is absolute, any limitation thereof should be gauged properly with reference to the general limitation of rights clause of section 36 or any provision which is akin thereto, such as the defence provisions afforded employers or respondents under specific statutory provisions. When gauging, or assessing, the limitation of the expression of the fundamental right of the employee, for example the right to express religious freedom in the workplace, then an approach of what is rational, reasonable and proportionate in the circumstances should be adopted. Such an approach is optimally balanced since it necessarily requires that one must also have regard to human dignity, equality and freedom.⁷⁹³

The close neighbourly association of the wording in section 9(3) of the Constitution and section 6(1) of the EEA, combined with the absence of a universal definition of unfair discrimination, culminated in the task being left to our courts to determine and give context and content to the meaning of unfair discrimination. Equality jurisprudence is complex by its very nature. Making a determination in terms of what constitutes differential treatment and the extent or impact of such treatment on the human dignity of another person are matters that are not readily ascertainable and can only be deduced as one does with the written terms of a contractual undertaking, for example. The matter is made all the more complex when it must be determined whether the differentiation has taken place on a direct or indirect basis and whether on a listed or unlisted ground. A determination on either basis will have different consequences in terms of presuming whether or not the differentiation is unfair. Consequently, the court in *Harksen v Lane*⁷⁹⁴ sought to lay down the following test regarding the determination of unfair discrimination:

- (a) Does the provision differentiate between people or categories of people? If so ...

⁷⁹³ See discussion in subparagraphs 2.6.2, 2.8.2, 3.2.2 and 3.2.3 above, in addition to 5.2.2, 5.2.3 and 5.4.6 below.

⁷⁹⁴ 1997 11 BCLR 1489 (CC).

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specific ground, the discrimination will have been established. If it is not on a specific ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specific ground then unfairness will be presumed. If on an unspecific ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of the enquiry, the differentiation is found not to be unfair, then there will be no violation ...

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the circumstances of the limitations clause.⁷⁹⁵

The *Harksen* test was subsequently adopted by the labour courts for many years.⁷⁹⁶

Du Toit criticised the test formulated in *Harksen*. Criticism of the *Harksen* test rests on two legs. In the first instance, the Court relied directly on the Constitution.⁷⁹⁷ This was in contravention of the subsidiarity principle which claimants were admonished to observe in *Stokwe v MEC, Department of Education, Eastern Cape*.⁷⁹⁸ Secondly, referring to *Harksen* for purposes of obtaining a definition of unfair discrimination in the employment context is actually unnecessary since ILO Convention 111 already contains a definition of unfair discrimination. Moreover, the EEA expressly recognises that it must be interpreted in a manner that gives effect to the ILO obligations (in

⁷⁹⁵ Para 50.

⁷⁹⁶ Van Niekerk *et al Law@work* 131. For some cases in which the *Harksen* test was employed see *Louw v Golden Arrow Bus Service (Pty) Ltd* 2000 3 BLLR 311 (LC) para 26; *Hoffmann v SAA* 2001 1 SA 1 (CC) para 24; *NUMSA v Gabriels (Pty) Ltd* 2002 23 ILJ 2088 (LC) para 9; *FAWU v Pets Products (Pty) Ltd* 2000 7 BLLR 781 (LC) para 13; *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 70; *IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC) para 80; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 110.

⁷⁹⁷ Section 8 of the Interim Constitution, now s 9 of the Constitution, which was used in order to test the constitutional validity of certain provisions of the Insolvency Act 24 of 1936.

⁷⁹⁸ 2005 BLLR 822 (LC).

general) and ILO Convention 111 specifically. As a result, it follows that in determining unfair discrimination for purposes of the EEA mere effect ought to be given to the definition thereof as set out in article 1(a) of ILO Convention 111, thereby making it unnecessary to resort to *Harksen*.⁷⁹⁹ In addition, obligations under ILO Convention 111 provide specific justifications⁸⁰⁰ to a claim of unfair discrimination as opposed to the general limitation clause in the Constitution.⁸⁰¹ A consequence of the wording adopted by the drafters of the Constitution pertaining to equality rights, namely section 9, is that the national legislation which has been enacted to give effect thereto has mirrored the wording by adopting the terminology of "unfair discrimination" as opposed to mere "discrimination" as it appears in ILO Convention 111.⁸⁰² The unfortunate effect of this was to narrow the effectiveness of ILO Convention 111 in its application to workers to the extent that employers are able to escape liability for alleged discrimination.⁸⁰³ The scope of defence afforded employers under the general limitations clause of the Constitution is conceptually wider. In contrast the ground of defence under article 1(2) of ILO Convention 111 is restricted to an employer showing that the distinction, exclusion or preference was based on the IROJ. Notionally, by assessing unfair discrimination in the labour context by relying directly on the Constitution and the limitation clause, essentially renders ILO Convention 111 and its relevant articles nugatory. There is no merit in upholding and/or permitting this non-adherence to ILO Convention 111 to take place on account of our constitutional obligations under international law.⁸⁰⁴

Such criticism as made by Du Toit against defining and/or justifying employment-related discrimination disputes through the lens of the definition offered in the

⁷⁹⁹ For a general discussion of the above critique see Du Toit "The prohibition of unfair discrimination: applying s 3(d) of the Employment Equity Act 55 of 1998" 151-152; Du Toit 2014 *ILJ* 2634; Du Toit and Potgieter *Unfair Discrimination in the Workplace* 14, 16-17.

⁸⁰⁰ Under article 1(2).

⁸⁰¹ Either in terms of s 33 of the Interim Constitution or s 36 of the Constitution.

⁸⁰² See s 6 of the EEA.

⁸⁰³ Du Toit 2007 <http://www.saflii.org.za/journals/LDD/20.pdf>.

⁸⁰⁴ See section 39(2), as read with ss 232 and 233 of the Constitution. Moreover, South Africa's obligations to comply with the obligations of the ILO are expressly stated in section 1(b) of the LRA and our obligations to give effect to ILO Convention 111 are expressly stated in section 3(d) of the EEA.

Harksen case is convincing and valid given the reasons advanced. Whilst the learned authors Van Niekerk *et al* agree with Du Toit in this regard they appear to suggest that the second stage of the *Harksen* enquiry should not as readily be jettisoned since it would eliminate the determination into the unfairness of the discrimination.⁸⁰⁵ It is submitted that the optimal way in which this issue should be addressed by our courts is for them to at all times adopt what is referred to as the "nuanced context-sensitive" interpretive method when adjudicating unfair discrimination workplace disputes based on religious grounds.⁸⁰⁶

When faced with a claim of religious discrimination it is essential to keep in mind that the employer does have a defence of showing the discrimination is fair based on the IROJ, in addition to the fact that it may be rational or otherwise justified. However, upon being able to demonstrate that an IROJ gave rise to religious discrimination, it follows that such a defence would arguably constitute a basis for establishing that the discrimination is rational and/or is otherwise justifiable. These are logical deductions made from the IROJ defence.⁸⁰⁷

This concept of a defence as contained in section 6(2) of the EEA has been adopted from article 1(2) of the ILO Convention 111. From examples referred to in Chapter 2 above, it is clear that in many instances employees or applicants alleging unfair discrimination on the basis of religion have their claim met by the employer's defence that the discrimination is not unfair based on the IROJ. But what does this notion actually mean in terms of article 1(2) of ILO Convention 111 and the EEA? In neither instrument is the concept or terminology actually defined. It is thus apparent that no clear indications or definitions are provided as to what is meant by this concept.⁸⁰⁸

⁸⁰⁵ Van Niekerk *et al* *Law@work* 131.

⁸⁰⁶ This is expanded on in Chapter 5. Also see discussion in subparagraph 2.3.3 above.

⁸⁰⁷ This is expanded on in Chapter 5.

⁸⁰⁸ See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 208; Van der Walt and Van der Walt 2005 *Obiter* 448-449; Grogan *Employment Rights* 200-205. Under the regime of the Labour Relations Amendment Act 9 of 1991 (before any notion of "inherent requirements of the job" existed) when the courts were still at will to develop the concept of unfair labour practices, it is noteworthy to keep in mind that whilst account was taken of arbitrary and unfair discriminatory practices by employers against employees, in the interest of "fairness" so too was notice taken of

It is to case law that we must turn for an understanding of the way in which the term has been interpreted.⁸⁰⁹ In *Whitehead v Woolworths (Pty) Ltd*⁸¹⁰ an applicant for employment alleged unfair discrimination on grounds that she was pregnant. The company contended that an IROJ was that the applicant be continuously present at work and not on maternity leave.

In *Kadiaka v Amalgamated Beverage Industries*⁸¹¹ the company refused to employ applicants who were formerly employed by its competitor. Significantly, the company claimed its decision in this regard was an operational requirement of its business interest as opposed to an IROJ. The company's claims in this regard were upheld.

The court in *Independent Municipal & Allied Workers Union v City of Cape Town*⁸¹² had to deal with a matter in which the municipal council had a blanket policy in terms of which it refused to employ diabetics irrespective of how their condition was being treated or controlled. Such policy was criticised by the court for its failure – as an IROJ – to treat each applicant on individual merits.

*Dlamini v Green Four Security*⁸¹³ is a religious discrimination workplace-related matter in which security guards refused to shave their beards claiming it was part of their religious faith to grow long beards. The employer dismissed them on grounds of their refusal. As a result, the employees alleged unfair discrimination on grounds of religion.⁸¹⁴ The employer claimed it was an IROJ as security guards to be clean-shaven since this accorded with a uniform dress code. Moreover, the rule was applied to all employees and not just the dismissed employees.

conduct that was inimical or negative to the interests of the employer. See Rycroft and Jordaan *A Guide to South African Labour Law* 168 and the authorities cited at fn 79.

⁸⁰⁹ In this regard also see discussion of cases in subparagraph 5.4.4 below.

⁸¹⁰ 1999 20 *ILJ* 2133 (LC); see also *Woolworths (Pty) Ltd v Whitehead* 2000 21 *ILJ* 571 (LAC).

⁸¹¹ 1999 20 *ILJ* 373 (LC). See discussion in subparagraph 3.4.4.1 below.

⁸¹² 2005 26 *ILJ* 404 (LC).

⁸¹³ 2006 11 BLLR 1074 (LC).

⁸¹⁴ Their claim was brought on the basis of an alleged contravention by the employer of s 187(1)(f) of the LRA.

These cases⁸¹⁵ and other cases⁸¹⁶ indicate that our courts will assess the IROJ in accordance with the facts and circumstances of each case. In other words, the concept does not permit a universal definition to be applied to the term. Whether or not an employer can validly show that discriminating against an employee on the basis of religion is related to the IROJ must be adjudicated with reference to the facts of each case. Once more, with an assessment of such a scenario there is a balance of competing rights and interests to be taken into account: on the one hand, the fundamental right an employee has to freedom of religion in the workplace; on the other hand, and in the overall acknowledgement of the right to fair labour practices under section 23 of the Constitution, the employer is entitled to protect the interests of the business enterprise in terms of assessing what are the IROJ. If these requirements are such that they are at odds with the employee's religious interests they may trump such interests. This inevitably leads one to the issue of accommodation. Even where there are competing interests, to what extent, even if IROJ weigh heavier than individual employees' religious interests, can and should the employer nevertheless be expected to accommodate the employee? This is a matter which is considered in greater detail below.⁸¹⁷

However, as previously stated, Codes of Good Practice have a relevant role to play in respect of discrimination. From the Codes of Good Practice that currently appear in the EEA the ones relating to disability, sexual harassment and HIV/AIDS are all relevant to equality discrimination in that the behaviour they seek to address and regulate relate to the prohibited grounds of discrimination listed in section 6(1) of the EEA. Apart from the normative aspects which the Codes of Good Practice seek to regulate, their greater relevance pertains to the issue of awareness on the part of the employer, which, as discussed below, can and should play a role in contextualising what was required or expected of the employer to address the alleged discrimination. Singular aspects of the Codes of Good Practice are looked at in this regard. The Code on Sexual Harassment is the duty imposed on an employer as follows:

⁸¹⁵ Which are referred to by Van Niekerk *et al Law@work* 133-135.

⁸¹⁶ Referred to in Chapter 5.

⁸¹⁷ See subparagraphs 3.4.4.1, 4.5.3.3 and 6.5.2 below.

Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which complaints of sexual harassment will not feel that their grievances are ignored or trivialized, or fear reprisals. Implementing the following guidelines can assist in achieving these ends:

Employers/management and employees are required to refrain from committing acts of sexual harassment;

All employers/management and employees have a role to play in contributing towards creating a working environment in which sexual harassment is unacceptable ...;

....

Employers/management should take appropriate action in accordance with this code *where instances of sexual harassment occur* in the working environment.⁸¹⁸

Moreover, in terms of the obligations imposed on an employer, the following procedure is set out as a guideline:

When sexual harassment has *been brought to the attention of the employer*, the employer should:

consult all relevant parties;

take the necessary steps to address the complaint; ...

take the necessary steps to eliminate the sexual harassment.⁸¹⁹

What is significant about the aforesaid excerpts of the Code on Sexual Harassment is the notional sense of awareness which is placed on the employer. In other words, once the employer has been alerted or been made aware of the fact then he or she is obliged to act in accordance with the guidelines set out in the Code on Sexual Harassment. Awareness on the part of the employer in relation to any issue regarding alleged discrimination in general and particularly with regards to religious discrimination in the workplace has an important role to play. An employer must first be made aware of an employee's alleged concern regarding expression of religious freedom in the workplace before he or she can reasonably be required to take steps

⁸¹⁸ See Guiding principles of Item 6, 6.1 to 6.4. Emphasis added.

⁸¹⁹ See Procedures of Item 8.2, 8.2.1 to 8.2.3. Emphasis added.

that are necessary and/or reasonable in the circumstances. From an analysis of case law,⁸²⁰ it is evident that knowledge on the part of the employer has a significant role to play in religious workplace-related discrimination disputes. In other words, awareness on the part of the employer will in a sense also be indicative of what was reasonably expected from the employer in the circumstances. For example, in the case of an employer who establishes a business with the purpose of such business serving a particular religious community, such as selling Halaal foods to persons of the Muslim faith, the employer intends employing only employees who are Muslims themselves, on account of the IROJ. On the other hand, an employer may operate a business that has IROJ of operating seven days a week. He or she should not be held accountable for alleged religious discrimination by an employee who seeks employment knowing the IROJ and who works on Saturdays without raising any objections only to claim at a later stage that he (the employee) is a member of the Jewish faith and that he is being discriminated against on the basis of religion.

What needs to be distilled from the above, is that in the overall adjudication of what is required of an employer when faced with a claim of religious discrimination in the workplace is to ask what duty was on the employer to take steps to address the situation. Awareness on the part of the employer must and should impose a duty to address the situation. Unawareness or lack of knowledge on the part of the employer makes having to take steps to address the situation impractical and unrealistic.

3.4.4 The Promotion of Equality and Prevention of Unfair Discrimination Act

The relevant portion of the Preamble to PEPUDA⁸²¹ states:

... Section 9 of the Constitution provides for the enactment of national legislation to prevent and prohibit unfair discrimination and to promote the achievement of equality; ...

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and

⁸²⁰ See discussion in subparagraphs 5.4.5 and 5.4.6 below.

⁸²¹ 4 of 2000, which came into operation 16 June 2003.

guided by the principles of equality, fairness, equity, social progress, justice, human dignity, and freedom ...

PEPUDA is binding on the state and on all persons.⁸²² However, it is not applicable to the workplace by virtue of section 5(3) which provides as follows:

This Act does not apply to any person to whom and to the extent to which the EEA applies.

The objects of the Act are noteworthy, which are, *inter alia*, to:

- (a) enact legislation required by section 9 of the Constitution;
- (b) 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) ...
 - (iv) and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
 - (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or *religion*, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution⁸²³ and section 12⁸²⁴ of this Act;
- (c)....
- (h) to facilitate further compliance with international obligations ...⁸²⁵

The interpretation of the Act requires the following:

- (1) Any person applying this Act must interpret its provisions to give effect to—
 - (a) the Constitution, the provisions of which include the promotion of equality through legislative and other measures...
 - (b) the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act.

⁸²² Section 5 binds the state and all persons whilst s 2 gives effect to the equality clause of s 9 of the Constitution.

⁸²³ This is the Constitutional provision containing the exact words geared against hate speech.

⁸²⁴ This has to do with the prohibition of the dissemination or publication of information that unfairly discriminates.

⁸²⁵ Section 2(a)-(h). Emphasis added.

(c) ⁸²⁶

A noteworthy feature of PEPUDA, as its title suggests, is to promote equality and prevent unfair discrimination. However, the types of unfair discrimination which are specifically expanded upon as substantive grounds which are prohibited are race,⁸²⁷ gender,⁸²⁸ disability,⁸²⁹ hate speech,⁸³⁰ harassment⁸³¹ and dissemination or publication of information that unfairly discriminates.⁸³² These aforesaid grounds should not, however, be interpreted to mean that PEPUDA has no relevance with regard to religious discrimination and/or other grounds of discrimination. The reasons for this appear from the following observations.

Under the definition part of the Act prohibited grounds of discrimination are listed as:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, culture, language or birth...⁸³³
- (b) any other ground where discrimination based on that other ground–
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination in paragraph (a).

HIV/AIDS status is also expressly mentioned defined as:

includ[ing] actual or perceived presence in a person's body of the Human Immunodeficiency Virus (HIV) or symptoms of Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status.⁸³⁴

⁸²⁶ Section 3(1)-(3).

⁸²⁷ In terms of s 7.

⁸²⁸ In terms of s 8.

⁸²⁹ In terms of s 9.

⁸³⁰ In terms of s 10.

⁸³¹ In terms of s 11.

⁸³² In terms of s 12.

⁸³³ Section 1. These are the same seventeen listed prohibitive grounds as in s 9(3) of the Constitution. Emphasis added.

⁸³⁴ Section 1.

Chapter 3⁸³⁵ of the Act sets out the statutory basis upon which a claimant may go about proving a claim. The only prescription or guidelines offered in this regard are as follows:

(1) If the complainant makes out a prima facie case of *discrimination*-

(a) The respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) The respondent must prove that the conduct is not based on one or more of the prohibited grounds.⁸³⁶

The above-mentioned so-called substantive grounds of discrimination are not specifically mentioned in Chapter 3. These grounds are obviously not excluded as grounds that are expressly protected by the ambit of PEPUDA. On the other hand, there is no reason to think of the conduct identified in the definition of PEPUDA as prohibited grounds as being excluded from the ambit of protection by the Act. If this were the case, there would be no logical or feasible explanation for such grounds to appear in the definition. PEPUDA, holistically considered, is equality legislation which is designed to give effect to the provisions of section 9(3) of the Constitution.⁸³⁷

Its applicability outside the ambit of the employment relationship should not be taken to mean that PEPUDA is irrelevant for purposes of advancing our understanding of how to deal with equality disputes based on religious discrimination in the workplace. Common to all sources of law⁸³⁸ is that they depend for their recognition on the value of the principles they establish.⁸³⁹ Where these principles contribute richly to our jurisprudence they are regarded as invaluable sources of guidance and assistance for judges, scholars and lawmakers. When adjudicating equality jurisprudence in the context of the employment relationship, there is in fact nothing which precludes a judge from having regard to relevant principles contained in a statute outside the employment relationship. The reason for this is that unfair

⁸³⁵ Under the heading "Burden of proof and determination of fairness or unfairness".

⁸³⁶ Section 13(1)-(2). Emphasis added.

⁸³⁷ See Dupper *et al Essential Employment Discrimination Law* 23.

⁸³⁸ Statutory law, common law, customary law.

⁸³⁹ Each in their own field of public or private law.

discrimination and its effects transcend the mere confines of the employment dynamic. Unfair discrimination on the basis of religion which adversely impacts upon the employee's human dignity is a phenomenon not novel to the South African experience or even the workplace. The mere fact that the legislature has elected to have specific legislation dealing with unfair discrimination outside the employment relationship does not detract from the overall conspectus of and issue of religious discrimination in the workplace. Moreover, in deciding matters before them, judges must have regard to principles used in other cases, even where these principles may arise from sources and legislation not necessarily germane to the facts and circumstances. The merit in doing so is in the extent to which such principles may add value to informing their decisions.

In this sense, it is noteworthy to take account of the manner in which PEPUDA deals with the description of unfair discrimination. No actual definition of unfair discrimination appears in the definition section. The significance lies in the manner in which PEPUDA deals with fairness and unfairness. Section 13(2) provides that if the complainant proves that discrimination took place on one of the prohibited grounds then it is unfair unless the respondent can prove that the discrimination is fair.⁸⁴⁰ The determination of fairness or unfairness is set out as follows:

- (1) It is not unfair discrimination to take measures designed to protect ...
- (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
 - (a) the context;
 - (b) the factors referred to in subsection (3) the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (3) The factors referred to in subsection (2)(b) include the following:
 - (a) Whether the discrimination impairs or is likely to impair human dignity;
 - (b) The impact or likely impact of the discrimination on the complainant;

⁸⁴⁰ Section 13(2)(b)(i) and (ii).

- (c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from patterns of disadvantage;
- (d) The nature and extent of the discrimination;
- (e) Whether the discrimination is systemic in nature;
- (f) Whether the discrimination has a legitimate purpose;
- (g) Whether and to what extent the discrimination achieves its purpose;
- (h) Whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) *accommodate diversity*.⁸⁴¹

The aforesaid provision has much to contribute to the notional and conceptual meaning of the concepts which are crucial in facilitating and enhancing our understanding of the following issues of equality jurisprudence as it pertains to religious discrimination in the workplace:

- (1) the adverse impact of differential impact upon human dignity;
- (2) the inherent imbalance of power in the employment relationship having regard to the overall context of the circumstances;
- (3) whether there are any protected interests of the employer at stake – which after all must in any event be considered against the backdrop of the IROJ; and
- (4) the accommodation of diversity speaks to what steps can be taken which are reasonable in all the circumstances, regard being had to the interests of both employee and employer.⁸⁴²

⁸⁴¹ Section 14(1)-(3)(a)-(j)(i)-(ii). Emphasis added.

It is the reference to "accommodation of diversity" that is of special importance. The notion of reasonable accommodation is expressly dealt with by only one of the national legislative instruments giving effect to the equality provision of section 9 of the Constitution. This is expressed in the EEA and defined as follows:

[meaning] any modification or adjustment made to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.⁸⁴³

In its current form it is without doubt applicable to matters related to the second objective addressed by the EEA, namely the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups.⁸⁴⁴ In the context of religious discrimination in the workplace, reasonable accommodation has come to take on a meaning which differs from what is articulated as meaning to apply to address affirmative action. Affirmative action seeks to target persons from designated groups who have been previously disadvantaged and uses reasonable accommodation as a mode to advance their employment. Employees with particular religious beliefs are protected by the equality provisions of the Constitution as given effect to by national legislation. Reasonable accommodation in this latter context seeks a symbiotic relationship by which freedom of religion and the IROJ or even the operational requirements of the employer can co-exist.

3.4.4.1 The notion of reasonable accommodation

The notion of reasonable accommodation⁸⁴⁵ referred to in the EEA is employed with reference to persons from a designated group.⁸⁴⁶ One such person would be an employee who is disabled. The reason for referring to this type of employee is

⁸⁴² Which is in fact nothing more than a limitation of rights in terms of which there is a proportionality of interest analysis infused with rationality and reasonableness. There is a necessity to compare and duly weigh the interests of the employer against the interests of the employee and weighing the advantages and disadvantages to be gained or lost by advancing or restricting either interest respectively. See discussion in paragraphs 3.2.2 and 3.3.3 above.

⁸⁴³ Section 1.

⁸⁴⁴ Section 2(b).

⁸⁴⁵ This subparagraph draws on an article by the author: Henrico 2012 *Obiter* 503.

⁸⁴⁶ A designated group in s 1 of the EEA is defined as black people, women and people with disabilities.

because the Code of Good Practice: Employment of People with Disabilities⁸⁴⁷ in the EEA (Code of Good Practice: EPD) specifically deals with reasonable accommodation for people with disabilities.⁸⁴⁸ It requires employers to effectively remove barriers to enable the employee to continue working in the workplace.⁸⁴⁹ Examples are set out in the Code of Good Practice: EPD,⁸⁵⁰ that make it clear that an employer does not need to accommodate where it would impose an "unjustifiable hardship",⁸⁵¹ which is defined as an action that "requires significant or considerable difficulty or expenses".⁸⁵² The duty to reasonably accommodate is a significant aspect of the enquiry in matters pertaining to dismissal disputes based upon medical incapacity.⁸⁵³

The aforesaid paragraph makes it clear why there is a need for reasonable accommodation in the sphere of employees suffering from disabilities. Whether an employee is born with a disability or incurs such disability later on life, the effect of either is that it impacts upon his or her ability to function and perform in the workplace, this could notionally lead to placing the employee in a disadvantageous position, in relation to other non-disabled employees, in that the employee may not be able to perform optimally and may face the likelihood of dismissal on the basis of incapacity. Reasonable accommodation, as a term or concept, essentially addresses the disparity of the duty to function that may otherwise exist between a disabled and non-disabled employee by simply requiring that reasonable measures are taken by the employer to enable the employee to work, except where such measures would be unduly hard. In this sense, it must be understood that the rationale for

⁸⁴⁷ Published under GN 1345 in *GG* 23702 of 19 August 2002.

⁸⁴⁸ Item 6.

⁸⁴⁹ Item 6.2.

⁸⁵⁰ Item 6.9, such as reorganising workstations or adjusting time and leave.

⁸⁵¹ Item 6.11.

⁸⁵² Item 6.12. See the discussion under Canadian jurisprudence in subparagraph 4.5.2.2 below, in terms of which reasonable accommodation must be "reasonable and bona fide" unless the circumstances "cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any".

⁸⁵³ See *Standard Bank of South Africa v CCMA* 2008 4 BLLR 356 (LC); *Steyn v SA Airways* 2008 29 ILJ 2831 (CCMA); *Tshaka v Vodakom (Pty) Ltd* 2005 26 ILJ 568 (CCMA); *National Education Health & Allied Workers Union obo Lucas v Department of Health (Western Cape)* 2004 25 ILJ 2091 (BCA); Ngwenya 2004 *JJS* 179; Marumoagae 2012 *PER* 351-353.

reasonable accommodation is the achievement of substantive equality, conversely the elimination of discrimination.⁸⁵⁴

The EEA refers to reasonable accommodation in the context of advancing the imperative of equality by addressing persons from designated groups who have a disability. This latter condition is just one basis upon which discrimination⁸⁵⁵ can take place in the workplace.

Conceivably there is also a role to be played by collective bargaining or workplace forums in terms of reasonable accommodation. The extent to which reasonable accommodation is manifested in the workplace must take due account of the conflicting interests of, for example, the IROJ which an employer may have, as against the diverse and various conflicting interests held by workers party to a collective agreement⁸⁵⁶ or workplace forum.⁸⁵⁷ What matters most is the extent to which employee interests are given expression as opposed to the formal structures under which such interests are represented.⁸⁵⁸ Whilst this is to be acknowledged and recognised, the focus of this study, however, is aimed specifically at religious unfair discrimination in the workplace as it manifests itself in individual labour relations.⁸⁵⁹

The basis of grounds for determining the fairness or unfairness of a discrimination as set out in section 14 of PEPUDA that are referred to above includes as a final reference the extent to which reasonable steps were taken to "accommodate diversity". This latter notion aligns itself neatly with the overall undertow of equality jurisprudence expressed in the context of the constitutional dispensation of South Africa and the advancement of transformative constitutionalism to enable the

⁸⁵⁴ Henrard 2012 *ErasLR* 61-62.

⁸⁵⁵ Whether direct or indirect.

⁸⁵⁶ In terms of s 23 of the LRA.

⁸⁵⁷ As envisaged in terms of ss 78-94 of chapter V of the LRA.

⁸⁵⁸ For a discussion on overlap between formal distinction between collective agreement and worker participation see Blanpain 1992 *BCLR* 4-8.

⁸⁵⁹ Where religious unfair discrimination is manifested in collective labour law then considerations of collective bargaining will necessarily play a significant role in the determination and consideration of how this form of discrimination should be dealt with appropriately. For further reading, see Van Niekerk *et al Law@work* 411; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 406; Grogan *Workplace Law* 332-333.

realisation of social justice. It is also relevant to note the following provision of the SACRRF:

Every person has the right to have their religious beliefs reasonably accommodated.⁸⁶⁰

Reasonable accommodation as a notion in terms of dealing with unfair discrimination in the workplace is of particular significance in the context of this study for the following reasons. First, the very terminology emphasises a need or imperative for tolerance. Making allowance and provision for in respect of something is to forbear it and/or put up with it. It also notionally implies inclusion as opposed to that which is exclusionary. In our constitutional dispensation diversification and tolerance thereof is a peremptory requirement as captured by the statement that "[w]e need to create an environment that brings about unity, embraces our diversity, and protects the idea of a rainbow nation".⁸⁶¹ In *Fourie*, Sachs J stated the following:

Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self ... but an acknowledgement and acceptance of difference ... Difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.⁸⁶²

Secondly, it being premised on nothing more than what is reasonable implies that a situation of undue hardship or something which is unbearable is not required, as such rationality informs the enquiry. Third, the notion is consistent with a sense of hospitality and cooperation. Both these latter concepts can be aligned with an overarching ideology of celebrating a diversity and plurality of differences. Fourth, inherent to the determination of what is reasonable accommodation must be an assessment of fundamental competing rights and interests. This in itself calls into play the complex inquiry previously referred to where rationality and proportionality are essential aspects of the enquiry.

⁸⁶⁰ Clause 2.2.

⁸⁶¹ Mokoena *The Times* 14.

⁸⁶² Para 60.

From the South African cases examined,⁸⁶³ there is no doubt that reasonable accommodation has played a significant role in the determination of religious discrimination disputes – not only in the workplace but also in non-workplace-related matters. The impetus that reasonable accommodation gives to equality jurisprudence is noteworthy, not least on account of the fact that it is a means of assessing what measures have been taken to embrace an individual who is different.

However, as regards religious discrimination in the workplace, it is contended that reasonable accommodation is sufficiently flexible to be used not only as a measure in terms of what steps have been taken by the employer but also in terms of looking at what steps have been taken by the worker. This is not to say that duties imposed on the employer to reasonably accommodate ought in any way to be disregarded. It is only meant to show that reasonable accommodation should be conceived of in the light of mutual accommodation inasmuch as it also takes account of the employee's actions in addressing measures pursuant to a conflict arising due to the employee's religious beliefs in the workplace.⁸⁶⁴ This contention is premised on the fact that both employee and employer are entitled to fair labour practices in terms of the Constitution.⁸⁶⁵ Moreover, by analogy, in an operational requirement dispute employees are not divested from seeking viable alternatives to avoid dismissals.⁸⁶⁶ In addition, in determining what is an appropriate penalty to impose in misconduct cases, it is important to balance the competing interests of both employee and employer.⁸⁶⁷ The IROJ ordinarily plays a predominant role⁸⁶⁸ in adjudicating the extent to which expression of religious freedom on the part of an employee should be limited or restricted. However, it is argued that operational requirements⁸⁶⁹ of an employers business can also have a role to play in assessing the extent to which

⁸⁶³ In Chapter 5.

⁸⁶⁴ Henrico 2012 *Obiter* 503.

⁸⁶⁵ Under s 23. See *NEHAWU v University of Cape Town* 2003 3 SA 1 (CC) paras 40, 52-54; Olivier "Labour rights" 160. Also see discussion in subparagraph 6.3.3 below.

⁸⁶⁶ Section 189(2) and (5) of the LRA.

⁸⁶⁷ See *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) paras 64-67 and esp the authorities cited at fns 60 and 62.

⁸⁶⁸ As evidenced by the cases examined in Chapters 4 and 5.

⁸⁶⁹ Section 213 of the LRA defines this as meaning "requirements based on the economic, technological, structural or similar needs of an employer".

expression of religious freedom in the workplace should be restricted or limited.⁸⁷⁰ In parity of reasoning, where a dispute arises relating to religious discrimination in the workplace, both employee and employer should bear the onus of seeking ways in which to mutually accommodate the competing fundamental rights and interests at issue. By doing so their constructive dialogue also speaks to the imperative of assuming responsible initiatives as role-players in the workplace who can make a difference and, in the event of succeeding with a consensual outcome in a win-win situation, obviating the need to engage in the formal mechanism of dispute resolution.

3.4.4.2 *Reasons for applying PEPUDA*

On account of inequality and unfair discrimination being all-pervasive in our society it is understandable that a legislative framework such as PEPUDA is in place to address inequality instances as they occur in the public⁸⁷¹ and even private domain.⁸⁷² As previously stated, PEPUDA applies outside the employment context and cannot be relied upon to address equality disputes in the workplace which are primarily addressed by the EEA⁸⁷³ and to a lesser extent by the LRA.⁸⁷⁴

⁸⁷⁰ An example of this is evidenced in cases such as *FAWU v Rainbow Chicken Farms* 2000 1 BLLR 70 (LC) and *Lewis v Media24* 2010 31 ILJ 2416 LC which are discussed in subparagraphs 5.4.4 and 5.5.5 below and in *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) discussed in subparagraph 3.4.3 above.

⁸⁷¹ An example is where at a public gathering such as a musical performance of Handel's *Messiah*, the conference organisers decide to permit entrance to the concert only to members of the public who declare themselves to be Christians and to exclude members of the public who are not followers of the Christian faith. This is an example of an event which plays itself out in the public sphere. A more current example, although relating to race discrimination, is the debacle in which Penny Sparrow posted derogatory comments on social media, ultimately resulting in magistrate Khalil of the Equality Court ordering her to pay a R150 000 fine. In the judgment it was noted how the racist remarks were not only hate speech but were also an affront to the human dignity of black people in general. See Pillay 2016 <http://www.timeslive.co.za/local/2016/06/10/Penny-Sparrow-ordered-to-pay-R150%E2%80%9A000-for-racist-Facebook-rant>. Admittedly less public and so-called "private" instances of unfair discrimination on the basis of religion can occur where a person who is in the business of providing services as a wedding organiser refuses on grounds of religious beliefs to provide services to a same-sex couple who attempt to procure the organiser's services for their civil union.

⁸⁷² An example could be where at a local gym a member is treated by any other member(s) or even by management of the gym on an unfair basis on grounds relating to such member's religious beliefs.

⁸⁷³ As discussed above, and as specifically mentioned in s 5(3) of PEPUDA.

Legislation may by its very nature be formal in terms of its definitions and stated purpose, and intended to reach only a specific area delineated by the legislature. There can be no doubt that the EEA and PEPUDA target two different areas in which unfair discrimination manifests itself. Whilst they may be different in terms of the area of their focus, they are materially and substantially the same in terms of the purpose they seek to achieve: to address the elimination of unfair discrimination and the promotion of a more egalitarian society. Based on the fact that they share a common goal directed at tackling equality jurisprudence, albeit in different areas, there is great advantage our courts can gain from a so-called cross-pollination of jurisprudence, namely a cross-reference to the subject matter of a different piece of legislation which shares a common purpose. In this regard, the test which section 14 of PEPUDA sets out in establishing whether the conduct in question is fair or unfair is particularly informative in general terms given the various factors referred to and specifically on account of the mention made of the need to accommodate diversity. Such an approach would conduce to a generous and purposeful approach of statutory interpretation to which previous reference has been made.⁸⁷⁵

In other words, judges, when called upon to adjudicate religious discrimination disputes in the workplace, are encouraged to use as extensive a number of resources as possible so as to facilitate their adjudication of the matter before them. A *caveat* to this, however, is the doctrine of *stare decisis*.⁸⁷⁶ A further limit to the extent of the interpretation is that judicial officers are bound by the manner in which the case before them has been pleaded.⁸⁷⁷ Put differently, if a claim is brought on the basis of a contravention of the EEA it would not be inappropriate in interpreting the matter and arriving at a decision, to have regard to a variety of sources including, but not limited to, what guidance may be provided by relevant portions of PEPUDA. It would

⁸⁷⁴ Discussed in subparagraph 3.4.5 below.

⁸⁷⁵ See subparagraph 3.4.2 above.

⁸⁷⁶ This is in accordance with the doctrine of *stare decisis*. For further reading see Hahlo and Kahn *The South African Legal System and its Background*.

⁸⁷⁷ See *King v King* 1971 2 SA 630 (O). See also Daniels *Beck's Theory and Principles of Pleadings in Civil Actions* (2002) 46 and the authorities cited at fn 18; Cilliers, Loots and Nel *Van Winsen and Herbstein The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 238 and the authorities cited at fn 64.

be inappropriate for an order to be made without regard to the nature of the prayer as it appears in the Notice of Motion or Pleadings based for its cause of action, on a specific provision of the EEA or LRA.

3.4.5 The Labour Relations Act

The LRA, which came into operation on 11 November 1996 is premised in the following objectives:

... to give effect to section 23 of the Constitution;

to give effect to the public international law obligations of the Republic relating to labour relations ...⁸⁷⁸

Its purpose is the following:

... to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of [the LRA], which are-

(a) to give effect to and regulate the fundamental rights conferred by section 23⁸⁷⁹ of the Constitution;

(b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organization ...⁸⁸⁰

Any person applying the provisions the LRA must interpret its provisions in the following way:

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international obligations of the Republic.⁸⁸¹

As previously mentioned, the EEA is the principal national legislation regulating equality discrimination in the workplace. But this is not to say there is no role to be played by the LRA. When seen through the lens of individual and collective labour

⁸⁷⁸ Although formally stated as the Preamble, these are provisions that preface the main provisions of the Act.

⁸⁷⁹ Which deals with labour relations and in particular subsection (1) provides that everyone has the right to fair labour practices.

⁸⁸⁰ Section 1(a)-(d).

⁸⁸¹ Section 3(a)-(c).

law, the mainstay of the individual component of the LRA as set out in Chapter VIII of the Act is the regulation of the right not to be dismissed unfairly⁸⁸² or be subjected to unfair labour practices.⁸⁸³

The grounds constituting an unfair labour practice contained in the LRA,⁸⁸⁴ whilst aimed at addressing specific acts on the part of the employer which unfairly impact upon the rights and interests of an employee, and which can result in the termination of employment, do not constitute any of the unfair discrimination grounds listed in section 9(3) of the Constitution. The relief provided for an unfair labour practice under section 186(1) is limited to the remedies contained in section 193 of the LRA.

Where an employer dismisses an employee and the reason for the dismissal is related to a ground of unfair discrimination, the dismissal is not only taken as being unfair but is regarded as being an automatically unfair dismissal.⁸⁸⁵ Section 187(1)(f) of the LRA states

that the employer unfairly discriminated against the employee, directly or indirectly, on any *arbitrary ground*, including, but not limited to, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, political opinion, culture, language, marital status or family responsibility.⁸⁸⁶

Accordingly, an employee is afforded remedies against unfair discrimination in terms of the provisions of the LRA⁸⁸⁷ as well as the EEA.⁸⁸⁸

A defence against a claim of automatically unfair dismissal is built into the Act in the provision which provides that:

Despite subsection (1)(f)-

⁸⁸² Section 185(a).

⁸⁸³ Section 185(b).

⁸⁸⁴ As set out in s 186(1)(a)-(f) and (2)(a)-(d).

⁸⁸⁵ In terms of s 187(1).

⁸⁸⁶ Emphasis added. Three grounds of unfair discrimination which are listed herein and which are not contained in section 9(3) of the Constitution are arbitrary grounds, political opinion and family responsibility. Family responsibility, political opinion and arbitrary grounds are also contained in s 6(1) of the EEA. HIV status, on the other hand, although included in s 6(1) of the EEA, is not listed as a ground under s 187(1)(f) of the LRA.

⁸⁸⁷ Namely s 187(1)(f).

⁸⁸⁸ Namely s 6(1).

(a) a dismissal may be fair if the reason for dismissal is based on the IROJ;

(b) ...⁸⁸⁹

Both the EEA and LRA provide for a defence to a claim in relation to unfair discrimination on the ground of religion on the basis that the discrimination was fair since it related to the IROJ. The precise difference in terminology between the two acts is that whereas the EEA merely refers to "a job", the LRA refers to "the particular job". This difference in semantics is not critical since, when having regards to the IROJ, the court will not be inclined to examine overall blanket policy considerations. By judging each case on its own merits, the court is more inclined to examine how the IROJ are precisely affected by the employee's particular rights.⁸⁹⁰

When employees are dismissed on grounds relating to their religion it is clear that the LRA is the national legislation giving effect to an employee's right to equality under the Constitution. In particular, the equality right is protected by providing that the dismissal is automatically unfair. The censure placed on this form of treatment by an employer against an employee is evidenced by the fact that compensation awarded is double the amount awarded in cases for ordinary dismissals,⁸⁹¹ namely 24 months' remuneration.⁸⁹² Unlike the LRA, where a ceiling is set on compensation and the form of remedy, namely compensation or reinstatement, in terms of the EEA the Labour Court may, in addition to awarding compensation also award damages to be paid by the employer to the employee.⁸⁹³

Instances of unfair discrimination on the grounds of religion taking place during the course of employment, but which do not necessarily give rise to the termination of

⁸⁸⁹ Section 187 (2)(a)-(b). Subsection (2)(b) is a defence based on age which is not relevant to this study.

⁸⁹⁰ See subparagraph 3.4.3.1 above.

⁸⁹¹ Where in all the circumstances it is just and equitable, a maximum of twelve months' remuneration calculated at the employee's rate of remuneration on the date of dismissal can be awarded under s 194(1) of the LRA.

⁸⁹² Where, once again, considerations of "just" and "equitable" are taken into account and the remuneration is calculated at the employee's rate of remuneration on the date of dismissal in terms of s 194(3) of the LRA.

⁸⁹³ Section 50(1) and (2).

the employee's employment would need to be addressed under the provisions of section 6 and 11 of the EEA.⁸⁹⁴

Common to the LRA, EEA as well as PEPUDA is the employment of terminology of the prohibition against "unfair discrimination" on any one of the grounds as provided for by the mentioned sections. It is submitted that the converse of "unfair discrimination" must be "fair discrimination" or differential treatment on a basis that is rational, objective, reasonable and not hurtful. This much is apparent from the LRA which provides that "despite section 187(1)(f), a dismissal may be fair if the reason for the dismissal is based on the IROJ".⁸⁹⁵ In similar vein, the EEA provides that it is not unfair discrimination to "take affirmative action measures consistent with the purposes of the Act; or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job".⁸⁹⁶ Apart from affirmative action measures, it is clear that a basis upon which a fair reason may exist to discriminate against an employee is the IROJ. The non-self-executing provisions of subsection 4 of the Constitution have resulted in the enactment of the LRA, EEA and PEPUDA.⁸⁹⁷

Since employees are required to rely directly on statutory provisions aimed at eliminating discrimination, instead of on the Constitutional provision contained in section 9, they are in a sense afforded additional or wider grounds upon which to base their claims.⁸⁹⁸ In addition, employees are afforded the additional ground of establishing discrimination on the basis of any arbitrary ground.⁸⁹⁹

⁸⁹⁴ Alternatively, it is not inconceivable that an employee could claim constructive dismissal in terms of s 186(1)(e) of the LRA on the basis that the employer made continued employment intolerable for the employer for reasons related to freedom of religion or the limitation of expression of freedom of religion.

⁸⁹⁵ Section 187(2)(a).

⁸⁹⁶ Section 6(2).

⁸⁹⁷ This is not to the exclusion of a private dispute relating to religious discrimination in the workplace that may arise as between co-workers which would either be dealt with in terms of a disciplinary hearing, alternatively more formally in terms of the provisions of PEPUDA, the latter of which will not fall within the scope of this research.

⁸⁹⁸ Namely HIV status, political opinion and family responsibility as provided for by the EEA, or political opinion and family responsibility as provided for by the LRA.

⁸⁹⁹ Provided for by s 6(1) of the EEA and s 187(1)(f) of the LRA, although usage of this additional ground does not appear to be without its problems.

In terms of the EEA where an allegation of unfair discrimination is made on a listed ground⁹⁰⁰ we have seen how the respondent is required to prove that such discrimination did not take place; is not rational and/or not unfair or is justifiable.⁹⁰¹ In terms of the LRA, a dismissal in terms of section 187(1)(f) may be fair if the reason therefor is based on an IROJ.⁹⁰² These specified grounds upon which unfair discrimination can take place is of particular significance on account of the fact that they pertain to "immutable biological attributes or characteristics of people" or to the "intellectual, expressive and religious dimensions of humanity".⁹⁰³ A notable feature of the specified or listed grounds of discrimination is the fact that apart from religion being part of this group, they can arguably be considered to be the main basis upon which unfair discrimination disputes are adjudicated. A reason that has been advanced for this is that it is due to the extensive nature of grounds set out in the EEA and the fact that the listed grounds lend themselves to being interpreted generously.⁹⁰⁴ PEPUDA on the other hand affords a greater ambit of factors which must be considered when asking whether the conduct complained of is fair or unfair.⁹⁰⁵ For reasons already stated, it would be in the best interests of any judge when adjudicating a matter of religious discrimination to take into account as much information as possible that could be of assistance in making an informed and well-reasoned finding. The grounds in section 14 of PEPUDA may very well constitute common-sense logical matters that any judicial officer would in any event have taken into account. However, assuming this not to always be the case, there is no harm or prejudice to any party by regard being had to such factors.

PEPUDA specifically binds the state and all persons.⁹⁰⁶ The EEA is binding on an organ of state as defined in section 239 of the Constitution⁹⁰⁷ and all other

⁹⁰⁰ In s 6(1).

⁹⁰¹ Section 11(1)(a) and (b).

⁹⁰² Section 187(2)(a).

⁹⁰³ *Harksen v Lane* 1998 1 SA 300 (CC) para 49.

⁹⁰⁴ See Van Niekerk *et al Law@work* 127-128 and the authorities cited at fn 55.

⁹⁰⁵ As set out under s 14.

⁹⁰⁶ Section 5(1).

⁹⁰⁷ Section 1.

employers.⁹⁰⁸ The same designation is attributed to employers in terms of the LRA.⁹⁰⁹ The provisions of the aforesaid legislation when dealing with unfair discrimination prohibit "any person" from unfairly discriminating against another person (in the case of PEPUA) or an employee (in the case of the EEA and LRA) on grounds of religion. No special dispensation or exception is given to cases where the state is an employer. From this it is clear that the legislative framework gives impetus to subsection (3) and (4) of the section 9 equality proviso in the Constitution that neither the state nor any person may unfairly discriminate against another person.

Conceptually, this feature underscores the fact that South Africa is a secular society premised on state neutrality in that the state does not play an active role in determining the extent to which right to freedom of religion can or cannot be pursued, save to the extent that it has sought to legitimately address a potential conflict of fundamental rights through the general limitation of rights clause as discussed above. Pew Forum reported that in December 2015, Sudan had charged 25 adult males for abandoning the Muslim faith and converting to another religion. These men could possibly be sentenced to death for merely following a different interpretation of Islam as opposed to the one endorsed by the Sudan government. Pew Forum also reported that in 2014 in the Middle East and North Africa, 18 of the region's 20 countries (constituting 90 per cent) have apostasy laws in terms of which civilians are prosecuted for not adhering to the official state religion of Islam.⁹¹⁰

3.5 Conclusion

Tensions arising from the right to religious freedom and ongoing intolerance in a pluralistic society toward the exercise of such rights has resulted in anti-

⁹⁰⁸ Therefore private and public employers (excluding the National Defence Force, National Intelligence Agency, the South African Secret Service, and the South African National Academy of Intelligence) in terms of s 1(a)-(d).

⁹⁰⁹ Section 1(a)-(e).

⁹¹⁰ See Theodorou 2016 <http://www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy/>.

discrimination legislation.⁹¹¹ The requirement for such legislation is necessary given the constitutional commitment to equality and the promise of establishing a more egalitarian society.

Legislation by its very nature is formal to the extent that it regulates rights and obligations in terms of prescribed rules and norms. An overview of the legislative scheme addressing equality jurisprudence and, in particular, religious discrimination in the workplace indicates that religious discrimination in the South African workplace is highly regulated. The EEA and LRA give express articulation to the values and principles set out in the Preamble and substantive equality provisions of the Constitution as they seek to prevent and illuminate instances of unfair discrimination in the workplace. PEPUDA, on the other hand, addresses unfair discrimination in spheres of private and public life where the EEA does not apply. The provisions of PEPUDA in terms of the definitions given for unfair discrimination are relevant to the workplace. For this reason, it is suggested and recommended that when adjudicating workplace-related religious discrimination disputes, judges take due account of the PEPUDA provisions inasmuch as these can assist with their interpretation and adjudication of the dispute.⁹¹² Put differently, the reach of PEPUDA in addressing equality issues, albeit not in the workplace, is wider and more expansive in terms of the factors taken into account under considerations of fairness in section 14. For this reason, PEPUDA should be taken into account as a frame of reference in the adjudication of religious discrimination disputes in the workplace.

⁹¹¹ See Kumar 2013 *JNatZuH* 133; Grim, Clark and Snyder 2014 *IJRR*; Benson 2011 *IJRF* 127 and Du Toit and Potgieter *Unfair Discrimination in the Workplace* 1; European Union Agency for Fundamental Rights 2014 129 <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013-annual-report-2013>; Nel 2013 *IJRF* 175; Hunsberger and Jackson 2005 *JSI* 807; Bramadat 2005 *JIMI* 201; Capell and Sahliyah 2007 *SecJ* 267; Currie and De Waal *The Bill of Rights Handbook* 243-249; Du Toit and Potgieter *Unfair Discrimination in the Workplace* 9-30; Fredman "Facing the future: substantive equality under the spotlight" 15; Fenwick, Kalula and Landau "Labour Law: A Southern African Perspective"; Du Toit 2006 *ILJ* 1311; Dupper and Garbers 2012 *AJur* 244; *Harksen v Lane* 1998 1 SA 300 (CC) para 53; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 18; *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR (CC) paras 71-73.

⁹¹² The fact that judges do take PEPUDA into account when adjudicating workplace disputes is dealt with in subparagraphs 5.4.1 to 5.4.6 below.

The notion of subsidiarity ensures that our national legislative framework cannot be bypassed by a complainant who seeks to rely directly on section 9 of the Constitution. This is understandable and underscores the role played by the principal institution of government democratically mandated to pass laws that address and regulate affairs of national interest. Unfair discrimination on the basis of religion, as shown above, is on the increase from a global perspective. With the increase of a pluralistic society in its diverse views in a secular state it can only be expected that a clash of interests is inevitable given that these very diverse cultures also represent individuals who have deeply held religious views. When these interests clash or conflict in the workplace, suitable remedies need to be found to address the problem. On the other hand, associations or organisations are also at liberty to hold a particular religious view and regard it only as fair discrimination to exclude from their organisation a person who does not hold a similar view. These aforesaid rights and interests, whether individual or collective, must be protected under the rubric of equality under our constitutional ethos. However, to protect one fundamental right in favour of another fundamental right is not a simple exercise.

The notion that South Africa can at least nominally be considered a secular society in which the state is neutral in relation to religious affairs⁹¹³ is supported by the legislative framework which gives the state no special allowance to interfere in the fundamental right of religious freedom. The fact that "no person" may unfairly discriminate against an employee on the ground of religion can be safely construed as giving due effect to the prohibition contained in subsection (3) of section 9 of the Constitution which also prohibits the state from unfairly discriminating against any person.

The South African constitutional and legislative framework on equality is significantly broad. A premium is placed on the notion of equality contained in section 9 of the Constitution as borne out by the fact that our jurisprudence endorses a substantive and not a formal concept of equality. This ensures that proper and full account is

⁹¹³ See discussion in subparagraphs 2.4.1 to 2.4.4 above.

taken of persons irrespective of their socioeconomic position and situation. Put differently, more room is made for a greater number of individuals to be included on account of their differences which must not be excluded but rather celebrated in a democratic order. Moreover, discrimination is dealt with in terms of the imperatives of "unfair discrimination" ensuring that a distinction is drawn between differentiation on objectionable (pejorative) grounds and non-objectionable (benign) grounds. In place is a highly regulated framework cemented together first and foremost by the tenets of the Constitution embracing a generous view of equality.

Giving effect to the constitutional imperative of equality is the national legislation in the form of the EEA and LRA which also gives effect to ILO Convention 111. As with all other disputes in the workplace, religious discrimination disputes demand expedient resolution in order to ensure the stability of a harmonious working environment between the employee and employer.⁹¹⁴ Religious discrimination disputes, as with all equality discrimination disputes, have an impact on the right to human dignity. When such disputes arise there is a clarion call for their effective resolution. Judges are encouraged to resolve such disputes by interpreting the relevant legislation through the prism of the constitutional imperatives that must be taken into account. Whether the *Harksen* test for determining unfair discrimination will continue to dominate our jurisprudential landscape will only be demonstrated by the passage of time. Notwithstanding this, judges are encouraged to adjudicate workplace religious discrimination disputes in the most appropriate manner, meaning to bring to their judgment the most informed reasoning, while account is being had to all the values and principles of our equality jurisprudence. Whether this bodes well for future cases will need to be viewed in terms of the nature of decisions handed down which forms the subject matter of chapter 5.

Due to the inherent regulated framework of legislation governing workplace religious discrimination disputes this in and of itself addresses the need for both employee and employer as role-players to engage in constructive dialogue to seek measures to

⁹¹⁴ Knight 2014 *MJSS* 593.

resolve conflicts and differences as and when they arise in the workplace. This dialogue speaks to the issue of tolerance, mutual responsibility, mutual respect and participatory conduct on the part of both parties in the employment relationship to make a meaningful difference of transforming the workplace into a node where social justice too can be realised.

In Chapter 4, an analysis will be made of the Canadian approach to the regulation of religious discrimination in the workplace. The purpose thereof will be to show that the Canadian approach to reasonable accommodation, which effectively places a duty upon both employee and employer to seek measures to address a means of accommodating the employee's religion short of it resulting in an undue hardship to the employer, is an approach from which our resolution and adjudication of religious discrimination disputes can be enriched.

In Chapter 5, an analysis of South African jurisprudence looks at how our courts have dealt with equality-related disputes and in particular religious discrimination in the workplace.

CHAPTER 4:

COMPARISON WITH INTERNATIONAL AND FOREIGN LAW PERTAINING TO RELIGIOUS DISCRIMINATION IN THE WORKPLACE

4.1 Introduction

In its concluding part, the Preamble to the Constitution provides that the Constitution is adopted as the supreme law of the Republic so as to:

... build a united and democratic South Africa able to take its rightful place as a sovereign state in the *family of nations* ...⁹¹⁵

South Africa has always played a significant role in international relations, commencing with the Dutch East India Company's identification of the Cape as a settlement outpost in 1652. Such settlements became usually formalised as a colony. This was the effective springboard for the commencement of development and modernisation of Africa subject to Western laws, norms and cultural influences. Notwithstanding advantages to be gained from such development, it cannot detract from the untold suffering incurred by millions of indigenous persons subject to colonisation, who were often subject to slavery and other forms of human rights abuses.⁹¹⁶

Under the influence of Roman-Dutch law, and already in the early nineteenth century, international law was recognised by the courts as part of South African

⁹¹⁵ Emphasis added.

⁹¹⁶ See Van der Merwe "The church order of De Mist and the advent of religious freedom in South Africa: A contribution to the common good" 77 from which it appears that pursuant to a charter of the Dutch East India Company (hereafter the company) the task of the company was to "*conserveren het publiek geloof*" (to protect the public faith) by means of establishing the Dutch Reformed Church as the officially recognised government church responsible for the "spiritual care and guidance of the people"; Hahlo and Kahn *The South African Legal System and its Background* 575 ff; Hahlo and Maisels 1966 *VirgLR* 2-10; Vink 2003 *JWH* 135-140; Rautenbach 2008 *EJCL* 2-5. In point of fact, colonialism has had far-reaching effects to the extent that it remains a relevant topic of discourse in South African jurisprudence in many respects, not least of which is the imposition of Western-based religious values which have been seen to "super-impose" themselves on traditional indigenous religions. See Van der Vyver 2008 *AHRJ* 338-343; Wallace 2015 *JSR* 24-27; Bartov and Mack *In God's Name: Genocide and Religion in the Twentieth Century*.

common law. Dugard⁹¹⁷ refers to comments made by Kotze CJ in the case of *CC Maynard v The Field Cornet of Pretoria*⁹¹⁸ whilst referring "with approval [to] a passage from Wharton's *Digest* that "the Law of Nations makes an integral part of the laws of the land", stating:

... as put by Sir Henry Maine "that the state which disclaims the authority of International Law places herself outside the circle of civilized nations". It is only by a strict adherence to these principles that our young state can hope to acquire and maintain the respect of all civilized communities, and so preserve its own national independence.⁹¹⁹

As part of the "family of nations", South Africa has always occupied a noteworthy place on the platform of international relations. This was especially apparent during its darkest days of government rulership under the apartheid regime.⁹²⁰ Its emergence under the constitutional dispensation was an epiphany captured by the following *dictum*:

[It] evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law ... [in accordance with] the Bill of Rights.⁹²¹

The "family of nations" motif in the Preamble is not mere prose. There is a greater practical dimension thereto. This is evidenced by the interpretive provision of the Bill of Rights making it obligatory for courts to consider international law⁹²² and that they may consider foreign law.⁹²³ As already mentioned,⁹²⁴ chapter 14 of the

⁹¹⁷ See Dugard *International Law: A South African Perspective* 45.

⁹¹⁸ (1894) 1 SAR 214.

⁹¹⁹ At 223.

⁹²⁰ See Dugard 1971 *SALJ* 181; Dugard *Human Rights and the South African Legal Order*, *S v Makwanyane* 1995 3 SA 391 (CC) para 262; *Brink v Kitshoff* 1996 4 SA 197 (CC) where at para 40 O'Regan J refers to the systemic discrimination against black people under the apartheid regime; Forsyth 1988 *SALJ* 680; Lobban *White Man's Justice: South African Political Trials in the Black Consciousness Era*; Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910-1954*.

⁹²¹ *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) per Van der Westhuizen J para 36.

⁹²² Section 39(1)(b).

⁹²³ Section 39(1)(c).

⁹²⁴ See discussion in subparagraph 3.3.4 above.

Constitution⁹²⁵ pertains to the regulation and application of international and customary international law. International law has been defined as "a body of rules and principles which are binding upon states in their relations with one another".⁹²⁶ What is significant is that despite international law having been part of South African common law, it was not until the coming into effect of the interim and final Constitutions that it was actually accorded constitutional recognition and its recognition was effectively constitutionally guaranteed.⁹²⁷ On account of the above reasons, it is necessary to consider the subject matter of this thesis also with reference to international and foreign law.

The purpose of this chapter is to employ foreign law as a relevant consideration to the subject matter of this thesis. As such, Canada as a country will be focused on in addition to relevant ILO recommendations.⁹²⁸

When dealing with Canada, reasons will be advanced why this country has been selected as a comparator for purposes of workplace religious discrimination. The study will proceed to look at the manner in which Canada has addressed religious discrimination in the workplace by means of its relevant regulatory framework. Included in, but not limited to, such analysis will be the conceptual and definitional issues attendant to religious discrimination, as explored in Chapter 2, and how Canadian jurisprudence has addressed these matters. Reported cases on religious workplace discrimination will be examined for the purpose of looking at the way in which Canadian jurisprudence has developed a mutual accommodation approach in terms of dealing with conflicting fundamental rights and interests at play in the workplace. This chapter will also seek to demonstrate whether there are any valuable principles established under Canadian regulation and jurisprudence in relation to

⁹²⁵ Sections 231-233.

⁹²⁶ See Brierly as quoted by Dugard *International Law A South African Perspective* 1. For a historical development of international law see Dugard's rendition thereof in the work cited at 11-15. See also Hosten *et al Introduction to South African Law and Legal Theory* 805-826; Rautenbach and Malherbe *Constitutional Law* 45. For an interesting analysis of the involvement of Jan Smuts in the Charter of the League of Nations see Steyn *Jan Smuts Unafraid of Greatness* 146-150.

⁹²⁷ See Dugard *International Law A South African Perspective* 51; Blake 1998 *SALJ* 670; Botha 1994 *SAPL* 255-256.

⁹²⁸ See discussion in subparagraphs 2.5.3, 3.3.4 above and 4.7.2 below.

workplace religious discrimination disputes which could be of benefit to South African jurisprudence. The reference to international and foreign law is not to simply import any of its principles regardless of the context,⁹²⁹ but to examine these principles for the assistance we can distil therefrom. This is after all the aim and purpose of comparative law.⁹³⁰

4.2 Canada

4.2.1 Canada as a suitable comparator

The egalitarian status of Canada as a nation has been the object of much scholarly debates and literature throughout the world.⁹³¹ Central to this debate is the way in which the Canadian Charter of Rights and Freedom⁹³² (hereafter the Canadian Charter) has been interpreted and the extent to which such interpretations have maintained, advanced or limited the egalitarian status of Canada. In other words, when the courts are called upon to adjudicate conflicting fundamental rights⁹³³ protected by the Canadian Charter, the judgments are often matters for extensive discussion and debate on account of the fact that there is an exercise of a value judgment.⁹³⁴ More significantly, Canada has been the focus of many South African Constitutional Court decisions.⁹³⁵ This is not to say our Constitutional Court has not

⁹²⁹ See Markesinis and Fedtke *Engaging with Foreign Law* (2009) 131; *Bernstein v Bester* 1996 6 BCLR 449 (CC); Cooper 2004 *ILJ* 750-751.

⁹³⁰ See *S v Makwanyane* para 39; *Jafta v Ezemvelo KZN Wildlife* 2008 10 BLLR 954 (LC) 964F; Davidov and Langille *Boundaries and Frontiers of Labour Law: Goals and Means in the regulation of Work* 355-356; *NUMSA v Bader Bop* 2003 BLLR 103 (CC) 116G-119G; *Discovery Health Ltd v CCMA* 2008 7 BLLR 633 (LAC) para 28.

⁹³¹ See Smithey 2001 *CJPS* 85-107, especially the authorities cited at fn 1.

⁹³² Adopted in 1982 as Part I of the Constitution Act of 1982 being Schedule B to the Canada Act 1982 (UK).

⁹³³ For example, the right of an employee to religious freedom in the workplace and the employer's right that the individual employee's specific religious belief is a contravention of an IROJ.

⁹³⁴ Made with reference to considerations such as, *inter alia*, rationality, reasonableness, proportionality, the IROJ, and the issue of mutual accommodation.

⁹³⁵ See *Fedsure* para 56; *S v Makwanyane* paras 60-62; *S v Zuma* para 15; *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders (NICRO)* 2004 5 BCLR 445 (CC) para 45; *Buzani Dodo v The State* 2001 3 SA 382 (CC) paras 28 and 30; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 292 (CC); *Mohamed v President of Republic of RSA* 2001 3 SA 893 (CC) paras 62-67; *Ex Parte The President of the RSA v In re: Constitutionality of the Liquor Bill of 11 November 1999* 2000 1 SA 732 (CC) para 7; *Lawrie John Fraser v Children's Court Act* 1997 2 SA 261 (CC) paras 43-44; *Lawyers for Human Rights and*

had regard to the jurisdictions of other foreign countries. The noteworthy aspect in relation to Canada's egalitarian status is determined ultimately against the backdrop and context of the Canadian Charter to which all its legal systems and regulations are subject. There is a notional link that South Africa shares with such a country given that our Constitution is supreme and ultimately determinative of the extent to which the exercise of all power⁹³⁶ is legitimate.⁹³⁷ On the other hand, Canada is in a felicitous position of having addressed its culture of plurality and human rights as will be expanded upon below, at a time when South Africa was characterised by a system of totalitarian laws ignoring and in fact flaunting human rights. Consequently, Canada has a rich heritage of equality jurisprudence addressing egalitarian issues that can only be of assistance to South African jurisprudence in terms of the values and principles to be obtained therefrom. The fact that Canadian courts are known to refer more often to foreign jurisprudence than for example the US Supreme Court, makes Canadian jurisprudence conceptually more mature in terms of the international sources it has considered.⁹³⁸ There is an interesting comity between South African and Canadian constitutional jurisprudence. For South Africa, transformative constitutionalism features high on the agenda of transition to our new democratic order. For Canada, there is also a notion of transformation in terms of its cultural heritage. The rights guaranteed under the Canadian Charter must be interpreted consistent with the "living tree" notion of constitutional jurisprudence justice. In this sense transformative justice giving effect to the metaphor of the "living tree" is aspired toward.⁹³⁹ This is especially relevant to constitutional

Ann Francis Eveleth v Minister of Home Affairs 2003 8 BCLR 891 (T) paras 76-77. These cases are referred to by Lollini 2012 *UtrLR* 55-87. Also see Dickson 1997 *FordhLR* 532 (especially authorities at fn 3), 539, 549-558; Rautenbach *PER* 1548 and especially the authorities cited at fn 26.

⁹³⁶ Whether by natural persons, juristic entities or organs of state.

⁹³⁷ In terms of the rule of law as expressed under s 1(c) of the Constitution.

⁹³⁸ See Clarke 2010 www.loc.gov/law/help/domestic-judgment/canada.php; Randy 2008 <http://www.thecourt.ca/2008/12/714/>; Liptak *New York Times*.

⁹³⁹ The metaphor of a living tree in the Canadian context is ascribed to Lord Chancellor Sankey in *Edwards v Attorney-General for Canada* [1930] AC 124 (PC 1929) in a case involving an interpretive provision under the then Canadian constitution involving gender equality. See Jackson 2006 *FordhLR* 943; Borrows 2012 *SCLR* 352 and especially the authority cited at fn 6; Whyte 2012 *RCS* 1; Hasan 2013 *SCLR* 343-348.

jurisprudence infusing labour law and equality law in particular.⁹⁴⁰ From a legal analysis point of view, it has been said that our Constitutional Court's approach to the interpretation of fundamental rights as expressed in the Constitution is "more compatible" with that of the Canadian courts than, for example the US Supreme Court on account of the criteria in respect of the limitation of rights as laid down in the Constitution.⁹⁴¹ In addition, the Canadian jurisprudential approach to proportionality and principle of subsidiarity is more closely aligned to the South African model.⁹⁴² What appears to be the greatest attraction is the notional attraction Canadian jurisprudence has with developing an organic jurisprudence that transforms in accordance with its multiculturalism which is directly aligned with the transformative ethos informing South African jurisprudence.⁹⁴³ However, the relevance in this regard is the extent to which transformation is manifested in the labour law dispensation as between worker and employer. A proper examination of this requires one to take into account the diverseness of Canadian society and the resultant confluence of religious freedoms with secular norms in a multicultural society.

4.2.2 The diverseness of Canadian society

Canadian society owes its current multicultural make-up to the significant impact and influence over time of immigrants and their descendants (especially French Roman Catholics and English Protestants) who settled in Canada⁹⁴⁴ joining the indigenous communities that had been living there for millennia.⁹⁴⁵ A 2011 National Household Survey revealed that Canada is home to people from over 200 different ethnic groups⁹⁴⁶ with an increase in religious diversity.⁹⁴⁷ The mosaic composition of

⁹⁴⁰ See *Edwards v Canada (Attorney-General)* [1930] AC 124; Weinrib 1998 *SAJHR* 371.

⁹⁴¹ See Lollini 2012 *UtrLR* 64, especially the authorities cited at fn 44.

⁹⁴² See Tushnet 2013 *OHLJ* 541.

⁹⁴³ See Tushnet 2013 *OHLJ* 540.

⁹⁴⁴ See Cole-Arnal "Canadian workers and social justice" 327; Des Rosiers 2010 *SCLR* 93; Dib, Donaldson and Turcotte 2008 *CanES* 161; Ventura *From outlawing discrimination to promoting equality: Canada's experience with anti-discrimination legislation*.

⁹⁴⁵ See Jukier and Woehrling "Religion and the secular state in Canada" 155.

⁹⁴⁶ See Government of Canada 2015 <http://www.cic.gc.ca/english/resources/publications/multi-report2014/3.asp> (the Annual Report in Canada 2013-2014). This is another aspect making Canada an appropriate choice as a comparator for South Africa.

Canadian society makes it at once a hot-pot of diverse cultures. A most befitting characterisation of Canadian society has been given as follows:

It would be more accurate to describe Canada as a bilingual, multicultural federation operating within a pluralistic society.⁹⁴⁸

Canada's former Prime Minister Pierre Trudeau recognised the necessity of developing a framework and paradigm within which the diverse interests of persons throughout Canadian society could be accounted for in terms of policy and national interests. In a speech delivered by the Prime Minister in the House of Commons on 8 October 1971 the principles of national unity, freedom of culture, equality and mutual respect were made clear when the following observation was made concerning the intent of the policy:

Such a policy (of multiculturalism within a bilingual framework) should help to break down *discriminatory attitudes* and cultural jealousies. National unity, if it is to mean anything in the deeply personal sense, must be founded on confidence in *one's own individual identity*; out of this can grow respect for that of others and a willingness to *share ideas*, attitudes, and *assumptions*. It can form the base of a society based on *fair play* for all.⁹⁴⁹

Concerns which come to the fore in the above sentiment are the need to address discrimination, uphold human dignity (with reference to the expression of individual identity), for benefits to be derived from a collectiveness of ideas, and for dealing with stereotyping (with reference to assumptions) and social justice (with reference to fair play for all).

The full *gravitas* of Trudeau's policy is evidenced by the fact that it gave impetus to the formulation and adoption of the Canadian Multiculturalism Act (the Multiculturalism Act).⁹⁵⁰ The most notable features of the Preamble to the Multiculturalism Act provide the following:

⁹⁴⁷ By 2011 approximately 7,2 % of Canadians adhered to non-Christian faiths, namely Muslim, Hindu, Sikh, Buddhist or Jewish, which was an increase from the 4,9% recorded a decade earlier in the 2001 Census (see the Annual Report on Canada 2013-2014).

⁹⁴⁸ See Jukier and Woehrling "Religion and the secular state in Canada" 155; McLachlin 2015 *WJLS* 5-8.

⁹⁴⁹ See Magsino 1998 *Paideusis* 12 (8-21). Emphasis added.

⁹⁵⁰ 21 July 1988. See Kawano 2015 *Notandum* 57-67.

Whereas the Constitution of Canada provides that *every individual is equal before and under the law* and has the right to the *equal protection* and benefit of the law *without discrimination* and that everyone has the freedom of conscience, *religion*, thought, belief, opinion, expression, peaceful assembly and association and guarantees those rights and freedoms equally to males and females.⁹⁵¹

The following is also expressly provided:

AND WHEREAS Canada is a party to the *International Convention on the Elimination of All Forms of Racial Discrimination*, which Convention recognises that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination, and to the *International Covenant on Civil and Political Rights*, which Covenant provides that persons belonging to ethnic, *religious* or linguistic minorities shall not be denied the right to enjoy their own culture, *to profess and practise their own religion* or to use their own language;⁹⁵²

AND WHEREAS the Government of Canada recognises the diversity of Canadians as regards race, national or ethnic origin, colour and *religion* as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to *preserve and enhance the multicultural heritage of Canadians* while *working to achieve equality* of all Canadians in the economic, *social*, cultural and political life of Canada.⁹⁵³

Distinctive features that can be gleaned from the aforesaid provisions of the Preamble is the overarching concern about addressing the issue of equality and working to achieve a societal egalitarian order in which all the inhabitants, despite their different cultures, are not merely tolerated, but actually recognised for their diverseness as something which contributes positively to the heritage and identity of Canada as a country. The fact that freedom of religion⁹⁵⁴ is accorded recognition in the first paragraph of the Preamble demonstrates the fundamental value of this within the context of equality jurisprudence. Moreover, the concern with protecting freedom of religion is apparent throughout the Preamble. The rationale for this is premised on the very fact which the Multiculturalism Act seeks to address, namely establishing an egalitarian society on account of the multicultural diversity of persons in Canadian society. This multicultural diversity is synonymous with a plurality society

⁹⁵¹ Para 1. Emphasis added.

⁹⁵² Para 7. Emphasis added.

⁹⁵³ Para 8. Emphasis added.

⁹⁵⁴ Together with the other rights mentioned.

or a society representative of persons with varying fundamental ethnic, social, cultural and religious beliefs.

This diversification of plurality of interests is fertile ground for disputes of fundamental rights and interests. This is particularly apparent in the workplace where, depending on the size and/or structure of the business, employees and employers are required to work in close proximity with each other or with co-employees or in accordance with the inherent requirements of an employer's business.⁹⁵⁵ This very matrix, and the potentially problem-based disputes attendant thereto, are explored and must be considered within this context but with reference to the issue of secularism.

The express reference in the Multiculturalism Act to specific national legislative and international human rights instruments bears testimony to the significant place and relevance of these matters to Canadian law and its stance with respect to human rights. It is significant that in the Preamble to the Multiculturalism Act, specific mention is made of the Canadian Human Rights Act⁹⁵⁶ (hereafter the CHRA) and that Canada is a party to the ICCPR.⁹⁵⁷ The Multiculturalism Act is legislation which embraces the principles of diversity and tolerance and is a so-to-speak statutory commitment on the part of national government to "encourage and assist individuals, organizations and institutions" to "project the multicultural reality of Canada" in their "activities".⁹⁵⁸ Whilst the aforesaid aspects require consideration in the context of religious discrimination in the workplace, this must also be considered within the context of what is meant by secularism in Canadian society.

⁹⁵⁵ See Dib, Donaldson and Turcotte 2008 *CanES* 161; Portes and Vickstrom "Diversity, social capital and cohesion" 161; Hodgett and Clark 2011 *IJCanS* 163.

⁹⁵⁶ Of 1985. It provides that every individual should have an equal opportunity with other individuals to make the life that the individual is able and wishes to have, consistent with the duties and obligations of that individual as a member of society and, in order to secure that opportunity, establishes the right to redress proscribed discrimination, including discrimination on the basis of race, national, or ethnic origin or colour.

⁹⁵⁷ As well as DEFIRB.

⁹⁵⁸ Section 5(1)(a)-(i).

4.2.3 Canadian secularism

The notion of secularism is a concept that resonates with a normative view of non-religious values versus religious values. It is also considered in terms of the extent to which the state involves itself in the domain of religious freedom, alternatively refrains from interfering, save where actions prove dangerous to others, in the realm of religious freedom and its practices. It is in within various contextual situations as set out below that secularism in Canada should be understood as a conceptual norm.

Jukier and Woehrling⁹⁵⁹ point to an illuminating decision of the Supreme Court of Canada in *R v NS*.⁹⁶⁰ The case is not employment related; it is a case in which the Court was called upon to make a ruling as to whether a witness (who was also the victim) in a criminal assault case could refuse to take off her full-face covering, namely her *niqab* whilst testifying. The majority of the court, in a judgment given by McLachlin CJ, acknowledged that there are no concrete rules to determining such questions, but that they need to be adjudicated on the basis of a "just and proportionate balance between freedom of religion and the right to a fair trial".⁹⁶¹ McLachlin CJ observed the following:

A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction. What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial ...⁹⁶²

The judgment highlights the fact that there can be no universal rule or policy regulating the wearing of religious garments in public. Each case would need to be

⁹⁵⁹ See Jukier and Woehrling "Religion and the secular state in Canada" 190.

⁹⁶⁰ [2012] 3 SCC 72.

⁹⁶¹ Para 31.

⁹⁶² Para 2.

determined in a balanced manner, taking due account of what is reasonable, rational and fair.⁹⁶³

An employment-related case of significance is the matter of *Bhinder v AG of Canada, Manitoba*.⁹⁶⁴ In this matter the company introduced a rule requiring all employees to wear hardhats at the worksite for safety reasons. The employee refused on the basis that his Sikh religion required him to wear nothing other than a turban on his head. As a result he was dismissed by the company. The employee claimed discrimination on the basis of religion. The tribunal interpreted the Canadian Human Rights Act to mean that wearing a hardhat was in fact a basic requirement of the job (hereafter BFOR) which eliminated the requirement of reasonable accommodation since the tribunal was dealing with "adverse effect discrimination".⁹⁶⁵ The majority judges of the Supreme Court of Canada confirmed the finding of the tribunal. The *Bhinder* case resulted in the Canadian Human Rights Commission submitting a report to Parliament requesting amendments to the aforesaid legislation to address the situation of reasonable accommodation. However, the issue of reasonable accommodation came to be addressed by the Canadian Supreme Court a few years later in the matter of *Alberta Human Rights Commission v Central Alberta Dairy Pool*.⁹⁶⁶ The effect of this judgment⁹⁶⁷ was to effectively find that Bhinder was

⁹⁶³ The finding by the majority of the Supreme Court (Chief Justice McLachlin, Justice Dechamps, Justice Fish and Justice Cromwell) in relation to the question of whether a woman could insist on wearing a *niqab* whilst testifying in open court had to be determined with reference to a just and proportionate balance between freedom of religion and the right which an accused had to a fair trial. Without making a finding that would bind future cases, the Supreme Court held that each case had to be decided on its own merits. A trial court judge, in deciding whether to order a woman to remove her *niqab* when testifying would need to consider:

- (a) Whether the removal of the *niqab* by the woman during her testifying would interfere with her religious freedom?
- (b) Would allowing her to wear the *niqab* create a serious risk to the right to a fair trial?
- (c) If both Charter rights are involved, is there a way to accommodate both rights and avoid conflict? and
- (d) If the rights cannot be accommodated, are the benefits requiring her to remove the *niqab* more than the negative effects of doing so? See para 9.

⁹⁶⁴ [1985] 2 RCS 561.

⁹⁶⁵ This is sometimes also referred to in Canadian jurisprudence as "bona fide occupational qualification" (BFOQ). For purposes of this study the author has chosen the acronym as set out in the text, namely BFOR. See subparagraphs 4.5.3.1 and 4.5.3.2 below.

⁹⁶⁶ [1990] 2 SCR 489. See further discussion of case under subparagraph 4.6.3 below.

⁹⁶⁷ Also see discussion under subparagraph 4.6.3 above.

incorrect insofar as it did not consider reasonable accommodation to be a requirement in cases of indirect/adverse discrimination.⁹⁶⁸

Religious clothes, their colours, symbols, and observances will always play a significant role in religious discrimination disputes on account of the fact that these are sometimes the very factors which by their nature evidence an individual's freedom of religion which when it clashes with their workplace duties or impedes their function at the workplace can culminate in various disputes in the workplace. There is nothing untoward about the external manifestations of religious freedoms in a secular society as evidenced by the symbolism of religious dress, icons or observances. However, when a clash occurs between the way or manner in which these freedoms are sometimes manifested and what is required by the employer at a particular workplace, it can result in a situation that needs to be assessed in a balanced manner taking into account fundamental rights as well as what is reasonable and rational in the limitation of such rights in fulfilment of complying with the BFOR.

4.2.4 Relative notions of secularism

The notion of secularism brings to mind a sense of non-religiousness. However, on account of the multicultural nature of Canadian society and also considering what we have come to understand by the definition of religion as a uniquely subjectively held belief, it would be naive to think of Canadian society as non-religious. One needs to consider the role played by the state in relation to freedom and expression of religion. In this regard, the state plays a neutral role in the extent to which citizens wish to express their freedom of religion. There is a separation by the state from the role played by religion in the lives of its citizens. Ultimately this translates into freedom of choice in that it is left to the election of the citizen whether they want to associate themselves with any particular religious faith, alternatively be atheistic⁹⁶⁹ or agnostic. Moon has described it as meaning:

⁹⁶⁸ Per Wilson J 516 j to 517 a-c and Sopinka J 527 g-j to 528 a-g.

⁹⁶⁹ See Doughart *National Post*.

... the ordering of public life exclusively on the basis of non-religious practices and values. It is viewed by many as a neutral ground that stands outside religious controversy.⁹⁷⁰

Whether someone chooses to be religious or non-religious is a matter of personal choice and not something in which the state professes or declares (or should legitimately claim) to have an interest.⁹⁷¹ In an appeal from Quebec, in the matter of *Mouvement laïque québécois v Saguenay (City)*⁹⁷² the Supreme Court on 15 April 2015 ruled that a religious prayer said prior to the commencement of a meeting at city council meetings was in fundamental breach of the right of atheistic believers under section 15(1)(a) of the Canadian Charter. The ruling is not only a celebration for atheists but an affirmation that there is to be no endorsement by the state in terms of which religion is officially enforced upon the citizens or members of the country.⁹⁷³

No study on religious discrimination would be replete with at least some notional reference to the "establishment clause"⁹⁷⁴ in the US. It warrants being referred to in the context of this thesis also to highlight and contextualise the Canadian model when looking at the essentially neutral role adopted by government in relation to religious freedom on the part of individuals and organisation.

The US "establishment clause" arises from the First Amendment, recognising the autonomy of religious entities free from state intervention. Essentially this is a guarantee of protection of religious freedom against interference from government. However, it also works as a means of preventing government from interfering in the affairs of religious organisations, groups, associations and affiliations relating to the running and operation of their ministries and entities. Whilst notionally this prevents

⁹⁷⁰ Moon *Law and Religious Pluralism in Canada* 6.

⁹⁷¹ See Mill *On Liberty, Utilitarianism and Other Essays* 75.

⁹⁷² [2015] SCR 3.

⁹⁷³ This is in contrast to countries, as previously mentioned, where religion is imposed by the state upon its citizens as a way of life and where an individual in effect is left with no choice but to adhere to the official recognised religion, failing which the result can be persecution by the state authorities. See discussion of position in South Africa under subparagraphs 2.4.1 to 2.4.4 above.

⁹⁷⁴ Also referred to as the "anti-establishment provision". See Lenta "The South African constitutional court's reading of the right to freedom of religion" 31-44. See discussion in subparagraph 2.4.3 above.

no problem *per se*, it can, depending on the factual matrix, lead to a situation of religious discrimination where the organisation in question unfairly discriminates against an applicant for employment on the basis of religion. Some may argue, but the right accorded to such organisations is no different to what is given to groups under section 31(1) of the South African Constitution. A manifest problem is the extent to which a court would permit employment discrimination by an organisation against another person. A case in point stems from the matter of *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*⁹⁷⁵ (hereafter *Hosanna-Tabor*). In this case the plaintiff who had been employed at the school returned to the school after having been on disability for several months. Upon her return she was urged to resign and despite refusing to do so was dismissed. An employment commission found in her favour; however, on appeal to the district court the decision was overturned on the basis of upholding the argument in favour of the Lutheran Church. They argued that they had "ministerial exception" under the First Amendment which permitted religious institutions to control their own affairs without interference from the courts. In a unanimous decision, the Supreme Court found that the employee was employed as a minister and due to the "ministerial exception", established by courts to prevent interference by government in church institutions. On this basis it confirmed the decision of the district court.⁹⁷⁶ The decision has been strongly criticised on the basis that religious discrimination is fundamentally being determined through the "prism" of liberty (on the part of a religious organisation) instead of a more balanced approach in favour of substantive equality.⁹⁷⁷ Moreover, the emphasis placed by the court on interpreting the secular duties and roles of the employee versus her religious duties appears to be overly rigid and formal.⁹⁷⁸ The judgment is a victory for religious institutions, and is open to potential abuse by other religious organisations who, when faced with allegations of religious discrimination claim protection under "ministerial exemption".

⁹⁷⁵ Sup Crt (United States) 694 (2012).

⁹⁷⁶ Pages 13-20.

⁹⁷⁷ See Murray 2015 *SMLR* 1127; Corbin 2012 *NWULRC* 951-972; Garnett 2012 www.usatoday30.com/news/opinion/forum/story/2012-01-11.

⁹⁷⁸ See Murray 2015 *SMLR* 1128-1129.

In this instance, the neutrality of the state is apparently too passive. Deference to the "establishment clause" has, as we have seen, untold consequences against potential employees in favour of organisations who can apparently claim protection under the exception as described. This is a clear case of a society extolling its commitment to freedom – freedom of religious practices on the one hand, and on the other, freedom from interference from the non-religious (secular) domain of government. This is a somewhat absolutist form of secularism.

The neutrality of the state in terms of freedom of religion should be subject to a notion of relativism, rather than be seen in absolute terms or a concept. This point of view is supported by the fact that the state does have a legitimate role to play in determining the extent to which the right to religious freedom ought and should be pursued by an individual or an organisation. In the interests of national security, and in the wake of the September 2001 terror attack on New York, the entire world has been made acutely aware of religious extremism. Whilst freedom of religion *per se* raises no objections, any claim to such freedom expressed in terms of a so-called "holy war" by way of terror attacks perpetrated with impunity against innocent lives cannot be tolerated by any government.⁹⁷⁹ Accordingly, the extent of state intervention in the realm of the expression of freedom of religion can be determined by the manner in which the former right is being expressed and the purpose sought to be achieved thereby. This is further contextualised in the following paragraph.

With reference to secularism in Canada, Jukier and Woehrling draw attention to the Bouchard-Taylor Commission (hereafter the Commission) that was tasked with

⁹⁷⁹ The position of South Africa, whilst neutral in relation to religious freedom, should not be interpreted as being non-vigilant in respect of matter of national security in relation to religious extremism. Responding to information received from the US embassy about possible terror attacks against South Africa during from the month of Ramadan, foreign affair's ministry spokesperson Clayson Monyela said: "The state security agency and other security agencies in the country are very much capable of keeping South Africa safe and everybody in this country including Americans." This apparently followed a similar warning on 2009. See Author unknown *Eyewitness News* 04 June 2016 ewn.co.za/2016/06/04/US (20 October 2016). Moreover, four persons suspected of being Islamic State supporters (in connection with plans to fly to Syria in an effort to join ISIS) who were arrested in antiterrorism police raids received much media coverage recently which is also indicative of the South African government's stance against religious extremism manifested in the form of terrorism. See Hosken *Rand Daily Mail*. For further reading see Rafudeen 2016 *AHRLJ* 239-240. See subparagraph 2.4.3 above.

looking into the question of accommodating religious practices in Quebec.⁹⁸⁰ The Commission identified four elements essential to any model of secularism, namely: moral equality between persons; freedom of conscience and religion; state neutrality in relation to religion, and separation of church and state.⁹⁸¹ The authors refer to terms such as "strict" or "rigid" secularism where, although freedom of religion is recognised, there is greater value and emphasis placed on private and community interests effectively resulting in what they term "a-religiousness", the consequence of which is that religious freedoms are not accommodated but stand to be sacrificed to advance public plurality policy interests.⁹⁸² In contrast with this stands the "flexible" or "open" secular model in terms of which in the interests of protecting religious freedom, any tensions arising between pluralistic interests and religious freedom are resolved in favour of accommodating "religious freedom and equality".⁹⁸³ It is this latter model which the Commission favoured and which was also ostensibly endorsed by Dickson CJ in *R v Big M Drug Mart*⁹⁸⁴ when he observed as follows:

... a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.⁹⁸⁵

The aforesaid authors contend, correctly it is submitted, that the Canadian courts apply an open model of secularism "in their interpretation of the Charter".⁹⁸⁶ This description given of the Canadian model is a fair and accurate one since it best describes not only the normative concept but also the practical dimension of effect given to the religious freedoms playing out in a secular domain.

In terms of the paradigm of the social contract the state must and does play a role in the lives of all its citizens. This is the normative reality of any modern society. The concern is not that the state is a role-player but rather the extent of its involvement as role-player with regard to the fundamental freedoms of its citizens. In theocracies,

⁹⁸⁰ "Religion and the secular state in Canada" 157.

⁹⁸¹ Jukier and Woehrling "Religion and the secular state in Canada" 158.

⁹⁸² Jukier and Woehrling "Religion and the secular state in Canada" 158 and authority cited at fn 22.

⁹⁸³ Jukier and Woehrling "Religion and the secular state in Canada" 158.

⁹⁸⁴ [1985] 1 SCR 295.

⁹⁸⁵ Para 94.

⁹⁸⁶ Jukier and Woehrling "Religion and the secular state in Canada" 158.

as pointed out in Chapter 2, living according to a strict religious moral code imposed by a monotheistic state is oppressive on account of the fact that it detracts from the sense of the individual will to be different; to disagree; to dissent; to not want to conform to what the religious majority regard as sacrosanct. In modern established democracies such as Canada and newly established democracies such as South Africa, it is submitted that on account of the plurality of interests, which include religious and non-religious freedoms, the state must continue to play a role in ensuring that in instances of a conflict of fundamental rights, there is an appropriate mechanism in place to address such conflict. This mechanism is the legislative framework which must be interpreted against constitutional norms and values by the judicial arm of government. Moreover, such framework also provides for participatory means on the part of interested parties to conflicts to resolve their differences in terms of constructive social dialogue. This framework, with equality as its point of reference as well as the establishment of a just society, is conceptually fundamental to the realisation of social justice.

Consequently, it is argued that conceptually it is artificial to conceive of specific models of secularism in pluralistic societies. When fundamental rights compete, such as an employee's right to freedom of religion and an employer's right to operate his business in a particular manner, they need to be dealt with and assessed in terms of certain values.⁹⁸⁷ Each and every case of conflicting rights has to be assessed on its own merits. As such varying cases will give rise to varying decisions. The extent of the limitation of the right to freedom of religion on the part of an employee would need to be contextualised and justified on each occasion with reference to fundamental principles of equality, freedom and human dignity. Ultimately what matters is not the label we attach to the model of secularism, but rather the extent

⁹⁸⁷ Such as rationality, reasonableness, proportionality, inherent job requirements and mutual accommodation. See discussion in subparagraphs 3.2.2 and 3.3.3 above.

to which it can be said that optimal effect is given to all competing interests at stake.⁹⁸⁸

As previously mentioned, a few examples of problems which would call for a balancing of interests appears from the scenarios discussed below.

4.2.4.1 *Religious dress, colours, symbols and observance*

Religions are often identified by dress codes, colours, symbols as well as observances on the part of their members. Many people advocate the cause of the fight against breast cancer by wearing pink ribbons as means of creating awareness and also showing solidarity in their cause.⁹⁸⁹ Whilst Elliot points out that the colour pink has strong associations with life and positivity, the point is also made in respect of the extent to which, historically, colours have always played significant roles in conveying strong statements.⁹⁹⁰ Take, for example, the use of a white flag to indicate peace in a time of war, or the tying of a yellow ribbon on trees by Americans during the Gulf war as an indication of concern for human dignity.⁹⁹¹

When it comes to members of particular religious faiths, they too, whether in celebration of or out of deference to their faith, often choose to dress in a certain manner, wear specific symbols, associate themselves with certain colours (usually manifested in their dress code or by some adornment on the body) and through observance of religious practices.

Some examples in this regard are considered below.

⁹⁸⁸ For further reading on secularism see Roald 2011 *ArsD* 152-153; Benson 2010 www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1654405; Benson 2007 *EmILR* 111-165; Benson 2010 *JSR* 17-41; Berger 2002 *CanJLS* 39-68; Bramadat 2014 http://www.recode.info/wp-content/uploads/2014/01/Fin-RECODE-22-Bramadat-2014_Final_fin.pdf; Kunkler and Sezgin 2013 *JLR* 337-340; Dalferth 2010 *JAmAR* 317; Berman, Bhargava and Laliberte *Secular States and Religious Diversity* 103; Van Praagh 2001 *CanBR* 605; Moon *Law and Religious Pluralism in Canada* 2.

⁹⁸⁹ See Elliot 2007 *CanJC* 521-536.

⁹⁹⁰ See Elliot 2007 *CanJC* 521-536.

⁹⁹¹ See Santino 1992 *JAmF* 27.

A person who is a follower of Hinduism, Buddhism or Jainism regards the area between the eyebrows as a place where the *bindu*, which is a red dot, must be placed as this is seen as a sacred symbol of the point at which creation begins, marking the "third eye" or *chakra*. The colour is usually red, maroon or vermilion and sometimes a spangle called a *lac* (from Hindu *Lakhera*) is added.⁹⁹² In addition, the wearing of a saree for Hindu women, although not strictly required in terms of Hinduism, has become traditional as a sign of respect as much for their faith as for their culture. The same applies to Hindu men who wear the kurta-pajama.

A person who is a follower of the Jewish faith may dress in much the same way as non-Jewish persons. More orthodox members may wish to manifest their religion in that men wear long black coats and wide-brimmed hats. They may decide to add to this a prayer shawl called a *tzitzith*. Men are required to have their heads covered when in the synagogue and this is usually accomplished by wearing the *kippah/kappel* (skull cap). Symbolic of their faith is also the fact that they do not shave their beards. Married women wear a wig or have their head covered and also keep their arms covered.

As regards persons of the Islamic faith it is significant to note the emphasis placed on the notion that all followers of the faith are encouraged to wear simple clothes in an aim of furthering a sense of brotherhood. The rationale is to dissolve the distinction between rich and poor and also to detract from any sensuality that may be occasioned by exposing body parts, especially on the part of females. Female Muslims must take adequate measures to ensure that when in public, specific parts of their body, such as their faces and/or hair, are covered. The extent of the coverage will depend on the degree of "orthodoxy" of the particular faith. The male Muslim wears a *salwar kameez* (loose trousers and a long overshirt). A Muslim woman may wear a skirt or *sari*, provided it is modestly worn, but the most Muslim women wear a *hijab* (headscarf), sometimes coupled with a veil (*nicab*) and overcoat

⁹⁹² See Gwynne *World Religions in Practice: A Comparative Introduction*.

(*juba*), or a *burka* (also *burqa*: long loose garment covering the entire body and face, often leaving just a slit or veiled part for the eyes).

Rastafarian men believe in keeping their hair worn knitted together in a cloth or *Tam*. The women ("sistren") prefer covering their hair with a cloth wrap or scarf. Rastafarians prefer their hair to remain uncut and uncombed for biblical reasons resulting in the appearance of *dreadlocks*. Their most preferred colours for dress and accessories are red, gold, green and black.

In the case of Christians, the most common symbol associated with Christianity is the crucifix which different believers prefer displaying in different ways. Some, by wearing it on a chain around their necks over their clothing apparel, others beneath their clothing apparel, whilst others would place a crucifix in their workplace office or upon their desk at work.

Male followers of the Sikh faith wear a turban, as will many Sikh women.

Unique to each of the above religions are also certain religious observances which hold special meaning for the followers of the religion but would be of no consequence to persons of other religions, or even persons of the same religion who hold less orthodox views.

Some examples come to mind. Traditionally known Christian holy days are Good Friday, Easter Sunday, Christmas Day. For Hindu's the festival of the lights (*Diwali*) or celebrating Lord Krishna (*Janmashtmi*) is important. For the Jewish faith *Pesach* (Passover) is observed in April, which celebrates the Jewish exodus from slavery in Egypt, and *Yom Kippur* (The Day of Atonement – the most holy day of the year). In the Islamic faith *Eid ul Fitr* marks the end of fasting during the month of Ramadan and *Eid ul Adha* takes place at the end of the Hajj. The Rastafarians, on the other hand, celebrate the birthday of Haile Selassie on 23 July and the Ethiopian New Year in early January.

4.2.4.2 *Addressing religious dress, colours, symbols and observance*

On the face of it a person dressing in a certain manner with certain colours and symbols and observing specific religious days of celebration is to be regarded as innocuous. Some persons manifest their association readily through symbols such as a crucifix which they display either on a chain around their necks on top of their garments or under their garments – or they may even place it on their desks at work. Problems can arise where these matters conflict with fundamental differences in terms of BFOR or perhaps even corporate culture dress code.

Consider the few following examples:

A male Sikh employee applies for a vacancy to work at a manufacturing plant where one of the inherent requirements of the job is that he wears a hardhat in terms of safety and health regulations. The employee applicant indicates his refusal to comply with such a rule on the basis that his religion does not permit him to wear anything other than a turban on his head.

Religious organisations such as a secondary education facility sponsored and financially run by members of the Catholic religion insist that any teacher applying for a position at the school is a member of the Catholic faith. However, the position being advertised is in relation to teaching practical lessons in piano and has nothing to do with anything relating to religion.

A male member of the Jewish faith applies for a position as a security officer only to discover that a BFOR of the position is to wear a prescribed uniform and be clean shaven. The applicant insists, however, that he cannot wear anything but his long black coat and wide-brimmed hat and/or cannot shave his beard.

Finally, consider a case where a Rastafarian who wears a huge *Tam* on his head applies for a position as a manager at a banking institution which has a specific corporate culture in terms of dress code to which the *Tam* is not regarded as being suitable and/or appropriate in terms of the image the company wants to portray when engaging with business clients on local and international markets.

The above issues are not easily and readily capable of resolution. This is because one is dealing with fundamental rights of freedom of religion, usually on the part of the individual, but which can also be claimed by associations which are in conflict with the BFOR.

Many male Muslims wear a cap on the head, called a *kufi*, in deference to the Islamic faith. Should such a person apply to join the local municipal fire brigade department to be trained and ultimately work as a firefighter, the department may have a strict dress code requiring that a BFOR is the wearing of a safety helmet. When the applicant objects on grounds that he is being discriminated against on the basis of his religion there would appear to be slim prospects of a court finding the above requirement of the job to not be legitimate and in the interests of safety.⁹⁹³ Surely the interests of religious freedom must be outweighed by considerations of safety and security.

A qualified nurse who is an adherent of the Christian faith may find employment at a health clinic (whether private or public). When called upon to assist in abortion procedures that patients undergo, the nurse may raise strong objections on religious grounds. However, irrespective of such objections, it is a BFOR for all nurses to assist surgeons performing abortions. If the health clinic is able to utilise the services of the nurse in an area where the BFOR does not involve assisting with abortion procedures, then the solution would be in accommodating such an alternative.

Both the above examples identify instances where the secular interests, namely those pertaining to the employer and the workplace, must be gauged against the individual right to freedom of religion. However, included in the matrix is also the employer's right to fair labour practices which is a non-religious right.

On the other hand, there may be instances where religious associations or organisations claim religious freedoms as protection against secular rights, such as

⁹⁹³ For other examples pertaining to contentious issues involving religious dress codes see Ali, Falcon and Azim 1995 *JMD*.

an employee's fundamental right to work. The Kashruth Council of Canada⁹⁹⁴ (the Council) is a Jewish organisation that grants a *hechsher*⁹⁹⁵ in the service industry to ingredients, packaged foods, and various other items in which kosher food is prepared. This is in accordance with rabbinical laws in respect of *kashrut*.⁹⁹⁶ A BFOR is that the *hechsher* is granted by a *mashgichim*.⁹⁹⁷ A non-Jewish applicant who applies for a vacancy in such an organisation to do the job of a *hechsher* and who is denied even the chance of an interview may well claim discrimination on the basis of religion. However, the religious interests of the association in terms of the BFOR must surely outweigh the applicant's right to fair labour practices and as such entitle the Council to discriminate against the applicant on the basis as explained – since this is fair.

What about a case where a music teacher applies for a position to teach music to pupils at a private secondary Catholic school in Ottawa known as all Saints Catholic Secondary School.⁹⁹⁸ The applicant is suitably qualified to teach music but is not Catholic and is in fact a member of the Jewish faith. In keeping with its doctrinal beliefs the school declines to employ the applicant on the basis that she is not a Catholic in response to which the applicant alleges unfair discrimination on grounds of religion. To what extent would the school be permitted to claim that being Catholic is a BFOR for teaching music to the pupils at the school? There is a conflict between their associational right and the applicant's individual right; however, in this instance, the BFOR should not be permitted to outweigh the applicant's individual right on the basis that the teaching of music has no manifest impact upon the religious integrity of the association. Put differently, being Catholic is not a prerequisite for teaching music. Religious discrimination against the applicant in this case would be unfair.

⁹⁹⁴ Founded in 1952.

⁹⁹⁵ Meaning "seal of approval" in Hebrew.

⁹⁹⁶ Standards in respect of laws pertaining to diets and the preparation and handling of food.

⁹⁹⁷ A representative of a specific rabbi.

⁹⁹⁸ Assuming for the example that the focus of the music lessons will be secular in nature in that they will deal with the theory, history and practice of music and include only the periods of baroque, classical, romantic and modern music. Assuming further that the school has a Catholic church choir teacher who trains the pupils in voice development relating to choir singing of traditional Catholic choral music.

The ethos underpinning the notion of Canadian multiculturalism is to embrace the secular as well as the religious. A combination of all these rights, interests and freedoms is what makes Canada a rich multicultural society. However, it would be naive and unrealistic to say that just because Canadian policy in the 1970s strove toward establishing an egalitarian society that it is now a conflict-free society. Canada's egalitarian reputation did not develop in a vacuum. As will be apparent from further analysis below, Canada set up an appropriate system of human rights regulations.⁹⁹⁹ Fundamental rights in a pluralistic secular society are destined to come into conflict with each other. As previously stated, nowhere is this more apparent than in the workplace where employees and employers often have to spend most of their time and where they are faced with having to deal with the most fundamental of human liberties, namely the right to what one (the employee) religiously may hold as a belief and what the other (the employer) may hold as being unsuitable to what is required under the BFOR.¹⁰⁰⁰ How these conflicting rights and interests are balanced, becomes an interesting debate in terms of what may be rational and justifiable¹⁰⁰¹ or even the extent to which rights and interests should be reasonably accommodated.¹⁰⁰² A means of addressing disputes arising from conflicts of the aforementioned fundamental rights exists with reference to the regulatory constitutional and legislative framework provided by the Canadian government.

4.2.5 An introductory overview of the Canadian system of government

Canada is constituted by fourteen different jurisdictions.¹⁰⁰³ In terms of the Constitution Act¹⁰⁰⁴ the federal government¹⁰⁰⁵ is vested with sole authority to make

⁹⁹⁹ See MacNaughton 2011 *SaskLR* 236-238.

¹⁰⁰⁰ HRP Ottawa 2012 *HRPA OTTAWA Magazine* 22; Moon *Law and Religious Pluralism in Canada* 2. See also Berman, Bhargava and Laliberte *Secular States and Religious Diversity* 103; Van Praagh 2001 *CanBR* 605.

¹⁰⁰¹ See Vickers *Religious Freedom, Religious Discrimination and the Workplace*. See discussion in subparagraphs 3.2.2 and 3.2.3 above.

¹⁰⁰² See Vickers *Religious Freedom, Religious Discrimination and the Workplace*. See discussion in subparagraphs 3.4.4.1 above in addition to 4.5.3.3, 5.4.5 and 6.5.2 below.

¹⁰⁰³ A single federal district (Ontario), ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan) and three territories (Yukon, Northwest and Nunavut).

¹⁰⁰⁴ Of 1867.

¹⁰⁰⁵ In terms of s 91.

laws for the "peace, order, and good government of Canada" in respect of matters where the provinces do not have exclusive legislative jurisdiction.¹⁰⁰⁶ In the event of a conflict between a federal and provincial legislative law, the federal law prevails. In 1982 the Canadian government adopted its Constitution which included the Canadian Charter. The Canadian Charter guarantees fundamental human rights. Courts have had to balance fundamental rights and liberties that conflict with each other by reasonably limiting rights in terms of what is justified in a free and democratic society.

As far as the judiciary is concerned, there is in each province a so-called first-level court which is essentially a supreme court or high court. This is known as a trial court, such as the Ontario Superior Court of Justice where judges are federally appointed, or the Ontario Court of Justice where judges are provincially appointed.¹⁰⁰⁷ A second-level court is a provincial appeal court like the Ontario Court of Appeal.¹⁰⁰⁸ The third and final level of court for the provinces is the national Supreme Court of Appeal of Canada in Ottawa to which it is possible to appeal from a provincial Court of Appeal, usually in limited matters and more importantly in relation to matters pertaining to the Canadian Charter.¹⁰⁰⁹

Apart from the above judicial provision in respect of each province, a separate court system is established by the federal government consisting of a trial division and a Court of Appeal and a third-level being the Supreme Court of Appeal of Canada in Ottawa. The Canadian federal court is in the main less active than the provincial courts, the latter being involved more actively in the day-to-day affairs of Canadians.

¹⁰⁰⁶ Some federal powers of legislation pertain to matters such as trade and commerce, unemployment insurance, postal service, the military, shipping, banking, patents and copyright, and marriage and divorce. Provincial legislation authority vests in matters pertaining to direct taxation in areas of specific provinces, prisons (but not penitentiaries), incorporating companies into provinces and property and civil rights in provinces.

¹⁰⁰⁷ They are also known as provincial or territorial Supreme Courts.

¹⁰⁰⁸ They are also known as provincial or territorial Courts of Appeal and will be constituted by three judges.

¹⁰⁰⁹ This is otherwise referred to as the top court in Canada and the final court of appeal, the equivalent of our Constitutional Court. It consists of a panel of nine judges including the Chief Justice.

The aforesaid constitutional and judicial make-up of Canada is rather complex. Constitutionally and judicially, the area traversed is of immense proportions since it commences from territory to provincial and culminates at the federal level. A somewhat naive comparison *a propos* government in South Africa, on a diminutive scale in proportion, is that it is constituted by the local, provincial and national spheres.¹⁰¹⁰ However, save to point out and acknowledge the basis upon which the Canadian government is premised, it is not the intention of this study to examine each and every territory constituting Canadian jurisprudence. This study aims to focus, apart from relevant Canadian Charter provisions, only on such aspects of Canadian legislation and court decisions pertaining to equality jurisprudence in general and in particular religious discrimination in the workplace.

A certain Don Hutchinson in Canada describes how, on 17 April 1982, after writing his last exam at school he went home to watch a national broadcast on television about that fact that the Canadian Constitution Act¹⁰¹¹ was being amended by the Canada Constitution of 1982. More tellingly, and of momentous occasion then, was the fact that Canada was adopting the Charter. He points out that the Canadian legal system is complex in terms of its constitutional and judicial structure. However, what stems from such complexity is the fact that the Supreme Court of Canada has emerged as the strongest arm of government and that the Canadian Charter has had a material impact on Canadian jurisprudence. Hutchinson points out that the first freedom listed in the Canadian Charter is "freedom of conscience and religion".¹⁰¹² Paradoxically, however, he notes from a sample of reported Canadian cases dealing with the interpretation of the right to religious freedom against the general limitation of rights clause in the Canadian Charter that there appears to be less religious freedom granted and in fact greater religious freedom denied.¹⁰¹³ The extent to which this can be applied in respect of religious freedom in the workplace is a

¹⁰¹⁰ In terms of s 40(1) of the Constitution.

¹⁰¹¹ Of 1867.

¹⁰¹² Hutchinson, quoting Grim and Finke in *The Price of Freedom Denied*, draws attention in the article to the importance of freedom of religion as the "canary in the coal mine" freedom – or to put it differently, a freedom fundamental to any free society.

¹⁰¹³ See Hutchinson 2014 www.davidanderson.ca/canadian-legal-system-and-religious-freedom.

criticism which is explored and evaluated in greater detail when looking at Canadian case authority. This aspect highlights the relevance of Canadian jurisprudence for purposes of evaluating how Canadian courts have dealt with unfair discrimination in the workplace on grounds of religion.

4.3 The Canadian human rights framework

4.3.1 The Canadian Charter

This paragraph will look at the relevance of Canada having adopted the Canadian Charter. It will look at what provisions thereof pertain to equality and why on account of the vertical application (as between state and individual) there was a need for human rights legislation to be enacted. This would have been in addition to the constitutional imperative of subsidiarity which encourages national legislation specifying finer-tuned mechanisms giving effect to the general rights enshrined in a constitutional provision such as the Canadian Charter.¹⁰¹⁴

The multicultural heritage and make-up of Canadian society is recognised in the Canadian Charter inasmuch as express provision is made that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".¹⁰¹⁵ The Canadian Charter takes priority over all other legislation because it is the supreme law of Canada. It applies to all government action, meaning that provincial legislatures and parliament are also subject to the Charter. Laws and policies developed by government must be in accordance with the Charter. The supremacy of the Charter is also evident in the fact that an individual may approach court alleging that a fundamental right guaranteed under the Charter has been violated by conduct on the part of government or the legislature and which needs to be declared invalid to the extent that such conduct is in violation of or infringes on the right.

¹⁰¹⁴ See discussion in subparagraph 4.3.1 below.

¹⁰¹⁵ Section 27.

4.3.1.1 *Aspects of the Preamble to the Canadian Charter*

Part I of the Canadian Charter provides as follows:

Whereas Canada is founded upon principles that recognize the supremacy of *God* and the *rule of law* ...¹⁰¹⁶

The supremacy accorded to the rule of law in the Preamble is significant because this enhances the status of the constitutional rights and asserts the valuable principle that everyone in the democratic order is subject to the constitutional order.¹⁰¹⁷ A puzzling part of the Preamble is the reference to God. If the Preamble acknowledges God as superior, the question arises what significance or value is to be attached to this recognition, especially in light of the fact that section 2(a) expressly guarantees the right to freedom of conscience and religion.

The nature of the "God" referred to in the Preamble is not identified. It could arguably be as much any monotheistic God as much as it could be one of the many polytheistic Gods. The reference to "God" creates a paradox and it is not clear what one should make of this provision in light of the aforementioned guarantee of freedom of religion. A troubling feature of this dilemma is the fact that Canada is proudly multicultural and moreover premised on a secular society. There is a separation between state and religion.¹⁰¹⁸ The Canadian Secular Alliance¹⁰¹⁹ (CSA) has advocated for the reference to God to be removed from the Preamble. A 2001 census of Canada revealed that one in four Canadians reported to have no religion¹⁰²⁰ thereby emphasising the secular nature of Canadian society. A clear victory for the CSA in this regard and, some may say, a basis for advancing the point of view that there is no reason for such a reference to appear in the Preamble. is the

¹⁰¹⁶ The Preamble. Emphasis added.

¹⁰¹⁷ See Muryinka *QLJ*620.

¹⁰¹⁸ See discussion in subparagraphs 4.2.4 and 4.2.5 above.

¹⁰¹⁹ Established as a federal non-profit corporate voluntary organisation in May 2000 with the aim of not promoting atheism *per se* but promoting a commitment to liberal democratic principles of equality, fairness and justice under the rule of law irrespective of religious beliefs or opinions. See Canadian Secular Alliance (CSA) www.secularalliance.ca.

¹⁰²⁰ This is said to be 16,2% of Canadians (4,8 million people) which showed a 49,3% increase from the census conducted in 1991. See Canadian Secular Alliance 2009 secularalliance.ca/wp-content/uploads/2009/09/csa-briefing-note-god-and-the-charter.pdf.

recent confirmation of the Supreme Court of Canada in the *Saguenay*¹⁰²¹ judgment of separation between state and religion. Sossin gives the following interesting anecdotal account:

At a conference some years ago, I once asked a Supreme Court Justice what he thought the supremacy of God's role was in Charter analysis? He looked visibly uncomfortable. He stammered something about the importance of freedom of religion in section 2 of the Charter and invited the next question. As soon as he could.¹⁰²²

Sossin continues to allude to the authoritative view asserted in the *Drug Mart* case that the reference to God in the Preamble should be contextualised against the historical background to the Charter steeped in recognition of Western and Christian values and principles.¹⁰²³ In addition, scholarly debate continues in relation to this aspect¹⁰²⁴ and there have been varying interpretations by Canadian courts on the significance of the provision in the preamble.¹⁰²⁵ A noteworthy aspect of Sossin's critique is that the supremacy of God fulfils a role that transcends the mere religious dimension. Whilst there can be no quibble with the fact that Canadian society is recognised as being pluralistic and secular, the recognition of the supremacy of God in the Preamble serves more to buttress the moral and social justice aspirations to which the Canadian Charter strives. Put differently, on account of the fact that no one particular religious, political, secular or judicial leader has "unique or superior insight into the meaning or mandate of God"¹⁰²⁶ the term is used so that when judges engage with the interpretation of the Canadian Charter they do so in terms of normative values and aspirations which must inform their judgment.¹⁰²⁷ The liberal and generous interpretative approach to be adopted in respect of the Canadian

¹⁰²¹ *Mouvement laïque québécois v Saguenay (City)* [2015] SCR 3.

¹⁰²² See Sossin 2003 *UNBLJ* 233.

¹⁰²³ Para 20 of the *Drug Mart* case.

¹⁰²⁴ See Brown 2000 *UBCLR* 551-563; Klaasen 1991 *UNBLJ* 95; Polka 1987 *McGill LJ* 856-858; Roach 2001 *McGill LJ* 129; Egerton 2004 *CanJLS* 2-10; Penny and Danay 2006 *UBCLR* 287. On the origins of the wording of the provision referring to the "supremacy of God" see Helis *God and the Constitution: The significance of the supremacy of God in the preamble of the Canadian Charter of Rights and Freedoms* 8-24; Tomlins *Navigating atheist identities: An analysis of nonreligious perceptions and experiences in the religiously diverse Canadian City of Ottawa*.

¹⁰²⁵ Sossin deals with the various court decisions in this regard in the following article: Sossin 2003 *UNBLJ* 233-235.

¹⁰²⁶ See Sossin 2003 *UNBLJ* 237.

¹⁰²⁷ See Sossin 2003 *UNBLJ* 240.

Charter, as endorsed by the *Drug Mart* case, is explored in greater detail below.¹⁰²⁸ However, Sossin's contention that the Preamble's recognition of the supremacy of God is something which transcends the prism of conceptual religiousness fails to address the nagging incongruity that exists between this overt and express recognition of a religious being against the apparent neutrality which must exist between state and society.

4.3.1.2 *General Canadian Charter provisions*

Under the heading of "rights and freedoms in Canada" the following is contained:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can demonstrably be *justified* in a *free and democratic society*.¹⁰²⁹

This is the general limitation of rights clause. Its presence is understandable on account of the fact that no fundamental right is absolute. This social reality of conflicting fundamental rights must be accounted for in a constitutional normative framework in terms of which competing rights and interests are required to be balanced and certain rights advanced over other rights depending on the facts and circumstances of each case. An assessment or determination in this regard is premised with reference to what is reasonable and justifiable in a free democratic order. This determination is in turn infused with notions of rationality and proportionality.¹⁰³⁰ A more detailed discussion of this aspect of the Canadian Charter appears below.¹⁰³¹

4.3.1.3 *The right to equality and freedom of religion*

Equality rights are provided for as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

¹⁰²⁸ See discussion in subparagraph 4.3.1.5 below.

¹⁰²⁹ Section 1. Emphasis added.

¹⁰³⁰ See Rolla 2007 *IJCanS* 341-342; Hiebert *Limiting Rights: The Dilemma of Judicial Review* 52-88.

¹⁰³¹ See discussion in subparagraph 4.3.1.5 below.

without discrimination based on race, national or ethnic origin, colour, *religion*, sex, age, or mental or physical disability.¹⁰³²

In addition, everyone has the fundamental:

- (a) freedom of conscience and *religion*;
- (b) freedom of thought, belief, opinion and expression;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.¹⁰³³

Equality of all individuals under the law and protection against discrimination on the grounds listed under section 15, in particular the ground of religion, raises the valid concern whether equality is conceived of conceptually in the formal or substantive sense of the term. For reasons pointed out in Chapter 2, an emphasis on formal equality would not adequately address the issue of unfair discrimination on account of the fact that all individuals are treated the same all of the time and no allowance is made to accommodate differences. Although scholarly debate has described the interpretation of section 15 equality as an area that has "been in flux"¹⁰³⁴ since the 1980s this is in the main attributed to the emphasis which specific judges place on the most apposite methodology to be applied in addressing inequality measures in terms of unfair discrimination. Commitment to a substantive notion of equality is apparent from the following *dictum* by Chief Justice McLachlin and Justice Abella:

At the end of the day there is only one question: Does the challenged law violate the norm of *substantive equality* in s. 15(1) of the Charter?¹⁰³⁵

Disputes over the best means of interpreting the Canadian Charter fail to detract from the fact that the Canadian courts have unconditionally endorsed a substantive approach to equality. In *Law v Canada (Minister of Employment and*

¹⁰³² Section 15(1). Emphasis added.

¹⁰³³ Section 2(a)-(d). Emphasis added.

¹⁰³⁴ See Sangiuliano 2015 *OHLJ* 603; Koshan and Hamilton 2013 *UNBLJ* 19; Young 2010 *SCLR* 190-199.

¹⁰³⁵ In *Withler v Canada (Attorney-General)* 2011 SCC 13 para 2 (emphasis added), referred to by Sangiuliano 2015 *OHLJ* 602.

Immigration)¹⁰³⁶ the Supreme Court emphasised the importance of approaching discriminatory disputes through the lens of substantive equality.¹⁰³⁷

The issue of substantive equality is relevant not only for the manner in which it lends appropriate context to the meaning of equality but also on account of the impetus it gives to the notion of human dignity which is axiomatic to the legal notion of equality and the specific right to religious freedom guaranteed under section 2 of the Canadian Charter. It has been argued that the cluster of equality rights under section 2 as read with section 15(1) is unique from other rights such as the freedom to vote, the right to a fair trial or the right not to be subject to unreasonable search. The latter rights are more expressive of interests, whereas the cluster of rights, such as the freedom of conscience or religion is fundamentally informed by strong judicial interpretations of equality and the emphasis placed on the role played by human dignity.¹⁰³⁸ The reliance placed by courts on interpreting equality with reference to dignity has not escaped scholarly criticism on the basis that dignity ultimately adds nothing of solid value to the analysis into equality jurisprudence and that it is a vacuous concept capable of abuse.¹⁰³⁹ Due to the unflinching role that human dignity continues to play in giving context as to notions of substantive equality in respect of fundamental right infringements such as religious discrimination in the workplace, there can be little reason to doubt the fact that human dignity will continue to play an important role in Canadian equality jurisprudence.

4.3.1.4 The right to freedom of association

The right to freedom of association is a fundamental right under section 2(1)(d). Whilst this right can understandably be seen in the context of any individual having, without restraint, the ability to associate with any religious affiliation, the right has significant implications for organisations, affiliations or groups who identify themselves with a common religion and who may wish to exclude others on the basis that such person(s) do not share their religion. With reference to the situation in

¹⁰³⁶ 1999 1 SCR 467.

¹⁰³⁷ Para 55.

¹⁰³⁸ See Reaume 2003 *LouLR* 1-2; Aviv 2014 *JLP* 668.

¹⁰³⁹ See Martin 2001 *CanBR* 328-330; Gibbons 2000-2001 *NJCL* 25.

South Africa, we see a right of associations or organisations to freedom of religion being afforded to entities in terms of section 31(1) of the South African Constitution. What is the implication for such entities under Canadian jurisprudence? As a notional concept this holds more relevance in the public than private domain. Privately, it is conceivable that individuals who are members of entities who share a common religious belief are free to pursue their common interests within the ambit of whatever may be regarded as lawful. Problems arise when an entity extends its interests into the public sphere, such as a school (operating as a privately owned or government-subsidised concern) which has the potential of engaging with secular (non-religious) interests, such as individuals who do not share the same religious beliefs as the entity.¹⁰⁴⁰ To what extent should faith or religious-based entities be permitted to exclude from their operation candidates for employment on the basis that such candidates do not share the same religious belief as the entity? The celebration of Canadian diversity and plurality should not be taken to mean that such issues do not contain fundamental systemic problems as outlined above. The CSA is a public interest group known for advocating a model in terms of which entities¹⁰⁴¹ steeped in a particular religion are not funded at all by the state in order to assert the secular model of Canadian society – not for altruistic purposes of advancing atheism, but with an overarching aim of seeking to address problems arising from conflicts between fundamental rights.¹⁰⁴²

Thus when disputes arises between the assertion of a fundamental right by an applicant for employment against a religious entity, the following, *inter alia*, would need to be considered: the competing interests of the religious entity, the nature of the job which the applicant is required to do, the relationship between the job performed and the actual religious tenets of the entity and overall considerations of

¹⁰⁴⁰ See Bowlby "Religious pluralism in the public sphere in Canada" 12-14; Seljak "Education, multiculturalism and religion" 178-200.

¹⁰⁴¹ Such as schools, colleges or hospitals.

¹⁰⁴² See Canadian Secular Alliance 2014
http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD6615327/412_FINA_PBC2_014_Briefs/CanadianSecularAlliance-e.pdf; also see Canadian Secular Alliance 2015
www.secularalliance.ca/media/special-projects/twu-intervention.

what is rational, reasonable and justifiable in the circumstances to favour the one right over the other.

4.3.1.5 *Interpretation of the Canadian Charter*

The injunction regarding interpretation of the Canadian Charter provides as follows:

This Charter *shall be interpreted* in a manner consistent with the preservation and *enhancement of the multicultural heritage* of Canadians.¹⁰⁴³

Use of the word "shall" makes it peremptory, when interpreting the Canadian Charter, to do so in a manner that conduces not only to the maintenance but also the furtherance of Canadian multicultural heritage. How this is achieved is through judicial interpretation of the text of the Canadian Charter by the judiciary.¹⁰⁴⁴ The courts comprise the judicial branch of government mandated not only to apply the law but also to interpret the law. The power of the judiciary is bolstered by the provisions of section 25 of the Constitution Act.¹⁰⁴⁵ The judiciary has assumed the role of being "umpire in a federal system"¹⁰⁴⁶ in that it is vested with the necessary judicial authority to define the limits of federal and provincial power in relation to the fundamental rights contained in the Canadian Charter which serves as a constitutional entrenchment of fundamental freedoms and rights.¹⁰⁴⁷

On account of their duty to interpret the law and thereby effectively create new law, judges are often criticised for being judicial activists and effectively interfering in the

¹⁰⁴³ Section 27. Emphasis added.

¹⁰⁴⁴ See discussion in subparagraph 4.3.1.5 below.

¹⁰⁴⁵ Of 1982. Section 25 is known as the supremacy clause of the Constitution which provides as follows: "The constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of its inconsistency, of no force or effect." This is akin to s 2 of the South African Constitution which provides as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must fulfilled."

¹⁰⁴⁶ See Sedler 1984 *NotreDLR* 1199 and especially the authority cited at fn 25.

¹⁰⁴⁷ See Fudge "The supreme court of Canada, substantive equality, and inequality at work" 42; Roach and Schniedermann 2013 *SCLR* 516; Tushnet 2013 *OHLJ* 524, 531-532, 542; Dodek 2007 *SCLR* 309; L'Heureux-Dube 2002 *YJLF* 367-369; Van Praagh 2001 *CanBR* 608; Henrico 2012 *Obiter*.

domain of the legislature.¹⁰⁴⁸ However, the context in which judicial interpretation takes place needs to be gauged. In adjudicating competing fundamental rights, such as religious rights on the part of the employee versus the BFOR of the job as specified by the employer, the court is not entering into the realm of policy affairs. Likewise, when fundamental rights are infringed upon by the executive or legislative in a manner that is clearly an *ultra vires* act on the part of the latter, it is only in the interests of democratic culture and dialogue that the court limits and censures such interference. In this sense, the judiciary acts as guardian of the constitution to whom stewardship has effectively been given, ensuring the "tree of life" transformation of Canadian culture embracing its multicultural heritage.¹⁰⁴⁹ On the other hand, in matters of judicial review it would be incumbent on the court to ensure it has the necessary justiciable jurisdiction to review the exercise of public power of the performance of public conduct in question in the event it may be dealing with a case of governmental policy in respect of which the court should pay due judicial deference and decline to intervene.¹⁰⁵⁰

Decisions pertaining to the interpretation of the text of the Canadian Charter are examined in greater detail below with a view to establishing the manner in which the Canadian Charter has been interpreted thus far.¹⁰⁵¹

4.3.1.6 Implications of the vertical application of the Canadian Charter

The vertical application of the Canadian Charter is apparent from the following:

This Charter applies:

- (a) *to the Parliament and government of Canada* in respect of all matters within the authority of Parliament including all matters relating to [the three territories];

¹⁰⁴⁸ See Anand 2006 *CFC* 87-88; Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* 89-95; Manfredi 2004 *UNBLJ* 188; Kelly *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* 87; Fader 1997 *DaJLS* 189-192.

¹⁰⁴⁹ See Desgagnés and Hussain 2002 *JPPL* 516-517, 520-521.

¹⁰⁵⁰ See Binnie 2013 *CJLJ* 5-21.

¹⁰⁵¹ See discussion in subparagraph 4.3.1.5 below.

(b) *to the legislature and government* of each province and each province in respect of all matters within the authority of the legislature of each province.¹⁰⁵²

The aforesaid provision underscores the supremacy of the Canadian Charter over the federal, provincial and territorial aspects of legislative and executive government. As previously mentioned, it is with regard to the potential infringement on fundamental rights provided for in the Canadian Charter by government power (through the exercise of public power or the performance of a public function) that the court plays a significant role in protecting human rights. But this is in respect of the so-called vertical application of the Canadian Charter.

The Canadian Charter effectively regulates interactions between the state (at a federal, provincial and territorial governmental level) and the individual.¹⁰⁵³ For over 25 years the Canadian Charter has served as emblematic of the values and principles of rights and freedoms upon which the liberal democratic state of Canada is based.¹⁰⁵⁴

Debate has ensued as to the extent to which the freedoms and rights guaranteed particularly by section 2 of the Charter can impose obligations upon non-governmental entities or private bodies. This is of particular concern in the realm of employment in the private sector. Unlike section 2 of the South African Constitution, which expressly provides that a provision in the Bill of Rights binds a natural or a juristic person, in addition to the application which the Bill of Rights has upon the legislature, executive, judiciary and all organs of state,¹⁰⁵⁵ the Charter lacks a similar provision. It has been suggested that attention should be had to the provisions of section 32 of the Charter which provides that the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of

¹⁰⁵² Section 32(1)(a)-(b). Emphasis added.

¹⁰⁵³ See *RWDSU v Dolphin Delivery* [1986] 2 SCR 573; *Irvin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624; *Vriend v Alberta* [1998] 1 SCR 493; *McKinney v University of Guelph* [1990] 3 SCR 229.

¹⁰⁵⁴ Sharpe and Swinton *Charter of Rights and Freedoms*; Beaudoin and Mendes *Canadian Charter of Rights and Freedoms*.

¹⁰⁵⁵ Under section 8(1).

Parliament" and "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province". Due to the absence of the word "only" the inference is unavoidable that the Charter will be applied to protect all persons (private and juristic) from actions, be they governmental or private, which interfere with the fundamental freedoms and liberties guaranteed by the Charter.¹⁰⁵⁶ Whilst the debate continues to ensue as to the extent to which the Charter can be applied horizontally, if at all, on the face of it there can be no question that the rights and freedoms given to everyone are with respect to governmental application.¹⁰⁵⁷ As already set out and explained above the constituent provinces of Canada are each in their respective right responsible for the enactment of human rights legislation to prohibit discrimination. These instruments, which in the form of human rights legislation (also known as codes) are regulated at provincial level and are given quasi-constitutional status on account of the substance which they seek to address (namely the affirmation of equality through ensuring anti-discrimination measures) are in place. This entire framework of human rights legislation must be consistent with the tenets of the Canadian Charter which is paramount over all other law including provincial legislation. Put differently, the human rights legislation must ensure that it gives life and impetus to the spirit of the Canadian Charter.¹⁰⁵⁸ Two significant issues arising from this aspect relate to the principle of subsidiarity and the human rights framework.

¹⁰⁵⁶ Bender 1983 *McGill LR* 832; Jackman 2000 *HLR* 22-25; Grimm 2007 *UTorLJ* 392-393.

¹⁰⁵⁷ See Wolhuter 1996 *SAPL* 520-521; Porter 2006 *SCLR* 36-38; Brodsky and Day 2002 *CanJW&L* 185-220; Leckey 2016 *AJCL* 4-5, 13.

¹⁰⁵⁸ Organization of American States (OAS) 2007 www.oas.org/juridico/mla/en/can/en_can_mla_sources.html; Carter *Canadian labour law at the millennium: The growing influence of human rights requirements* 7-9; Koshan 2014 *CanJHR* 141-142; St-Hilaire 2012 *RDUS* 543-551; Beaudoin "The Supreme Court of Canada and the protection of rights and freedoms" 249; Weiss 2007 *UCDJL&P* 88-91; Holmes 2001 <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp279-e.htm>, especially in the conclusion section.

4.3.2 Human rights principles

4.3.2.1 The principle of subsidiarity in Canadian jurisprudence

The principle of subsidiarity is recognised in constitutional democracies and countries premised on federal systems – like Canada – as an essential and effective means of political governance in terms of which larger entities are required to refrain from interfering in the domain of smaller entities. There is no specific mention of this principle in the Canadian Constitution. It is derived from the Latin word *subsidium* which has been interpreted as meaning "troops that are on stand-by to offer help, assist".¹⁰⁵⁹ As pointed out in Chapter 2, it essentially means having resort to rules of specificity and exhausting such remedies before relying on broader, more general rules and norms for relief. The apparent usefulness of such a doctrinal principle in a federal and provincial system is obvious, in that it permits each respective political area to address its legal concerns at grass roots level. In this sense effect is also given to the norm of self-determination.¹⁰⁶⁰ In a constitutional sense it is a division of power between territories permitting each territory to govern its affairs respectively. However, as with the principle of *trias politica* which addresses the wider devolution of power within government itself, subsidiarity within a federal system of government must not be conceived of in absolute norms, but rather in terms of a system of mutual or intergovernmental cooperation which ultimately works in unison to give effect to the overall democratic commitment to constitutionalism.¹⁰⁶¹ Only a failure to resolve disputes at local level should justify the elevation of the dispute to higher authorities warranting their engagement.¹⁰⁶² Ultimately, the context in which the principle of subsidiarity must be understood, and has come to be understood, is not a mere theoretical notion. It is conceived of in Canadian jurisprudence as a constitutional imperative in terms of the following narrative articulated by the Supreme Court of Canada as follows in *Reference re Senate Reform*.¹⁰⁶³

¹⁰⁵⁹ See Cyr 2014 *CFC* 29.

¹⁰⁶⁰ See Friesen 2005 *FedGov* 9.

¹⁰⁶¹ See Cyr 2014 *CFC* 34; Breton, Cassone and Fraschini 1998 *UPennJIEL* 47-48.

¹⁰⁶² See Brouillet 2011 *SCLR* 605-606; Le Claire 2003 *QLJ* 411; Hogg 1993 *NJCL* 345; Kong 2015 *RDUS* 13-46; Newman 2011 *SaskLR* 26.

¹⁰⁶³ 2014 SCC 32.

The Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.¹⁰⁶⁴

The principle of subsidiarity is said to have been referred to by the Supreme Court of Canada in several instances, evidencing an awareness and endorsement of its role on Canadian jurisprudence. However, it has also been pointed out that Canadian jurisprudence indicates a strong inclination on the parts of the Supreme Court to strengthen central government in favour of the provincial government.¹⁰⁶⁵ Whilst it falls outside the remit of this study to go into a detailed analysis of the exact role played by the principle of subsidiarity in Canadian jurisprudence, it is important to point out its notional, normative and constitutional imperative. Moreover, what appears from an analysis of the Supreme Court of Canada decisions is the extent to which the courts have considered the text of the Canadian Charter through the prism of Canadian human rights legislation giving effect to the fundamental rights in the Canadian Charter. The human rights legislative framework is the second phenomenon that emerges from the vertical provision in the Canadian Charter.

4.3.2.2 The Canadian human rights legislative model

As referred to above¹⁰⁶⁶ the Canadian Charter only has a vertical application thus limiting the exercise of public power on the part of governmental authorities. It is noteworthy, that the guarantee of human rights in the Charter did not render nugatory the provision of statutory human rights on a provincial or territorial level, but gave impetus to the statutory human rights legislation in provinces and territories thereby "elevating human rights laws to the status of quasi-constitutional legislation".¹⁰⁶⁷ Consequently, it is incumbent on governments at all levels through their representative agencies, namely legislatures, to pass human rights laws and

¹⁰⁶⁴ Para 132.

¹⁰⁶⁵ See Jachtenfuchs and Krisch 2016 *LCP* 12, especially the authorities cited at fn 47.

¹⁰⁶⁶ See discussion in subparagraph 4.3.1.6 above.

¹⁰⁶⁷ Holmes 1997 <http://publications.gc.ca/Collection-R/LoPBdP/MR/mr102-e.htm>.

enforce them.¹⁰⁶⁸ One is reminded of the derivative Constitutional source¹⁰⁶⁹ that the federal government¹⁰⁷⁰ is vested with sole authority to make laws for the "peace, order, and good government of Canada" in respect of matters where the provinces do not have exclusive legislative jurisdiction. In terms of the hierarchy of legislation the Canadian Human Rights Act¹⁰⁷¹ (hereafter the CHRA) deserves consideration on account of the fact that it applies on a federal level. However, due to the fact that it only extends to areas of business or workforce related to the provision of goods and services in specific sectors, such as banks, railways, airlines and telecommunications, its area of coverage is limited. The workforce not covered by either the CHRA or the Canadian Charter has to rely on provincial human rights antidiscrimination legislation.¹⁰⁷²

The human rights legislation¹⁰⁷³ which has been enacted at a provincial level is colloquially referred to as human rights codes. The enactment of these codes in the various provinces have a common denominator, namely to address and illuminate unfair discrimination in the private sector and in particular in the workplace. This system of various codes, although noble in its purpose, has and continues to be the subject matter of trenchant debate amongst scholars and judges. This is on account of the fact that various codes, which are applied horizontally to private bodies and vertically to governmental bodies, give rise to various and differing interpretations concerning the notion of substantive equality. Added to the complexity of this matter is the substantive equality notion that has been formulated by the courts when interpreting the Canadian Charter.¹⁰⁷⁴ It has been noted, however, that this apparent tension between the Canadian Charter and human rights legislation is dissipating in favour of Canadian Charter jurisprudence which addresses the issue of

¹⁰⁶⁸ See Legalline.ca (year unknown) www.legalline.ca/legal-answers/human-rights-laws; Lepofsky 1992 *LCP* 169-173.

¹⁰⁶⁹ In terms of the Constitution of 1867.

¹⁰⁷⁰ In terms of s 91.

¹⁰⁷¹ Initially passed by the Parliament of Canada in 1977, now referred to as the CHRA of 1985.

¹⁰⁷² As discussed in paragraph 4.5 below.

¹⁰⁷³ In this regard the CHRA and the CEEA are discussed respectively in subparagraphs 4.4.1 and 4.4.2 below.

¹⁰⁷⁴ See Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 43-44, 46, 50-51, 55-56.

transformative justice.¹⁰⁷⁵ This apparent tension and the anticipated resolution in favour of an approach on the part of the courts towards an interpretation of substantive equality aligning itself with the transformative ethos of the Canadian Charter is discussed below.

4.4 Canadian human rights legislation at a federal level

The reason for focusing on human rights legislation at a federal level is that this is the means by which antidiscrimination conduct by the government as well as private entities is regulated due to the non-horizontal application of the Canadian Charter. As previously mentioned, the Constitution invests in the legislature at all the respective levels of government within the federal system, the authority to take legislative measures to address the provisions of rights and freedoms protected under section 15 of the Canadian Charter in the form of enacting antidiscrimination legislation (also referred to as codes). The importance of the Canadian human rights framework is galvanised in the recognition, as pointed out by Lanyon,¹⁰⁷⁶ of the fact that parties may not contract out of any legislation regulating rights and obligations under such a framework.¹⁰⁷⁷ In addition, human rights legislation is included in all collective agreements¹⁰⁷⁸ and a broad and purposeful interpretation is given to human rights

¹⁰⁷⁵ Fudge "The supreme court of Canada, substantive equality, and inequality at work" 55-61; Sangiuliano 2015 *OHLJ* 637-645; Koshan 2014 *CanJHR* 121-123, 128-131, 141-142; McGill 2016 *AlbLR* 585, 586-588, 597-608.

¹⁰⁷⁶ See Lanyon 2014 *CanJHR* 75-113.

¹⁰⁷⁷ See *Ontario (Human Rights Commission) v Etoboke* [1982] 1 SCR 202; Lanyon 2014 *CanJHR* 79. In terms of South African jurisprudence it should also be borne in mind the extent to which parties to the employment relationship are bound by the horizontal application of the Bill of Rights thereby affording parties protection under section 23 the Constitution. In particular, minimum standards under the BCEA must be incorporated into employment contracts, unless employees are subject to standards or terms that are more favourable to the employee than provided by the BCEA. See Gericke 2014 *PER* 2605-2609; Du Toit et al *Labour Relations Law: A Comprehensive Guide* 583 593; *Parry v Astral Operations Ltd* 2005 10 BLLR 989 (LC) para 58; Garbers 2002 *LD&D* 106.

¹⁰⁷⁸ See *Parry Sound District Social Services Administration Board v OPSEU Local 324* [2003] SCC 2 SCR; Lanyon 2014 *CanJHR* 79.

codes and employment rights.¹⁰⁷⁹ The relevant statutes and codes constituting this corpus of human rights legislation needs to be examined.

4.4.1 The Canadian Human Rights Act

The purpose of the CHRA¹⁰⁸⁰ is

... to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals *should have an equal opportunity* with other individuals to make for themselves the lives that they are able and wish to have and to have *their needs accommodated*, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by any discriminatory practices based on race, national or ethnic origin, colour, *religion*, age ...¹⁰⁸¹

Part I of the CHRA deals with proscribed grounds of discrimination as follows:

For purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion...¹⁰⁸²

Discriminatory practices are defined by the CHRA under the subheading of "Good [sic], service, facility or accommodation" to mean the following:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation in relation to any individual ...

on a prohibited ground of discrimination.¹⁰⁸³

Employment and discrimination on the basis of religion is dealt with as follows:

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual; or

¹⁰⁷⁹ See *Ontario (Human Rights Commission) v Simpson-Sears Ltd* (O'Malley) [1985] 2 SCR 536, Lanyon 2014 *CanJHR* 79.

¹⁰⁸⁰ Which operates at a national and federal level.

¹⁰⁸¹ Section 2. Emphasis added.

¹⁰⁸² Section 3(1).

¹⁰⁸³ Section 5(a)-(b).

- (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.¹⁰⁸⁴

Under the subheading "Employment", the CHRA provides the following:

It is a discriminatory practice, directly or indirectly,

- (a) to refuse to employ or continue to employ any individual, or
- (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.¹⁰⁸⁵

Under the subheading "Employment applications, advertisements", the CHRA provides the following:

It is a discriminatory practice

- (a) to use or circulate any form of application for employment, or
- (b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral enquiry that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.¹⁰⁸⁶

Under the subheading "Discrimination policy or practice" provision is made as follows:

It is a discriminatory practice for an employer, employee organization or employer organization

- (a) to establish or pursue a policy or practice, or
- (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer of any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.¹⁰⁸⁷

Exceptions to discriminatory practices are provided for by the CHRA in the following context:

It is not a discriminatory practice if

¹⁰⁸⁴ Section 7(a)-(b).

¹⁰⁸⁵ Section 7.

¹⁰⁸⁶ Section 8 (a)(b).

¹⁰⁸⁷ Section 10 (a)-(b).

- (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement.¹⁰⁸⁸
- (b) ...(d)
- (e) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by the guidelines, issued by the Canadian Human Rights Commission (the CHRC) pursuant to subsection 27(2), to be reasonable;
- (f) ...
- (g) ... an individual is denied goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation ... and there is a *bona fide* justification for that denial or differentiation.¹⁰⁸⁹

Under the subheading "Accommodation of needs" the following is stated:

For any practice mentioned in paragraph 15(1)(a) to be considered to be based on a *bona fide* occupational requirement ... it must be established that *accommodation* of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to *accommodate those needs, considering health, safety and cost*.¹⁰⁹⁰

Under the subheading "Regulations" the following is stated:

The Governor in Council may make regulations prescribing standards for assessing *undue hardship*.¹⁰⁹¹

¹⁰⁸⁸ Section 15(1).

¹⁰⁸⁹ Section 15(1)(a)-(f).

¹⁰⁹⁰ Section 15(2). Emphasis added. It is noteworthy that the "accommodation of needs" is in relation to considerations of health, safety and cost. In South Africa, "reasonable accommodation" as defined under section 1 of the EEA means "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment". This latter definition is clearly distinguishable from the definition employed in the CHRA, by reason of the fact that the latter pertains to instances of discrimination on a listed ground and is not limited to instances of affirmative action. Moreover, the two are also distinguishable from each other in terms of the specific needs identified in terms of which accommodation will be considered. PEPUDA, on the other hand, to the extent that it merely lists what steps were taken by the respondent to reasonably accommodate diversity (in terms of section 14(3)(i)(ii)), in determining whether discrimination is fair, does not limit the accommodation test to any given factors. In this sense, the test is open-ended and not limited to specific fact(s) but can be developed casuistically by the courts on a case-by-case basis. See discussions in subparagraphs 3.4.3 and 3.4.4.1 above.

¹⁰⁹¹ Section 15(3). Emphasis added.

The above provisions of the CHRA set make it clear that discriminating against another person on the basis of religion is proscribed. This form of discrimination is statutorily regulated where it manifests itself in the non-employment domain, namely the public sphere where services, facilities or accommodation are provided or with the delivery of goods. More significantly, it also applies to the workplace, whether the employment relationship is public or private sector based.

It is noteworthy that the term "unfair" has not been employed to qualify the discrimination. However, as can be seen in the provisions of section 15 of the CHRA, certain practices are deemed to be exempt from discriminatory conduct. In a sense, the inference is that should one of these exceptions exist it would render an otherwise unfair discriminatory practice fair. These exceptions constitute defences to claims of unfair discrimination on the grounds of religion. The defences are as follows:

- *BFOR*¹⁰⁹² – a material aspect of establishing this is to also demonstrate *accommodation* of the needs of an individual or class of individuals affected would impose undue hardship on the person who would be have to *accommodate such needs*;
- *Bona fide* justification; and
- Any grounds provided for in a CHRC guideline.¹⁰⁹³

These defences will be considered when specific cases dealing with religious discrimination are examined.¹⁰⁹⁴

¹⁰⁹² See discussion of BFOR in subparagraph 4.2.3 above.

¹⁰⁹³ One such guideline is the one provided by the Ontario Human Rights Commission (OHRC), which is discussed in greater detail in subparagraph 4.5.2 below. The purpose of the guideline is to provide information on human rights matters (including religious discrimination) which deal with, *inter alia*, dispute resolution procedures, recent cases, education and social awareness issues. This is done by way of a website to which all persons have free access. See www.ohrc.on.ca.

¹⁰⁹⁴ See discussion in subparagraph 4.5.3.3 below.

4.4.2 The Canadian Employment Equity Act

4.4.2.1 Normative provisions of the Act

The Canadian Employment Equity Act¹⁰⁹⁵ (hereafter the CEEA) is a legislative measure, adopted a decade after the CHRA, which is aimed at promoting cultural diversity, acknowledging plurality and effectively prohibiting discrimination by advancing equal treatment of persons. Its purpose and noticeable emphasis on equality appears clearly from the following provision:

The purpose of this Act is to achieve equality in the workplace so that *no person* shall be denied employment opportunities or benefits for reasons unrelated to ability and, in fulfilment of that goal, to correct conditions of disadvantage in employment ... by giving effect to the principle that *employment equity means more than treating persons in the same way* but also requires special measures and the *accommodation of differences*.¹⁰⁹⁶

Employers' duties are expressly dealt with under the CEEA which specifies the obligations imposed upon employers to implement employment equity by:

identifying and eliminating employment barriers against persons in *designated groups* that result from the employer's employment systems, policies and practices and are not authorized by law.¹⁰⁹⁷

"Designated groups" is defined to mean:

women, aboriginal peoples, persons with disabilities and members from visible minorities.¹⁰⁹⁸

"Members from visible minorities" are in turn defined to mean

"persons, other than aboriginal people, who are non-Caucasian in race or non-white in colour".¹⁰⁹⁹

The CEEA and the South African EEA both seek to seek address employment equity as an imperative aimed at addressing, establishing and implementing measures of

¹⁰⁹⁵ 15 December 1995 which applies at a federal level.

¹⁰⁹⁶ Section 2. Emphasis added.

¹⁰⁹⁷ Section 5(a). Emphasis added.

¹⁰⁹⁸ Section 1.

¹⁰⁹⁹ Section 1. For reasons advanced in subparagraph 4.4.2.2 below these also include religious minorities.

equity in respect of designated persons in the workplace.¹¹⁰⁰ Their approach, in terms of terminology articulated by their purpose, is different. The South African EEA expresses its purpose in a distinctive two-fold manner. First, to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. Second, implementing affirmative action measures to address the disadvantages suffered by disadvantaged groups to ensure equity.¹¹⁰¹ In contrast, the CEEA is not as distinctive. The CEEA does place emphasis on substantive equality by recognising that employment equity means "more than treating persons in the same way".¹¹⁰² It would appear that whilst the South African EEA aims at addressing¹¹⁰³ unfair discrimination and affirmative action, the CEEA addresses in the main affirmative action.¹¹⁰⁴ A significant similarity between the CEEA and the South African EEA is that both serve as a means and basis by which a designated employer is required to prepare and implement an employment equity plan.¹¹⁰⁵ This very facet substantiates the fact that the CEEA is more closely aligned to serving and addressing the needs of affirmative action than dealing substantively with unfair discrimination disputes arising from the workplace.¹¹⁰⁶

4.4.2.2 *Protection afforded by CEEA in religious discrimination*

Whilst the Canadian strife to achieve substantive equity is admirable, one may be tempted to argue that the CEEA has no or limited application insofar as religious workplace disputes are concerned. This is on account of the definition section of the CEEA making it clear that the CEEA applies to "designated groups" which are defined as "women, aboriginal peoples, people with disabilities and members of visible

¹¹⁰⁰ See Oosthuizen and Naidoo 2010 *SAJIP* 1-9.

¹¹⁰¹ See s 2(a) and (b).

¹¹⁰² See Barnard *EU Employment Law* 292.

¹¹⁰³ Through means of elimination and prohibition in terms of s 5 as read with s 6.

¹¹⁰⁴ See *Action Travail des Femmes v Canadian National Railway* [1987] 1 SCR 1114; *National Capital Alliance on Race Relations v Canada (Health and Welfare)* [1997] CHR D No. 3.

¹¹⁰⁵ See ESDC Canada 2012 <https://equity.esdc.gc.ca/docs/IntroductionEN.pdf> 12-13; Bakan and Kobayashi 2000 https://www.academia.edu/3063071/Employment_Equity_Policy_in_Canada_An_Interprovincial_Comparison?auto=download; also see section 20 read with section 13 of the EEA; Van Niekerk *et al Law@work* 171-172.

¹¹⁰⁶ See Wubbenhorst "Canada's employment equity acts and the communications industry: effective social regulation in a neo-liberal era" 15-20.

minorities".¹¹⁰⁷ "Members of visible minorities" are in turn defined as "persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour".¹¹⁰⁸ Because protection under the CEEA is offered merely to four categories of persons, does this mean that persons falling outside such category, such as a Caucasian employee who is the victim of religious discrimination, cannot claim protection under the CEEA and must have recourse to other human rights laws such as the OHRC Policy on creed, the CHRA or the Canadian Charter?¹¹⁰⁹ It is contended that the definition of groups under the term "designated groups" in the CEEA does not mean that it excludes religious minorities.¹¹¹⁰ The South African EEA addresses and regulates unfair discrimination in the workplace on listed or unlisted grounds¹¹¹¹ or on the basis that the discrimination cannot be said to be rational, fair or otherwise justifiable,¹¹¹² as read with its purpose. The CEEA extends equality measures not only to those with a disability¹¹¹³ but also in respect of an employer's "systems, policies and practices" which are "not authorised by law". Notionally, all the grounds listed under the EEA, would fall within the purview of matters "not authorised by law". To deny a person any "employment opportunities" on one or more of the above reasons could support an argument that it is disadvantageous and that the employer has failed to adopt special measures to "accommodate differences".

Although the CEEA refers to the fact that "no person" shall be denied employment opportunities, as compared to the wording in the South African EEA that "no person" may "unfairly discriminate against an employee"¹¹¹⁴ it is clear in the context in which "no person" is used in the CEEA that reference is being made to an employee.

Due to the fact that the CHRA is more typically suited to affirmative action remedies, employees in the private and public sector who are unable to rely on the Canadian

¹¹⁰⁷ Section 1.

¹¹⁰⁸ Section 1.

¹¹⁰⁹ See Cornish, Faraday and Borowy "Securing employment equity by enforcing human rights laws" 16.

¹¹¹⁰ See Mooney Cotter *This Ability: An International Legal Analysis of Disability Discrimination* 39.

¹¹¹¹ See discussion in subparagraph 3.4.3 above.

¹¹¹² See discussion in subparagraph 3.4.3 above.

¹¹¹³ Section 2.

¹¹¹⁴ Section 6(1).

Charter to address instances of discrimination on grounds of religion would need to have resort to other legislative mechanisms in order to enforce their rights against religious discrimination. The effectiveness of having rights protected in terms of such measures is dependent on the manner in which effect is given thereto, or the regulation thereof in terms of the dispute resolution procedures to which we now pay attention.

4.4.3 Giving effect to legislative framework

The Canadian Human Rights Commission (CHRC) is a creature of statute having been established in terms of the CHRA.¹¹¹⁵ Its power, duties and functions are also statutorily defined.¹¹¹⁶ Guidelines issued by the CHRC may be issued on application or the initiative of the CHRC.¹¹¹⁷ These guidelines, which are published in the Canada Gazette,¹¹¹⁸ until revoked or modified, are binding on the CHRC and any member or panel assigned to the CHRC with respect to the resolution of a complaint. Whilst the emphasis is placed on the fact that it is a human rights commission this should not detract from the notion that aside the framework, for reasons that appear below, it is appropriate and suitable for addressing and resolving disputes arising from the employment or workplace context. Put differently, whilst the framework includes workplace-related disputes pertaining to human rights violations it would also be a forum that can be accessed by individuals in relation to non-workplace-related matters.¹¹¹⁹ In terms of dispute resolution it must be noted that the CHRC will not deal with a complaint which "could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than the CHRA."¹¹²⁰

In other words, a statute which permits the initiation and resolution of a dispute arising from the employment relationship or even the public sphere which is not

¹¹¹⁵ Section 26(1).

¹¹¹⁶ Section 27(1)(a)-(h).

¹¹¹⁷ Section 27(2).

¹¹¹⁸ Section 27(4).

¹¹¹⁹ Mahoney 2009 *WFLR* 348-349; Fudge 2014 *DaLLJ* 602-603; Fudge 2007 *CLLPJ* 29.

¹¹²⁰ Section 41(1)(b).

employment related – in other words, in relation to the provision of goods or services but in which a discriminatory practice on the basis of religion has taken place, based on an allegation of discriminatory practice on the grounds of religion – would take preference over the dispute resolution offered by the CHRC. The CHRC has a website¹¹²¹ available in English and French. It affords any reader information relating to three main areas of interest. The first advisory section, under the heading "General public" sets out detailed information relating to human rights and how to pursue a discrimination complaint. The second advisory section under the heading "Organizations and businesses" provides various kinds of information.¹¹²² Lastly, the third advisory section under the heading "Resources" provides information on archived publications and recent media statements. It is clear that the aim of the website is to inform the reader of basic human rights relating to discrimination disputes arising from the workplace and the appropriate resolution thereof. This media source aligns itself with the human rights culture as articulated through the abovementioned legislative instruments.

In giving effect to the horizontal provision of human rights (in respect of which the Canadian Charter makes no provision) the CHRA applies to all individuals, whether private or public sector employees. Citizens throughout Canada are afforded the opportunity of pursuing their discrimination-based disputes through a Tribunal as established by the CHRC which is also a creature of statute having been established by Parliament.¹¹²³ In determining discrimination disputes referred to it such disputes are decided by the CHRT in terms of the CHRA. The CHRC Tribunal decides cases referred to it by the CHRC. The hearing of such cases is done on a rather informal basis, subject however to basic rules of fairness to both parties in a dispute.¹¹²⁴ A decision or finding of the CHRT is made only after a failed conciliation procedure between the parties; however, such finding can be appealed to the Federal Court of

¹¹²¹ <http://www.chrc-ccdp.ca/index.html>.

¹¹²² Relating to knowing one's obligations; being considered for an employment equity audit; what to do when you are a respondent in a discrimination complaint; how to improve the workplace with specific reference to preventing discrimination and resolving conflicts when they arise, and developing an internal process for addressing dispute resolution.

¹¹²³ In 1977.

¹¹²⁴ The rules are issued by the CHRC and dated 3 May 2004.

Canada. It is significant to note that the CHRT can only hear claims referred to it relating to federally regulated employers and service providers. In other words, the CHRT would not have jurisdiction in respect of non-federal or private-employment-related disputes. This type of dispute, namely arising from the private sector employment relationship, fall within the domain of Provincial and Territorial human rights agencies, such as, for example, the Ontario Human Rights Tribunal (the OHRT). Sixteen such agencies exist throughout the provincial and territorial regions of Canada.¹¹²⁵ Each agency, as with the OHRT, is responsible for the dispute resolution of discrimination-related disputes referred to it as a forum.

The role played by the CHRT in addressing religious disputes in the workplace undoubtedly fulfils an instrumental function as a dispute-resolution mechanism on account of the fact that it addresses those areas of dispute to which the Canadian Charter cannot be applied, namely a vertical-based relationship as referred to above. It must also be borne in mind that there is a notional cooperativeness between the various human rights frameworks comprising the Canadian system. Whilst the CHRA seeks to address discrimination at a federal level through establishing a CHRT, there is an overarching common concern in relation to such a matter which impacts upon the equality provisions of the Canadian Charter, as a result of which such concerns are also addressed at the provincial level of government. In this regard Ontario is considered.¹¹²⁶

4.5 Canadian human rights legislation at provincial level

4.5.1 The uniqueness of Ontario as a province

As previously indicated, Canada is comprised of ten provinces. Ontario has been singled out for purposes of this study. Although it is only the fourth largest of the provinces in total area,¹¹²⁷ it is home to Canada's capital city, Ottawa, and to its most

¹¹²⁵ See list as it appears on the website: Canadian Human Rights Commission 2013 <http://chrc-ccdp.gc.ca/eng/content/provincial-and-territorial-human-rights-agencies>.

¹¹²⁶ The reason for focusing on Ontario appears from subparagraph 4.5.1 below.

¹¹²⁷ When one includes the territories of Northwest and Nunavut.

densely populated city, Toronto.¹¹²⁸ On account of its population density, Ontario serves as a suitable exemplar of Canada's multicultural and pluralistic society. Moreover, Ontario is especially significant since it was the only province in 1962 to codify a variety of its human rights laws into a single instrument called the Ontario Human Rights Code (the OHRC).¹¹²⁹

It is also important to take account of employees of aboriginal extraction. The Anishinabek people are an example of an aboriginal group in Canada. Their faith, practices and cultures are central to their religious belief which relates to an idea of the living Earth. At once it is clear how such a strongly held belief is bound to conflict with claims in respect of territory and land.¹¹³⁰ Their right to aboriginal religious rights protected by the Canadian Charter¹¹³¹ may be sufficient guarantee against discrimination by governmental powers. However, in the private sector, where the Canadian Charter has no application, as a minority group they are afforded protection against discrimination on the basis of protecting their living Earth religion under the human rights framework discussed below.

4.5.2 The Ontario human rights framework

4.5.2.1 The Ontario Human Rights Commission

The Ontario Human Rights Commission (OHRC) was established in 1962 and is regarded as the first official human rights body in Canada. Its inception date is

¹¹²⁸ Greater Toronto Marketing Alliance listed Toronto as having an estimated population of over 2,6 million in 2011, and the greater Toronto area has an estimated population of over 6,8 million in 2016. See Greater Toronto Marketing Alliance 2011 <http://www.greatertoronto.org/regional-profiles/toronto>. Statistics Canada issued the National Household Survey of 2011 revealing that Toronto has no dominant culture or nationality, making it one of the world's most diverse cities. Statistics showed that 49% of the city's population belong to a visible minority group (compared to 14% in 1981) and that visible minorities are expected to reach a majority of 63% of the Toronto population by 2017 (Statistics Canada 2011 <https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/index.cfm?Lang=E>). Furthermore Christianity is the most common religion in the city (at 54,1%) with 28% being Catholic, Protestants 12%, Christian 4,3%, and other denominations at 10%. Other common religions include Islam at 8%, Hinduism at 5,6%, Judaism at 4% and Buddhism at 3%. Almost a quarter of the city's population has no religious affiliation. See World Population Review 2016 www.worldpopulationreview.com/world-cities/toronto-population.

¹¹²⁹ RSO 1990 c. H. 19 as referred to by St Hilaire 2012 *RDUS* 549 fn 128.

¹¹³⁰ See Moon *Law and Religious Pluralism in Canada* 181-185 ff.

¹¹³¹ In terms of s 35(1).

noteworthy because it preceded the coming into operation of other significant human rights regulatory frameworks and bodies such as the ICCPR¹¹³² and the Charter.¹¹³³ Pursuant to the establishment of the OHRC, the Ontario Human Rights Tribunal (OHRT) was founded which aggrieved citizens could access directly in order to, for example, pursue complaints relating to religious discrimination disputes in the workplace as from 2008.¹¹³⁴ The OHRT continues to play a relevant role in the development of human rights jurisprudence pertaining to unfair discrimination in general and religious matters in particular.¹¹³⁵

In 1996 the OHRC published a Policy on Creed and the Accommodation of Religious Observances (hereafter the Policy)¹¹³⁶ due to the significant phenomenon of extensive public debate and ongoing interest concerning human rights protection in Ontario with specific reference to religion and creed.¹¹³⁷ The Policy provides, *inter alia*, the following:

It is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The Code aims at creating a climate of understanding and mutual respect for the

¹¹³² Established in 1966. See discussion in subparagraph 2.2.4 above.

¹¹³³ See discussion in subparagraph 4.3.2 above.

¹¹³⁴ In terms of the Human Rights Amendment Act 2006 (formerly called Bill 107) making access by citizens to the Tribunal effective as from 30 June 2008. Formerly, citizens who had a discrimination claim were required to pursue such claim with the Ontario Human Rights Commission which would investigate same and make a finding in regard thereto. The OHRT operated from 30 June 2008 as a forum which would process a discrimination claim, offer mediation services and, in the event of the claim being unresolved, adjudicate upon the merits thereof. Obvious comparisons can be drawn between the services provided to claimants by the OHRT and the services of the South African Commission for Conciliation, Mediation and Arbitration (CCMA) as established under the auspices of section 112 of the LRA. For further reading as to the history of the inception of the OHRT see Pinto 2012 https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-END.pdf.

¹¹³⁵ See Mandhane 2015 www.huffingtonpost.ca/renu-mandhane/ontario-human-rights-commission_b_8435082.html.

¹¹³⁶ Section 30 of the Ontario Human Rights Code authorises the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the Code. In terms of section 45.4 of the Code, the OHRT *may* consider policies approved by the OHRC before it and in instances where requested to do so by a party in proceedings before it, the OHRC *must* consider an OHRC policy [emphasis added]. This is the wording which appears under the heading "purpose of OHRC Policies".

¹¹³⁷ Approved by the OHRC on 20 October 1996; available at www.ohrc.on.ca.

dignity and worth of each person, so that each person feels able to contribute to the community.¹¹³⁸

Furthermore, that creed is a prohibited ground of discrimination under the Code. Every person has the right to equal treatment with respect to services, goods, facilities, employment, the occupancy of accommodation, the right to enter into contracts and the right to join trade unions or other vocational associations, without discrimination because of creed.¹¹³⁹

It is also noteworthy that whilst the OHRC policies are subject to decisions of the superior courts interpreting the OHRC, that the policies are considered with deference by the courts and tribunals.¹¹⁴⁰

As pointed out in the Policy, in *Quesnel v London Educational Health Centre*¹¹⁴¹ the court concluded that the "OHRC policy statements should be given 'great deference' if they are consistent with the Code values and are formed in a way that is consistent with the legislative history of the Code itself".¹¹⁴² The deference to be paid to the OHRC policy statements was reiterated by the Ontario Superior Court, albeit in relation to age discrimination disputes.¹¹⁴³

4.5.2.2 *The Ontario Human Rights Code*

The Ontario Human Rights Code¹¹⁴⁴ (the OHRCCode) acts as a provincial law to which all other laws in Ontario are subject, and which is considered part of Canadian human rights legislation.¹¹⁴⁵ The OHRCCode authorises¹¹⁴⁶ the OHRC to prepare,

¹¹³⁸ Page 4 of Policy.

¹¹³⁹ Page 4 of Policy.

¹¹⁴⁰ Page 3 of Policy.

¹¹⁴¹ [1995] 28 CHRR D/474 (Ont. Bd. Inq.).

¹¹⁴² Page 3 of Policy.

¹¹⁴³ See *Association of Justices of the Peace of Ontario v Ontario (Attorney General)* [2008] 92 OR (3d) (Sup.Ct.) para 45.

¹¹⁴⁴ First enacted in 1962.

¹¹⁴⁵ See Ontario Human Rights Commission 2013 www.ohrc.on.ca/en/guide-your-rights-and-responsibilities-under-human-rights-code-0; Hum 2015 <http://www.thehumlawfirm.ca/article/taking-a-closer-look-at-human-rights-commission-policy-directives/>; *British Columbia (Public Service Employee Relations) v BCEU* (1997) 149 DLR (4TH) 261 (BCCA); *Ontario Human Rights Commission v Simpson-Sears Ltd* [1985] 2 SCR 536 para 12. Also see Agocs *Employment Equity in Canada: The Legacy of the Abella Report* 228; Eliadis *Speaking Out On Human Rights: Debating Canada's Human Rights System* 29.

¹¹⁴⁶ In terms of s 30. Emphasis added.

publish and assist with policies and guidelines in order to assist with interpretation of the Code. The following are listed as being fundamental to the OHRCCode:

... recognition of the *inherent dignity* and the *equal* and inalienable rights of members of the human family as the foundation of freedom, justice and peace in the world and is in accord with *the Universal Declaration of Human Rights* as proclaimed by the United Nations;

... it is public policy in Ontario to recognize the *dignity and worth* of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the *dignity* and worth of each person so that each person feels a part of the community and able to *contribute fully to the development and well-being of the community* ¹¹⁴⁷

The account taken in the above provisions of human dignity, equality and the UDHR manifests a clear intention to align the aspirations of what is sought to be achieved with the fundamental tenets of the Canadian Charter. Moreover, due recognition is also given to the notion of the need for development of a community in accordance with notions of equality which underscores the transformative ethos of Canadian constitutional jurisprudence.

Various categories are dealt with under the heading "Freedom from discrimination". Under the category "Services" it is provided that:

every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of ... *creed* ¹¹⁴⁸

Under the category "Contracts" it is provided that:

every person having legal capacity has a right to contract on equal terms without discrimination because of ... *creed* ¹¹⁴⁹

Under the category "Employment" it is provided that:

every person has a right to equal treatment with respect to employment without discrimination because of ... *creed* ¹¹⁵⁰

¹¹⁴⁷ Preamble.

¹¹⁴⁸ Section 1, Item 1. Emphasis added.

¹¹⁴⁹ Section 1, Item 3.

¹¹⁵⁰ Section 1, Item 5(1).

Under the category "harassment in employment" it is provided that:

every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of ... creed ¹¹⁵¹

Reasonable accommodation is provided for as follows:

no tribunal or court shall find that a qualification under clause (1)(b) is *reasonable and bona fide* unless it is satisfied that the circumstances of the person *cannot be accommodated without undue hardship* on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any.¹¹⁵²

No definition of "creed" is provided under the OHRCCode. However, the OHRC has adopted a policy in terms of which it gives guidelines to the courts and tribunals to take into account when considering "creed". In terms of the policy the following characteristics are relevant when considering if a belief system is a creed under the Code:

regard must be had to whether it:

- is sincerely, freely and deeply held;
- is integrally linked to a person's identity, self-definition and fulfilment;
- is a particular and comprehensive, overarching system of belief that governs one's conduct and practices;
- addresses ultimate questions of human existence, including ideas about life, purpose, death and the existence or non-existence of a Creator;
- has some nexus or connection to an organisation or community that professes a shared system of belief.¹¹⁵³

¹¹⁵¹ Section 1, Item 5(2).

¹¹⁵² Section 24, Item 2. Emphasis added. The provision of reasonable accommodation which is made to operate at a provincial level by virtue of the coverage of the OHRCCode is essentially no different in substance to the provision of reasonable accommodation provided for at a federal level by virtue of the coverage of the CHRA as discussed in subparagraph 4.4.1 above. Also see comment on South African position in respect of reasonable accommodation under EEA and PEPUDA as discussed in subparagraphs 3.4.4.1 and 3.4.4.2 above.

¹¹⁵³ Ontario Human Rights Commission 2015 <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed>. In this regard it is noteworthy to draw a similarity in the common law requirement in South Africa where the test of whether a practice or belief qualifies for protection as a religion is also to ask "whether the claimant professes a sincere belief"; see Govindjee

As such there can be little doubt that discrimination on the basis of religious creed is sufficient to constitute religious discrimination. It is notionally the same as religious belief or even a religious view or culture which can be considered part of an individual's personal make-up comprising and constituting who they are and defining him or her as an individual.¹¹⁵⁴

"Constructive discrimination", the equivalent of indirect (disparate) discrimination,¹¹⁵⁵ is provided for as follows:

A right of a person under section 1 is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground *but that results* in exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination *and of* whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17,¹¹⁵⁶ that to discriminate because of such ground is not an infringement of a right.¹¹⁵⁷

In addition, provision is made for the following:

The tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs *of the group* of which the person is a member cannot be accommodated without *undue hardship* on the person responsible for *accommodating* those

"Freedom of religion, belief and opinion" 116; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 14; *MEC for Education: Kwa-Zulu Natal v Pillay* 2008 1 SA 474 (CC) para 58; *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 16.

¹¹⁵⁴ As is recognised to be the case in South Africa. See *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) paras 46-50; *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 35 ILJ 209 (SCA) paras 23 and 27.

¹¹⁵⁵ See further discussion in subparagraph 4.5.3.1 below where it is also referred to as adverse effect discrimination.

¹¹⁵⁶ Dealing with disability.

¹¹⁵⁷ Section 11, Item 1. Emphasis added. The significance and importance of indirect discrimination is that many instances of discrimination on the basis of religion are more than likely to manifest themselves not as overt acts on the part of the employer. Whilst not ignoring the fact that blatant religious discrimination can and does take place, discrimination on a basis which is not "direct" but still takes place on grounds of religion and has the effect of differentiating an employee, on the basis of "exclusion, restriction or preference" is as deserving and demanding of being addressed on account of the fact that it is offensive and objectionable, unless found to be discrimination falling within the purview of section 11, Item 1 (a).

needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.¹¹⁵⁸

The reference in the aforesaid section to "of the group" refers to the fact the provision is sufficiently broad to ground a claim of discrimination on the basis of religion with reference to the claimant being a member of a particular religious association, organisation or affiliation. This provision also protects vulnerable employees who may be discriminated against on any other listed ground, such as disability, gender or sexual orientation. The employer would be required to show that the needs of the person, including the group to which he or she belongs, his or her particular religious affiliation, cannot be accommodated without creating undue hardship. The apparent rationale for insertion of "the group" they belong to is to give effect to the pluralistic multicultural ethos of Canadian society which strives for inclusivism as opposed to exclusivism.¹¹⁵⁹

There is a category referred to as "special employment". This relates to associations and organisations or affiliations that share a particular common belief,¹¹⁶⁰ and the following provision is made:

The right under section 5 to equal treatment with respect to employment is not infringed where,

- (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their ... creed ... employs only, or gives

¹¹⁵⁸ Section 11, Item 2. Emphasis added.

¹¹⁵⁹ Ontario Human Rights Commission 2015 <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed/9-duty-accommodate>. See also Shipley 2015 *CanJW&L* 248 250-253; Haveman *Indigenous Peoples' Rights in Australia, Canada and New Zealand* 238-242. The emphasis on inclusivism is particularly evident in the case of *Ontaria (Human Rights Commission) v Christian Horizon* 2010 ONSC 2105. The employer was a non-profit faith-based organisation which provided residential homes and care to citizens of Ontario who suffered from disabilities regardless of creed. They, however, sought to restrict the lifestyle of one of their employees by insisting that her homosexual relationship was not in kilter with their charitable mission. When looking at the BFOR of the work, namely caring for the disabled, this was in no way adversely affected by the sexual orientation of the employee, as a result of which the discrimination against the employee was found to be unfair; see paras 80-101. The nexus drawn by the court between the discrimination and the absence of a rational or justified basis between the job's qualifications and the abilities and qualities needed to satisfactorily perform the particular job confirms the important role played by rationality and reasonableness, as referred to in subparagraphs 3.2.2 and 3.2.3 above.

¹¹⁶⁰ The equivalent of s 31 of our Constitution.

preference in employment to, persons similarly identified by their qualification if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

(c) ...¹¹⁶¹

4.5.2.3 Proving discrimination in terms of the human rights legislation

A complainant in discrimination cases is required to prove the existence of differential treatment – something about distinction, exclusion or preference that was taken as based on a prohibited ground.¹¹⁶² Given that such complaints are civil in nature, whether before a tribunal or in a formal court, the onus is always to be discharged on a balance of probabilities. Since the phrase "*prima facie* case of discrimination" is often employed in human rights cases, it is important to conceptualise the full meaning of what the term actually means. It is, in a sense, a test of certain requirements, necessary to sustain an allegation of discrimination. *Prima facie* has been interpreted as the complainants having to establish the following:

(a) that the complainant has a characteristic which is protected from discrimination (either in terms of the Canadian Charter or human rights legislation);

(b) that they have experienced an adverse impact relating to a service; and

¹¹⁶¹ Section 24, Items (1)(a)-(h). The "nature of the employment" is notionally the same as what in South African legislation is referred to as "an inherent requirement of the job" in terms of section 187(2)(a) of the LRA and section 6(2)(b) of the EEA. See discussion in subparagraphs 3.4.4 and 3.4.5 above.

¹¹⁶² See Keene 2001 *JLSP* 188-189; *Andrews v Law Society of British Columbia* [1989] 1 SCR 141 163; Charter of Ville de Montréal para 84 (Publications Québec 2016 <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-11.4>); *McGill University Health Care (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal* [2007] 1 RCS 161 paras 45, 49-50.

(c) the protected characteristic was a factor in the adverse impact.¹¹⁶³

Fulfilment of the above criteria will establish what is referred to as a *prima facie* case of discrimination which would then shift the burden to the respondent to justify the conduct within the parameters of exemptions available under human rights legislation. If it cannot be justified, it will be found to be discriminatory.

4.5.3 Direct discrimination

As has already been discussed, the Canadian Charter applies only to government officials, while human rights legislation regulates discrimination on a comprehensive federal and provincial level in respect of the provision of goods, services, facilities, accommodation and employment, not only in relation to government but to all entities falling within the legislative jurisdiction.¹¹⁶⁴ Discrimination as such is sought to be addressed in an attempt to not only affirm the commitment to equality but ensure good order and social justice.

Direct discrimination takes place when another person is treated differently in a manner for an arbitrary, capricious reason which has the effect of adversely impacting upon the person's fundamental right to human dignity and thereby detract from his or her right to equality. For example, denying an employee a promotion in a workplace on account of her sexual-orientation alternatively her gender or because of her particular religious beliefs is fundamentally wrong and unacceptable on account of the harm it causes.

The fundamental right to equality set out in section 15(1) of the Canadian Charter is something to which every citizen is entitled. Denying a citizen a right to their religion on a ground that cannot be defended will be regarded as direct discrimination. To discriminate against someone or an employee on a ground that is listed in one of the human rights instruments contained in the CHRA, CEEA, Policy on Creed or the OHRCCode would be direct discrimination because it would amount to a preference, a

¹¹⁶³ See *Moore v British Columbia (Education)* [2012] 3 SCA 360 para 33; also *Commission de droits de la personne et des droits de la jeunesse v Bombardier Inc.* [2015] 2 RSC 789 para 63.

¹¹⁶⁴ See Pooran and Wilkie 2005 *JLSP* 5.

distinction made on a basis or ground that is immediately recognisable, namely colour, gender, age, religion. Direct discrimination is normatively associated with listed, alternatively readily identifiable, grounds upon which a person has been differentiated against. These grounds have been listed in human right legislation also on account of the fact that they are the most frequent bases upon which people are usually known to be discriminated against and in respect of which there is always a concern that the right to equal treatment is being compromised. In *Ontario (Human Rights Commission) v Simpsons-Sears Ltd (O'Malley)*¹¹⁶⁵ MacIntyre J made the following observation in respect of direct discrimination:

... in this connection [it is] where an employer adopts a practice or rule which on its face discriminated on a prohibited ground. For example, "No Catholics or no women or no blacks employed here".¹¹⁶⁶

It is a prohibited ground on the basis that it is offensive to the common normative notion of human decency to differentiate and distinguish against any person on such basis.

4.5.3.1 *Constructive discrimination/Adverse effect discrimination*

In cases of constructive or "adverse effect discrimination"¹¹⁶⁷ the qualifications or requirements may appear to be neutral but the outcome is adverse to a particular group based on an employee's religion. An example is an employer who operates a fast-food franchise open seven days a week. *Prima facie* it is a BFOR to require all employees to work on all seven days, but Jewish, Christian and Seventh-Day Adventist employees would be adversely affected by such a requirement. When an employer is asked to address the situation of the aforementioned employees in terms of the notion of reasonable accommodation, the practical implications of adopting and enforcing measures to give effect thereto may very well give rise to various complexities and difficulties in terms of the employer's capacity and capability of

¹¹⁶⁵ [1985] 2 SCR 536.

¹¹⁶⁶ Para 18.

¹¹⁶⁷ Section 11(1).

meeting business or operational targets depending on the nature of the business enterprise.¹¹⁶⁸

The duty is on the claimant to first establish constructive discrimination, before the duty to accommodate is placed on the employer or organisation. Not all acts which have an adverse impact upon an employee's religion is taken to be constructive discrimination deserving of protection under the OHRC. It depends on the degree of the adverse impact. In *Eldary v Songbirds Montessori School Inc*¹¹⁶⁹ the OHRT held that a woman was unable to establish that managing a children's day camp as part of her church's fundraiser was of sufficient religious nature to fall within the definition of "creed" of the OHRC.

A clearer understanding of the difference between direct and constructive discrimination and the defence requirements thereto under the human rights legislation is required.

4.5.3.2 Problems emerging from distinguishing between direct and constructive ("adverse effect") discrimination

Differentiating between whether discrimination is direct or "adverse effect" discrimination is important because it has implications for the different defences. Until 1999, if direct discrimination was established, the respondent could justify the discrimination on the basis that the standard¹¹⁷⁰ was a BFOR.¹¹⁷¹ The standard would qualify as a BFOR if the respondent could prove that:

- (a) it was imposed honestly and in good faith; and

¹¹⁶⁸ Alternatively, requiring a non-religious believer, such as an atheist to work on all seven days of the week on account of the fact that co-employees cannot work seven days a week due to their respective religious beliefs may result in the atheist employee claiming unfair discrimination on the basis that the co-employees are being more favourably treated on account of their religious beliefs.

¹¹⁶⁹ 2011 HRTO 1026).

¹¹⁷⁰ Such as conduct.

¹¹⁷¹ *Bona fide* occupational requirement.

(b) it was reasonably necessary for the safe and efficient performance of the work and did not impose an unreasonable burden on those to whom it applied.¹¹⁷²

If the respondent could not establish (a) and (b), the standard would be struck down as discriminatory. The respondent could not side-step the standard by, for example, making exceptions or accommodating certain persons.

In reality few standards would be blatantly discriminatory, for example, no employer would consider advertising a vacancy highlighting that the position was not available to any person of the Jewish faith on account of the employer's antisemitism. An advertisement, however, might be to the effect that all workers must be prepared to work on all seven days of the week. *Prima facie* it would appear to be neutral, but the effect thereof is to preclude Jewish applicants who consider a Saturday their Sabbath on which they are not allowed to do any work. This is where "adverse effect" discrimination plays a significant role. Alternatively, an advertisement may be for a position as a tour guide for a travel agency. An integral part of the job would be to accompany tourists on tours to Israel that traverse areas of Israel (advertised as the "Holy Land") and to visit designated revered "biblical sights". Such an

¹¹⁷² Essentially what all these factors address is the ability or means of the respondent employer establishing a basis upon which it can be said that the discrimination is fair. We see similar provision being extended to respondents and employers under South African legislation. The reference to direct and indirect discrimination in s 187(1)(f) of the LRA must be read subject to a defence granted an employer of proving that a dismissal on either of the grounds is fair if it is based on an IROJ under s 187(2)(b). The prohibition against direct and indirect discrimination in s 6(1) of the EEA must also be read subject to a general defence granted an employer of proving that the discrimination was on the basis of an IROJ under s 6(2)(b); however, this must also be read in conjunction with the burden of proof imposed under s 11(1) of the EEA which widens the ambit of defence, in the case of a claim on a listed ground, to showing that the discrimination did not take place; or is rational and not unfair or is otherwise justifiable (in terms of s 11(1)(a) and (b). Significantly, the most expansive basis upon which a claim of unfair discrimination can be defended is ironically provided not to an employer in the workplace, but to a respondent in the non-workplace. These are the various factors adumbrated under s 14(3), as read with subsections (1) and (2) of PEPUDA. See discussions in subparagraphs 3.4.3, 3.4.4 and 3.4.5 above.

advertisement would also appear to be neutral, but it effectively excludes applicants who are strong adherents of atheism or agnosticism.¹¹⁷³

Until 1999, the test for discrimination on this basis was less stringent in that once the applicant established *prima facie* discrimination, the respondent would be required to prove that:

- (a) There was a rational connection between the respondent's goal and the standard in question; and
- (b) The respondent could do nothing further to accommodate the applicant without suffering undue hardship.

Effectively a respondent could continue to apply a standard that effectively caused discrimination, as long as they took steps, short of undue hardship, to accommodate an applicant affected by discrimination.¹¹⁷⁴

This changed in the matter of *British Columbia (Public Service Employee Relations Commission) v BCGSEU*¹¹⁷⁵ (hereafter the *Meiorin* case).

The test in relation to this form of discrimination is now to be understood in the following sense. First the complainant is required to establish a case of *prima facie* discrimination. Having done so, only then is the respondent (the employer) required to take reasonable steps to accommodate the employee short of undue hardship to the employer's business. There need be no question of justification because the rule, if rationally connected to the employment, needs none. If the reasonable steps do not reach the desired end, the complainant, in the absence of some accommodating

¹¹⁷³ Atheists reject the belief in a supreme being (of whatever nature or description). In 2005 the Wisconsin 7th Circuit Federal Court of Appeals ruled that Wisconsin prison officials violated an inmate's rights because they failed to treat atheism as a religion. The decision relied upon the 1961 Supreme Court decision of *Torcaso v Watkins* 367 US 488 (1961) which held that religion need not be based on belief in a supreme being, but could be described as "secular humanism". See WND.com 2005 www.wnd.com/2005/08/31895.

¹¹⁷⁴ Per McLachlin in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)(Grismer)* [1999] 3 SCR 868 879-880.

¹¹⁷⁵ [1999] 3 SCR 3.

steps on his or her own part, must sacrifice either his or her religious principles or the employment itself.

Meiorin criticised the characterisation of a standard as direct or indirect discrimination as being artificial given that the effect of the standard was the same, namely the adverse impact it had upon the integrity and human dignity of the person against whom the standard was directed, or against whom the discrimination took place. *Meiorin* articulated a unified approach to the adjudication of discrimination disputes under human rights legislation. Employers and respondents governed or subject to human rights legislation are in all cases now required to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory supplemented by those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to his or her own abilities and merits instead of being judged against a group characteristic. The *Meiorin* test applies not only to the workplace but to all claims of discrimination under human rights legislation in Canada.¹¹⁷⁶

Since *Meiorin*, the basis upon which discrimination, whether direct or "adverse effect", is adjudicated is as follows. The complainant must prove¹¹⁷⁷ that the standard is *prima facie* discriminatory. Once having established this to be the case, the respondent must discharge the onus¹¹⁷⁸ of showing that the discriminatory standard is a BFOR or has a *bona fide* and reasonable justification. A BFOR can be determined with reference to the nature, function and purpose of the standard. However, in order to establish a *bona fide* and reasonable justification, the respondent must prove¹¹⁷⁹ that:

- (a) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

¹¹⁷⁶ See *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)(Grismer)* [1999] 3 SCR 868 880-881.

¹¹⁷⁷ On a balance of probabilities.

¹¹⁷⁸ On a balance of probabilities.

¹¹⁷⁹ On a balance of probabilities.

- (b) it adopted the standard in good faith, in the belief that it is necessary in the fulfilment of the purpose of the goal; and
- (c) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.¹¹⁸⁰

The test articulated in *Meiorin* has not been received without criticism.¹¹⁸¹ However, if one looks at the rationale thereof it is to be merited on account of its attempt to disassemble conceptual notions in relation to distinctions between direct and indirect discrimination. More importantly, on a practical level, it addresses the fact that a more balanced view and approach should be taken to the adjudication of discrimination disputes under human rights. This means that when looking at principles of rationality and reasonableness in terms of *bona fide* and justificatory issues, factors pertaining to the competing fundamental rights of the complainant are also factored into the analysis by addressing concerns of reasonable accommodation and all the steps taken in this regard. The unified approach of *Meiorin* must also be seen in the context of giving effect to the principle of substantive equality by its insistence on reasonable accommodation being made with reference to the individual needs of the complainant.

4.5.3.3 *Defences to claims of discrimination*

4.5.3.3.1 Exceptions to the prohibitions on discrimination

A person or organisation faced with a claim of discrimination on the basis of religion may contend that the basis of discrimination is reasonable and *bona fide* and thus legitimate,¹¹⁸² and that they cannot accommodate without suffering undue hardship.

¹¹⁸⁰ See *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)(Grismer)* [1999] 3 SCR 868 881.

¹¹⁸¹ Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 41; Heather and Connell 2011 *UBCLR* 150-155; Dabby 2010 *LexE* 39-41.

¹¹⁸² Section 11.

4.5.3.3.2 The duty to accommodate

The rationale underpinning the notion of accommodation speaks to the conceptual idea of equality. In a society striving toward fulfilling an egalitarian mandate, taking into account a plurality of interests that people in a multicultural society have, there should be a means of "levelling the playing fields" where situations of potential inequality or unfair treatment may arise on account of people's innate human characteristics. One such characteristic is someone's religious belief. The dynamic of the inherent imbalance of power in the employment relationship makes accommodation especially relevant and important. Accordingly, there is a duty on an employer to take steps to reasonably accommodate the employee unless to do so would result in undue hardship to the employer.¹¹⁸³ Undue hardship would consist, but not necessarily be confined to, cost, outside external funding, and health and safety requirements.¹¹⁸⁴

The test for reasonable accommodation has also been interpreted to include mutual accommodation, meaning that it is the responsibility of both parties to seek an appropriate outcome to a conflict of interests.

4.5.3.3.3 *Bona fide* reasons

A defence may well be that the discrimination took place on the basis of religion for a legitimate reason in relation to the function being performed by the employee. This addresses the notion of BFOR. However, the employer or organisation would have to establish that the discrimination is rational, reasonable and that the decision to not employ a person was taken in good faith on account of the BFOR. Moreover, it would still have to be demonstrated that it is impossible to accommodate the worker without undue hardship. When dealing with the defence of BFOR, the duty is essentially made more onerous on the employer since apart from establishing what has already been referred to, the employer must also establish that the employee (including "the needs of the group", assuming the employee is from a particular

¹¹⁸³ Section 9.5.

¹¹⁸⁴ See *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec* [2008] SCC 43; McLachlin 2015 *WJLS* 10-11.

religious association or affiliation), cannot be accommodated without undue hardship. The notion of "needs of the group", however, would be more prevalent in instances of, for example, disabled employees or female employees who claim maternity leave and who are denied same, whose interests can be addressed under the rubric as "needs of the group" of employees being discriminated against on the basis of gender. But it is not to say that employees who are victim to religious discrimination cannot fall within the category of "needs of the group". An example would be where an organisation or employer begins treating employees who are of the Muslim faith differently in a manner that affects them adversely on account of the recent spate of international terror attacks by Islamic extremists in the name of organisations such as ISIS.

The defences to claims of discrimination are considered in closer detail when looking at the jurisprudence of the Supreme Court of Canada.¹¹⁸⁵

4.5.3.4 Seminal aspects of the OHRC Code

The OHRC Code, administered through the OHRC, as detailed below, seeks to regulate discrimination in both public and private spheres of the community or society. Every person has the right to equal treatment in the provision of services, goods and facilities. This would pertain to schools, public health facilities, medical clinics, or community organisations. Moreover, persons entering into contracts are also protected, as are members of vocational associations such as trade unions or employer organisations. Most significantly, protection is provided in the workplace to private and public sector employees, including applicants for employment.¹¹⁸⁶

This scope of coverage reinforces the need for this type of regulation to extend to areas in respect of which the Canadian Charter has no application on account of its vertical structure. Moreover, it aligns itself, together with the human rights

¹¹⁸⁵ See discussion in paragraph 4.6 below.

¹¹⁸⁶ See Ontario Human Rights Commission (year unknown) http://www.ohrc.on.ca/sites/default/files/Teaching%20Human%20Rights%20in%20Ontario_2013.pdf.

framework at the federal level, namely the CHRA, with the equality imperative of the Canadian Charter.

What are referred to as exceptions, as we saw when we looked at the CHRA, are nothing more than defences against a claim of unfair discrimination. Employers (private and public sector), service and housing providers including unions cannot discriminate against members of the public.

4.5.4 The Ontario Human Rights Tribunal

The Ontario Human Rights Tribunal (OHRT) is constituted under the provisions of the OHRCCode¹¹⁸⁷ for the purpose of determining disputes referred to the tribunal¹¹⁸⁸ alleging any infringement of any right protected under the OHRCCode.¹¹⁸⁹ A decision by the tribunal is final and binding save where it can be set aside on appeal or reviewed on the basis that the decision is patently unreasonable.¹¹⁹⁰ It has been pointed out that human rights administration is "complaint -based"¹¹⁹¹ insofar as a complaint of discrimination must be lodged by the complainant with the human rights commission or council within a specified time. Pursuant thereto a process of attempted conciliation takes place whereafter, if unsuccessful, a tribunal is formed to hear the case and make a binding decision. This is akin to the process of dispute resolution before the Commission for Conciliation, Mediation and Arbitration (CCMA) under the provisions of the LRA in South Africa. In point of fact, complainants are obliged to exhaust the dispute mechanisms as provided by the Code – they are prohibited from side-stepping same and litigating directly in the Superior Court against the respondent.¹¹⁹² Thus we see an effective enforcement not only of the principle of subsidiarity but also ensuring the cooperative enforcement of the human rights legislative framework in areas outside the reach of the Canadian Charter. An

¹¹⁸⁷ Section 32.

¹¹⁸⁸ In terms of s 34.

¹¹⁸⁹ Section 34(1).

¹¹⁹⁰ Section 45(8). For reading as to the basis upon which a court will interfere with the decision of a tribunal which is administrative in nature, see Slattery 1987 *OHLJ* 732 and the authorities cited at fn 50. In the same work, the judiciary is referred to as "guardian of the judicial system" 734.

¹¹⁹¹ See Holmes 1997 <http://publications.gc.ca/Collection-R/LoPBdP/MR/mr102-e.htm>.

¹¹⁹² See *Bhadavria v Board of Governors of Seneca College* [1981] 2 SCR 183; Hunter 1981 *OttLR* 219; Langer *Rights and Wrongs: Bureaucracy, Human Rights and Public Accountability* 7.

examination of some of the decisions by the OHRT pertaining to religious workplace discrimination disputes offers some insight as to how the provisions of the OHRC Code have been interpreted. Another purpose of looking at such decisions is to see to what extent they address and align themselves with the Canadian Charter's ethos commitment to equality and transformation.

4.5.5 Decisions by the OHRT

4.5.5.1 Introduction

The purpose of this paragraph has already been alluded to. This does not purport to be a replete historical analysis of all decisions pertaining to equality jurisprudence and workplace religious discrimination disputes in Ontario in particular. The aim is to focus on what the author considers decisions by the OHRT which contribute significantly and appreciably to the equality jurisprudence of Canada in a manner that can work toward a conclusion being drawn as to what approach should be adopted in future by South African legislatures, the judiciary and participatory role-players in society who can contribute to the field of religious discrimination in the South African workplace.

4.5.5.2 A few examples

In *Modi v Paradise Fine Foods*¹¹⁹³ the tribunal found the owner of a butchery responsible for initiating confrontations which became inflammatory and resulted in an altercation with a customer concerning the ethnic background and religious issues in the Sudan. The case is interesting for two reasons. Firstly, it extends liability for religious discrimination beyond the mere employment realm into the public sphere. Secondly, it emphasises the importance of equality in society in general irrespective of being affiliated to a particular religious belief or creed. This second aspect appears from the following observation by the tribunal:

[f]or purposes of determining whether [the customer] experienced discrimination, it did not matter whether the [respondent] knew that he was Christian. It was sufficient that the personal respondent behaved as he did

¹¹⁹³ [2007] HRTO 12.

because [the customer] clearly revealed himself as someone who was not a Muslim. The right to equal treatment based on creed covers discrimination on the basis that someone does not adhere to a particular creed and not just discrimination because of adherence to a particular creed.¹¹⁹⁴

In *Dufour v Roger Deschamps Comptable Agree*¹¹⁹⁵ three employees were harassed by the employer on the basis of their creed. They were Catholic believers and over an extensive period of time were subjected to various acts of differentiation and objectification by their employer on account of being Catholic. The OHRT held the following:

Harassment or discrimination against someone because of religion is a severe affront to that person's dignity, and a denial of the equal respect that is essential to a liberal democratic society.¹¹⁹⁶

The finding is an affirmation of the fact that human dignity is an inexorable dimension of equality. Moreover, being discriminated against on the basis of religion is intolerable and out of kilter with a society committed to democratic values.

In *Gohm v Domtar*¹¹⁹⁷ the employer agreed to accommodate the employee's religious beliefs by permitting her to work on a Sunday instead of a Saturday on the proviso the employee did not receive premium pay for Sunday work provided by the collective agreement. The union did not find such an arrangement acceptable. A collective agreement was in place which the union refused to amend in order to address any measures in the interests of mutual accommodation. As a result, the court held the union jointly responsible liable with the employer. In respect to the approach adopted by the union, the Ontario Divisional Court held the following:

Discrimination in the workplace is everybody's business. There can be no hierarchy of responsibility ... [C]ompanies, unions and persons are all in a primary and equal position in a single line of defence against all types of discrimination. To conclude otherwise would fail to afford to the Human Rights Code the broad purposive intent that it is mandated.¹¹⁹⁸

¹¹⁹⁴ Para 48.

¹¹⁹⁵ [1989] 10 CHRR D/6153 (Ont. Bd. of Inquiry).

¹¹⁹⁶ Para 69.

¹¹⁹⁷ [1982] 89 DLR (4TH) 305 (Ont. Div. Ct.).

¹¹⁹⁸ Page 312.

The principle to be taken from *Gohm* is that equality, and discrimination which detracts therefrom, is something which impacts on not only the workplace but on society in general. Inequality has far-reaching consequences; hence the importance of the emphasis placed on the egalitarian ethos of the Canadian Charter alternatively the spirit of transformation to which it and the South African Constitution strive. In the workplace in particular, where fundamental rights need to be balanced, and in the context of the case in question, where the imperative of mutual accommodation must be addressed, it is the responsibility of both employee and employer to seek a win-win solution.

In *Yousufi v Toronto Police Services Board*¹¹⁹⁹ an employee was lampooned by a prank against him by fellow employees. The tribunal found that in light of the extent of the nature of the jokes which allegedly linked the employee to the 9/11 attacks in the US merely on the basis of "creed", the employer failed to take adequate steps against the offending employees who made the working environment unpleasant for the claimant. The case addressed in essence the issue of discrimination on the basis of religion, although not on the part of the employer, but by co-employees against a fellow employee, in respect of whom the employer owed a duty to act by taking appropriate steps against the offending employees. Clearly the issue is directed at not only addressing discrimination *per se* but at taking measures to eliminate its manifestation as and when it takes place. Failure to do so can have deleterious repercussions on the victim involved. It can also have short- or long-term implications for the nature of the working environment in question – is it an area which is hostile and intolerable of religious differences, or accommodating and inclusive of a plurality of views and differences?

In *Loomba v Home Depot Canada*¹²⁰⁰ the OHRT found that an employer discriminated against an employee, a security guard, on the basis that was directly linked to the "creed" of the employee. Mr Loomba's religion as a Sikh required him to wear only a turban on his head. When his employer demanded he remove his turban

¹¹⁹⁹ [2009] HRTO 351.

¹²⁰⁰ [2010] HRTO 1434.

and replace it with a hard hat he refused, saying he had to wear the turban on account of his religious faith. He was summarily dismissed. The tribunal made a finding that Mr Loomba had been discriminated against on the basis of religion; however, it deferred the question of deciding the extent to which wearing a hardhat was a BFOR and whether the employer satisfied the duty to accommodate Mr Loomba. If Mr Loomba had been employed merely as a security guard, it seems highly unlikely that for reasons relating to safety and security, the wearing of a hardhat could constitute a BFOR.

4.5.5.3 The OHRT and policy

The OHRC Policy is a guideline to any tribunal or court in much the same way as Schedule 8 of the Code to Good Practice would be in relation to dismissal disputes in South Africa.

The Policy concludes with the statement that "religious pluralism poses a challenge in any multicultural society, especially one as diverse as ours. Although the law is developing rapidly in this area, an informed spirit of tolerance and compromise is indispensable to any civil society, as well as its capacity to make opportunities available to everyone, on equal terms, regardless of creed."¹²⁰¹

There is a clear connection between the values and ideals articulated in terms of the Policy and the overarching human rights legislation and general jurisprudence arising from and giving impetus to the Canadian Charter. It is this human rights framework that arguably, when collectively combined, earmarks Canada on global map as an egalitarian nation. As pointed out previously, it is for this very reason that Canada serves as a noble example not only to South Africa, a young democracy, but also to already established democracies the world over. A material contributor to this phenomenon have been the judgments handed down by the Supreme Court of Canada. Their interpretation of the Canadian Charter has in many instances set the bar for many judges as to how constitutional rights and freedoms should be given

¹²⁰¹ Page 16.

expression, subject to certain limitations. It is to that area that the focus of this study must turn.

4.6 Canadian Supreme Court case law jurisprudence

4.6.1 Introduction

It is important to have regard to the jurisprudence of the Canadian Supreme Court.¹²⁰² This is to determine the extent to which the different judgments engage with the interpretation of the text of the Canadian Charter that colours the judicial landscape. It casts varying meanings and understandings on what to make of religious discrimination in the workplace; effectively, how fundamental competing rights are balanced and what effective tests are employed to arrive at a suitable adjudication of such a dispute. It is to that area of law that this study now turns.

This section aims to look at certain cases that have been reported in the Canadian legal system with a view to establishing how religious discrimination in the workplace is adjudicated on and whether there is anything that we can learn from this jurisprudence.

It must be acknowledged that the jurisprudence of religious discrimination cannot simply be seen through the prism of workplace discrimination disputes – although that remains the prime focus of analysis of this work. A more balanced understanding of equality jurisprudence does require knowledge of the general tenets of the discipline. In other words, even where the discrimination in question has transcended the boundaries of the employment relationship it may be valuable as a guide.

The cases studied below have not been approached on the basis of a historical chronology. That is not the aim of this thesis. Cases have been selected on the basis of the extent that they add value and facilitate a better understanding of the following imperatives: equality jurisprudence, religious discrimination in the

¹²⁰² Joanes 1958 *CanBR* 175; Cheffins 1966 *OHLJ* 259-275.

workplace, an adjudication of fundamentally conflicting human rights, the need for transformative constitutionalism and giving effect to social justice.

4.6.2 A matter of toleration

In *In Re Ontario Public Service Employees Union and Forer*,¹²⁰³ a case dealing with the interpretation of the Canadian Charter, the Supreme Court observed the following:

In the multicultural country which Canada has become there will have to be even greater toleration of a wide variety of religious beliefs and practices than existed before the Charter ... [V]iews cannot be described as "non-religious" because they differ from the religious beliefs of the dominant groups in society.¹²⁰⁴

The reference to "greater toleration" underscores the inherent tension created by a convergence in society of diverse beliefs and practices and the obvious possibility of a fundamental conflict between different individuals sharing different views. The only realistic means of addressing such conflict is through tolerance; the ability to bear, within reason, a view, belief or practice held by another person. What is reasonable can only be determined according to the facts and circumstances of each case. The aforesaid *dictum* also highlights the important role to be attributed to a wider and more expansive meaning of the term "religious belief". As previously seen, opinion, conscience and even culture have a dominant role to play in informing an individual's religion. Merely because a religion is not mainstream or conceived of as a religion in stereotypical terms as a typical monotheist or polytheistic manifestation of one's faith does not make it less deserving of protection. Aborigines of Canada who consider the live Earth in Canada to be an integral part of their religious belief are entitled to protection from the indignity of being subject to any form of discrimination as well.

4.6.3 Setting the stage for a stance against religious discrimination

The most significant case thus far dealing with religious rights in Canadian jurisprudence is the matter of *R v Big M Drug Mart Ltd.*¹²⁰⁵ It is not workplace

¹²⁰³ 1985 DLR (4TH) 97.

¹²⁰⁴ Page 120.

¹²⁰⁵ 1985 1 SCR 295 (Can).

related. It involves the respondent company that had been charged with unlawfully carrying on business on a Sunday in contravention of the Lord's Day Act which provided for and insisted on Sunday observance. After being acquitted of the charge, the State appealed the decision but was unsuccessful on the basis that the Lord's Day Act constituted an infringement of the right to freedom of conscience and religion guaranteed under the Charter. Dickson J referred with approval to the following extract from *Chaput v Romain*:¹²⁰⁶

In our country there is no state religion. All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete of liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to think that a majority might impose its religious views upon a minority, and it would be a shocking error to believe that one serves his country or his religion by denying in one Province, to a minority, the same rights which one rightly claims for oneself in another Province.¹²⁰⁷

The excerpt is as much an affirmation of Canadian secularism as it is a confirmation of the accommodation of religious beliefs in a pluralistic society. It signals the fact that no one religion is entitled to preferential treatment over another religion. Moreover, acknowledgment of the need for tolerance of plurality of religious beliefs is underscored later in the judgment when Dickson J makes the following observation:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms ... Freedoms must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.¹²⁰⁸

From the above *dictum* one can see the strong association between a society committed to the attainment of equality by means of a fundamental premise based on tolerance of diversity on the one hand and the imperative of human dignity as an

¹²⁰⁶ 1955 SCR 834 (Can).

¹²⁰⁷ At 246.

¹²⁰⁸ Para 94.

inexorable part of an individual's self-identity, determination and fulfilment as a human being in a modern society on the other.

It is important to refer back to the *Big M Drug Mart* case on account of the perspective placed on religious freedom in the context of the Canadian Charter, with reference to the basis upon which such freedom stands to be limited. In this regard, Dickson CJC observed:

One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion such as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or fundamental rights and freedoms of others, no one is forced to act in a contrary way to his beliefs or conscience.¹²⁰⁹

The aforesaid *dictum* sets out a normative notion of the basis upon which religious discrimination is essentially adjudicated to be fair or unfair. In certain instances, where differentiation on the ground of religion is made for mere hurtful or malicious reasons, there can be no doubt that this is manifestly wrong in that it is blatant and objectionable. In other instances, where discrimination on the basis of religion takes place for reasons relating to safety or order – relating, in other words, to the BFOR – then the assessment thereof relates to the balancing of competing fundamental rights: on the one hand, the right of the employee to freedom of religion and on the other, the right of the employer to insist that the inherent requirement of the job requires a compromise on the part of the employee, for example, by not wearing a visible crucifix. As looked at above, the enquiry, depending on the circumstances, can extend to notions of reasonable accommodation.

In *Ontario Human Rights Commission v Simpsons-Sears Ltd (O'Malley)*¹²¹⁰ an employer was obliged to accommodate an employee who during her employment converted to the Seventh-Day Adventist faith requiring her to be absent from work

¹²⁰⁹ Pages 336-337.

¹²¹⁰ 1985 2 SCR 536 (Can).

on Friday evenings and Saturdays, unless the employer could show accommodation would result in undue hardship. The employment rule which required all employees to work due to the business operations of the employer may have appeared fair and equal since it applied to all employees. This was, however, not the case concerning the employee in question, since the consequence for her, given her religion, was that it interfered with her ability to observe her faith. The complainant's case had been dismissed on the basis of finding that the employer had not acted unreasonably in the steps it took to accommodate the complainant. Two subsequent appeals were lodged; both were dismissed. An interesting feature in both appeals is the extent to which both fora¹²¹¹ were concerned with a contravention of the OHRC. After referring to previous Canadian authority with the purpose of human rights legislation, McIntyre J observed the following:

To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create, as in *Griggs v Duke Power Co* 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal.¹²¹²

In Canadian jurisprudence with regard to the notion of "indirect", "constructive" or "adverse effect" discrimination, McIntyre J proceeded to state the following:

It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.¹²¹³

Simpsons-Sears affirms that intention is not a prerequisite to prove discrimination, whether direct or constructive discrimination. In addition, to impose such a requirement makes it not only too onerous for applicants, but also detracts from the substantive notion of equality as pointed out in the aforesaid *dicta*.

¹²¹¹ The Divisional Court and then the Court of Appeal.

¹²¹² Page 549.

¹²¹³ Page 551.

The reasoning in respect of indirect discrimination is welcome since in reality it would be unrealistic, if not improbable that an employer would expressly and blatantly discriminate against an employee for reasons relating to religion. By focusing rather on the effect which a rule or policy adopted by an employer has upon an employee or group of employees it does indeed increase the ambit of discrimination, focusing the attention not on the *animus* of the employer but rather on whether the rule or standard has a discriminatory effect on a prohibited ground.¹²¹⁴ The reasoning by McIntyre J in respect of indirect discrimination is also notionally prescient of the stance adopted in 1999 by the Supreme Court in *Meiorin* in relation to indirect discrimination.

However, it may be argued that distinction between "direct", "indirect", "constructive" or "adverse unfair" discrimination may after all be rather formalistic and ultimately a matter of semantics. The final substantive analysis, irrespective of the terminology adopted, requires assessment of discrimination, or being differentiated against on grounds or reasons unrelated to the employer's *bona fide* operational requirements or where the employee cannot be accommodated without undue hardship to the employer. This distinction has been unified in terms of a single test adopted by the court in *Meiorin*, the effect of which is to not only look at formal criteria relating to differentiation but to look at the overall impact thereof.

The court in *Alberta Human Rights Commission v Central Alberta Dairy Pool*¹²¹⁵ held that an employee who had become a member of the Worldwide Church of God which precluded him from attending work on Mondays would be adversely discriminated

¹²¹⁴ For further reading of cases where the court has invoked the "constructive" or "adverse effect" discrimination distinction, see *Canada (Treasury Board) v Robichaud* [1987] 8 CHRR (SCC) (where the Supreme Court of Canada held employers are vicariously liable for sexual harassment acts of their employees against co-employees); *Central Okanagan School District No. 23 v Renaud* [1992] CHRR (SCC) (where the Supreme Court of Canada, in upholding a decision of the Council of Human Rights that the employee had been discriminated against on the basis of religion, went further to state that when adverse effect discrimination is at issue it is incumbent on both employer and union (or the employee) to consider whether the employee can be accommodated without undue hardship to the employer); *Canada (Human Rights Commission) v Toronto Dominion Bank* [1996] 25 CHRR (FCTD) (where the Federal Court of Toronto in considering the issue of employee drug testing stated that insofar as it was alleged that it was adverse effect discrimination that such testing was a BFOR of the job).

¹²¹⁵ 1990 2 SCR 517 (Can).

against even if there is a BFOR unless the employer is able to discharge the onus of showing that accommodation would impose undue hardship, regard being had to a variety of factors.¹²¹⁶ Where, on the face of it, a BFOR is discriminatory against an employee's religion, the employer would still be required to prove a rational link between the discriminatory rule and the purpose of the job in order to show that the standard is imposed in good faith solely a "work-based purpose".¹²¹⁷ Here we see the court is still dealing with indirect discrimination and employing the test before the change invoked by *Meiorin* in 1999.

The *Meiorin*¹²¹⁸ case is a landmark decision in Canadian equality jurisprudence. Meiorin was a firefighter in British Columbia who was dismissed due to the fact that she failed to pass a mandatory physical test given to her by her employer. The case does not deal with religious discrimination; it deals with discrimination on the basis of gender. *Meiorin* alleged that the test administered by the employer, although by all appearances it was *prima facie* neutral because it was required to be passed by all employees, constituted "adverse discrimination" because the consequence was that it was more difficult for women to pass than for male employees. Her claim was successful before the Labour Arbitration Tribunal but on appeal by the employer to the British Columbia Court of Appeal it was set aside. An appeal to the Supreme Court of Canada was allowed which, as previously stated, ignored the division between direct and "adverse" discrimination. The Court took account of the fact that in the arbitration hearing due account was taken by the arbitrator of the fact that the physical test in fact adversely discriminated against women since men as a result of their physiology had higher aerobic capacity and that the government as the employer did not show it had accommodated the employee to the point of hardship. Consequently, the Supreme Court of Canada restored the finding of the arbitrator.¹²¹⁹

¹²¹⁶ Sossin 2003 *UNBLJ* 497.

¹²¹⁷ Vickers *Religious Freedom, Religious Discrimination and the Workplace* 198. See also the case referred to by the learned author.

¹²¹⁸ [1999] 3 SCR 3.

¹²¹⁹ See paras 35, 50 and 84.

In *Central Okanagan School District No 23 v Renaud*¹²²⁰ a unionised employee who was a member of the Seventh Day Adventist faith objected to working shifts from sundown Friday to sundown Saturday. The recommendation by the employer that Renaud work a Sunday to Thursday shift was rejected since same would have been contrary to the collective agreement. This the court viewed as "impeding the reasonable efforts of an employer to accommodate"¹²²¹ essentially finding that there was a mutual duty of accommodation on both parties to seek accommodation.¹²²² In deliberating on the reasonable accommodation test, Sopinka J made the following observation:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation ... Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered. This does not mean that, in addition to bringing to the attention of the employer the facts relating to the discrimination, the complainant has a duty to originate a solution ... When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complainant will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation ... The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.¹²²³

Sopinka J, in considering mutual accommodation in relation to constructive or "adverse effect" discrimination observed that where a standard was neutral in the face of it, but the result is still discriminatory it would nevertheless be "valid in its general application".¹²²⁴ Moreover, Sopinka J, four years earlier, referred to accommodation as "a duty more in the nature of an exception from liability than an additional obligation".¹²²⁵ It has been pointed out by Lanyon¹²²⁶ how the reasoning

¹²²⁰ 1992 2 SCR 970.

¹²²¹ See page 991.

¹²²² Vickers *Religious Freedom, Religious Discrimination and the Workplace* 198-199.

¹²²³ Page 994.

¹²²⁴ Para 25.

¹²²⁵ *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489 para 69.

¹²²⁶ See Lanyon 2014 *CanJHR* 83.

by Sopinka J is in stark contrast with the observations expressed by McLachlin J in *Meiorin*¹²²⁷ that

... a rule neutral on its face, but discriminatory in effect, is not a valid rule.¹²²⁸

The *Renaud* case established the so-called "equal liability principle" meaning that there is a duty upon both employee and employer to take constructive steps in accommodating the religious beliefs of the employee. What such measures are will be determined on a case-by-case basis, meaning that there is no universal "one-size-fits-all" remedy as to what accommodation on the part of both parties would entail.

Vickers is correct, it is submitted, in advocating that the mutual duty of accommodation can be lauded for "achieving a reasonable balance" between employer and employee.¹²²⁹ Such a multidiversity, non-exclusivity approach¹²³⁰ has positively developed Canadian jurisprudence in the direction of tolerance and embracement of diversity in the interests of maintaining a harmonious working environment that also holds good for sound community interests.

Whilst the *Renaud* case is important for having recognised that reasonable accommodation had to be expansive enough to extend to mutual accommodation, Sopinka J's application of the doctrine was not sufficiently extensive to address the underlying issue of substantive equality. The fundamental difference between the notion of mutual accommodation – as conceived by the court in *Renaud* – to that as reasoned by Abella J in *Meiorin* is to conceptually "transform" the understanding of mutual accommodation to address the fundamental tenet of all manifestations of discrimination (direct or indirect) – through demanding that substantive equality is given effect to in terms of the human rights framework and the overarching Canadian Charter.¹²³¹

¹²²⁷ Para 42.

¹²²⁸ See Lanyon 2014 *CanJHR* 83.

¹²²⁹ Lanyon 2014 *CanJHR* 205.

¹²³⁰ Buckingham 2011 *IJRF* 65.

¹²³¹ See further recommendations made in this regard by the author under subparagraph 6.7 below.

Put differently, accommodation can no longer be used merely as a measure to pay lip service to enquiring as to what steps were taken to address ways in which an employer can include the employee short of undue hardship. Analysing measures taken in terms of notions of reasonableness, rationality and an impossibility on the part of the employer to do anything else short of undue hardship with reference to the actual consequences for the employee goes far in giving effect to a substantive notion of equality.¹²³²

The court in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*¹²³³ (also referred to as "*Grismer*")¹²³⁴ provided that in a case of alleged discrimination the respondent was required to show that "it cannot accommodate persons with the characteristics of the claimant without incurring undue hardship",¹²³⁵ alternatively "that the standard incorporates every possible accommodation to the point of hardship".¹²³⁶ *Grismer* and *Meiorin* are authority that it was not sufficient for the employer or respondent to demonstrate what they did to accommodate the complainant, but rather that "no further accommodation is possible without imposing undue hardship".¹²³⁷ The so-called unified approach adopted by the court in *Meiorin* was adopted by subsequent decisions dealing with discrimination disputes.¹²³⁸ However, the standard imposed on employers or service

¹²³² See Davidov and Mundlak "Accommodating all (or: 'Ask not what you can do for the market; ask what the market can do for you')" 207-208.

¹²³³ [1999] 3 SCR 868. Whilst the *Meiorin* case had to do with discrimination in the employment contract, the *Grismer* case had to do with discrimination in relation to the provision of services. The test as set out by the court in *Meiorin* has also been followed by the Ontario Court of Appeal in *Entrop v Imperial Oil Ltd* [2000] 50 OR (3d) 18 (CA) (in which the court dealt with discrimination on the ground of disability).

¹²³⁴ The name of the personal claimant.

¹²³⁵ Para 20.

¹²³⁶ *Grismer* para 32.

¹²³⁷ *Meiorin* para 55.

¹²³⁸ See *Entrop v Imperial Oil Ltd* [2000] 50 OR (3d) 18 (CA) (in which the Ontario Court of Appeal in dealing with discrimination on the basis on alcohol and drug testing of an employee found that the test established in the *Meiorin* case was to be welcomed and that it should have application to Ontario human rights legislation under ss 11 and 17 which distinguish between "direct" and "constructive" discrimination. In *Ontario (Human Rights Commission) v Roosma* [2002] O.J. No. 3688 (Div. Ct) (which involved the question of religious accommodation by an employer of employees who on account of their faith were precluded from working shifts on Fridays. The Board of Inquiry found that *prima facie* discrimination had been established but that due to the cost imperative and implications for the collective agreement the company could not be expected

providers as established in the *Meiorin* and *Grismer* cases respectively came to be the subject matter of much criticism on account of the considerable onus placed on such employers or service providers.¹²³⁹

Two Supreme Court decisions, however, set the stage for a lowering of the standard. Although neither case involves discrimination on the basis of religion, both cases are relevant insofar as they relate to the question of discrimination and the duty to accommodate. In *McGill University Health Centre v Syndicat des employés de l'Hôpital général de Montréal*,¹²⁴⁰ where an employee was dismissed for reasons relating to disability, the issue before the court was the scope and duty to accommodate and whether the employer and union were able to agree on such duty in advance in terms of a collective agreement. Whilst citing the *Meiorin* case, the court noted that the undue hardship test "[is] not entrenched and must be applied with common sense and flexibility".¹²⁴¹ The court noted further that "the right to accommodation is not absolute".¹²⁴² More significantly, the court made the observation that "[t]he duty to accommodate is neither absolute nor unlimited. The employee has a role to play in an attempt to arrive at a reasonable compromise."¹²⁴³ This reinforces the notion of mutual accommodation.¹²⁴⁴ In *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec*¹²⁴⁵ a

to accommodate. The court did not interfere with the finding of the Board of Inquiry and in substance supported the *Meiorin* test); *Central Okanagan School District No. 23 v Renaud* [1992] 2 SC. 970; *Ontario (Ministry of Community and Social Services) v OPSEU* [2000] OJ No. 3411 (in which an employee alleged the employer failed to accommodate him in his request for 12 days of leave for purposes of religious observance. The court on appeal found that the employer had met its duty to accommodate by the nature of leave offered to the employee). It has been stated that the *Meiorin* test "is now being applied throughout Canada by arbitrators, human rights tribunals and courts dealing with the duty to accommodate": See Turkington 2003 <http://www.cavalluzzo.com/docs/default-source/publications/2003-02-01-the-duty-to-accommodate-and-undue-hardship.pdf?sfvrsn=2> 1; Canadian Human Rights Reporter 2013 http://cdn-hr-reporter.ca/hr_topics/systemic-discrimination; *Commission de droits de la personne et des droits de la jeunesse v Bombardier Inc* [2015] 2 RSC 789 para 61.

¹²³⁹ See Irving 2009 <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/duty-accommodate-undue-hardship%20>.

¹²⁴⁰ [2007] SCC 4.

¹²⁴¹ Para 15.

¹²⁴² Para 15.

¹²⁴³ Para 38.

¹²⁴⁴ See discussion in subparagraphs 3.4.4.1, 4.5.3.3 above and 5.4.5 below.

¹²⁴⁵ [2008] SCC 43.

union had brought a grievance on the basis of an employee who had been dismissed on the basis of a history related to her disability. The main issue before the Supreme Court was the interpretation of the undue hardship standard. The court noted that "the employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work".¹²⁴⁶ In confirming the ruling by the court in *McGill*, the court held that:

A decision to dismiss an employee because the employee will be unable to work in the reasonable foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.¹²⁴⁷

The rigidity of an employer having to establish a so-called "exhaustion" of all possible remedies to address accommodation short of undue hardship appears to have been softened by the interpretation of "undue hardship" as applied in the *McGill* and *Hydro-Québec* decisions.

An additional factor that should be borne in mind in relation to the accommodation test is that the employer is "in charge of the workplace and will be in a better position to formulate measures to accommodate".¹²⁴⁸ The equal liability principle was endorsed by the court in *CUPW V Canada Post Corporation*¹²⁴⁹ where the Supreme Court reiterated that the union and employer were both under a duty to accommodate the employee, a Seventh Day Adventist, who argued that religious beliefs precluded work from sundown Friday evening to sundown Saturday. It was also pointed out that where the employee raised objections and these were

¹²⁴⁶ Para 16.

¹²⁴⁷ Para 21.

¹²⁴⁸ Para 58. Also see Cotter *Heaven Forbid: An International Analysis of Religious Discrimination* 142; Buckingham *Fighting Over God: A Legal and Political History of Religious Freedom in Canada* 120-133; Nixon and Berkenbosch 2012 www.selectpath.ca/resource-centre/earc/articles/development.

¹²⁴⁹ [2001] BCJ No. 680 (CA).

inconsistent with the values and principles of human rights then such objections would be deemed irrelevant.¹²⁵⁰

The rationale for the equal liability principle must, of course be the fact that at any time in the employment relationship, when an employer is required to deal with the religious beliefs of the employee – where it poses a threat to the needs and requirements of the business, it does not mean that the employee can simply require of the employer to look for ways to accommodate the religious belief short of suffering undue hardship. As with an operational requirement dispute, both parties are called upon to constructively address all issues in a manner that may provide a viable alternative to retrenchment, so too, when seeking an accommodation there is no reason why an employee should not be required to propose ways in which his or her religious beliefs can be accommodated short of undue hardship. This phenomenon is a necessary consequence of what I submit is giving effect to fair labour practices between parties in the employment. To require less or more from a specific party in the employment relationship would be an affront to the above principle. This equal liability principle as it applies between employee and employer should, however, be distinguished from a situation where the nature of relationship is no longer between employee and employer, but rather between persons (in the collective sense of the word) and government (be it in the form of the legislature or executive). In this latter relationship the dynamic is unique to the realm of public law in which one finds the exercise of public power or the performance of public functions taking place, the impact of which on the rights of individuals as citizens can be far-reaching. To this end the case of *Alberta v Hutterian Brethren of Wilson Colony*¹²⁵¹ is relevant. In the *Hutterian* case, members from a particular religious community challenged a provincial regulation which obliged them to display photographs of themselves on their driver's license on the basis that the Second Commandment in the Bible prohibited them from having their photographs taken willingly. The Supreme Court held that the "concept of reasonable accommodation

¹²⁵⁰ See para 158.

¹²⁵¹ [2009] 2 SCR 567.

which envisions a dynamic process of adjustment of the relationship between two parties – most commonly an employer and an employee – is not suitable for the very different relationship that pertains between a legislature and the people subject to its laws".¹²⁵²

4.6.4 Future role of adjudication in relation to equality jurisprudence

As we have seen, the Canadian Charter and the rights and freedoms it protects applies vertically in that it controls the exercise of government power. The CHRA and CEEA are examples of legislation enforced by the CHRC in addition to the OHRCCode which all constitute human rights legislation geared to protect against discrimination and in particular religious discrimination in the workplace in areas where the Canadian Charter has no application. This framework is quasi-constitutional in nature in as much as it needs to align itself with the tenets of the Canadian Charter.

The rights and freedoms contained in this human rights framework which are interpreted by the courts add to the Canadian corpus of jurisprudence in respect of equality jurisprudence. A willingness on the part of the courts to interpret rights and obligations in a manner that gives meaningful effect to the notion of substantive equality is affirming on account of the fact that it demonstrates a commitment to the

¹²⁵² Para 67-71. For further reading see Foblets *et al Belief, Law and Politics: What Future for Secular Europe?* 179. In this regard it is also important to point out the case of *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 which had to do with Orthodox Jews, who were co-owners in a block of flats, setting up "succahs" on their balconies in accordance with their religious beliefs. The case had to be decided with reference to, *inter alia*, the meaning of "freedom of religion" under Quebec human rights law and the Canadian Charter where the test of mutual accommodation applicable to the employment relationship was not appropriate. The Supreme Court upheld the right of Jews – as an expression of their religious beliefs – to build "succat" structures on their balconies over the objections of co-owners and residents of the complex. In another case dealing with the provision of services which allegedly infringed upon a citizen's religious rights, see *Clipperton-Boyer v RedFlagDeals.com* [2014] HRT0 1796, in which the Human Rights Tribunal of Ontario dismissed a claim by a claimant who posted religious messages until directed by the owner of the website to remove same. The claimant alleged that the directive from the service provider constituted discrimination on the basis of creed under the Human Rights Code. In referring to the *Amselem* decision (para 15) as a case wherein religious discrimination was determined with reference to the Charter, the court stated that the description of religious discrimination given by the court in *Amselem* applies equally to religious discrimination under the Ontario Code (paras 15-16).

underlying ethos and Canadian leitmotiv of multiculturalism. In particular, it emphasises the commitment to continual transformation.¹²⁵³

At the outset, the point was made that Canada has been earmarked as a world-leader of egalitarianism. It is in this context relevant to consider Canadian responsibilities in relation to international law.

4.7 Canada and its obligations under international law

4.7.1 Introduction

Inasmuch as international law continues to play a relevant role in the jurisprudence of South Africa, so too does it continue to have relevance for other sovereign countries. As previously stated, in our globalised world, although sovereign independence is important, each modern democratic liberal state considers itself part of a greater world order subject to recognisable fundamental rules of great importance relating to various issues of international relations impacting upon trade, industry and more importantly human rights. Amnesty International has referred to Canada as playing a pivotal role on the world stage as a human rights champion as evidenced in its continual active involvement with the United Nations, Commonwealth and other regional bodies. Moreover, in terms of foreign policy relations Canada's reputation for human rights, freedom, democracy and the rule of law is noteworthy.¹²⁵⁴

International human rights law has played a significant role in assisting with the interpretation of the rights in the Canadian Charter.¹²⁵⁵ A most notable observation in this regard was made by Dickson CJ in *Reference re Public Service Employee Relations Act (Alta)(Alberta)*,¹²⁵⁶ namely:

¹²⁵³ See Weinrib "Canada" 114-115; *R v Hape* [2007] 2 SCR 292 para 40-46; *Divito v Canada (Public Safety and Emergency Preparedness)* [2013] 3 SCR 157 paras 22-26; Oliphant 2014 *Appeal* 106.

¹²⁵⁴ Amnesty International 2013 <http://www.amnesty.ca/news/news-releases/time-for-consistent-action-amnesty-international%E2%80%99s-human-rights-agenda-for-canada>.

¹²⁵⁵ See Beaulac 2004 *SLR* 20.

¹²⁵⁶ [1987] 1 SCR 313.

The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter provisions.¹²⁵⁷

When referring to international human rights law, this refers to the following sources, namely ILO recommendations and standards and relevant United Nations Covenants.

4.7.2 Canada and the ILO

Canada is a dominant participant in the ILO and was also a founding member of the organisation in 1919. In fact, Montreal was home to the ILO during World War II. Canada's ILO participation is evidenced by the fact that of the eight core ILO Conventions, Canada has ratified all but two.¹²⁵⁸ It participates in and is party to the ILO Declaration on Fundamental Principles and Rights at Work. In this regard the ILO Declaration on Social Justice for a Fair Globalization¹²⁵⁹ which seeks through its four themes¹²⁶⁰ to address "decent work" in the context of economic globalisation is particularly relevant as far as the theme of transformative constitutionalism is something which remains on the agenda of Canadian Charter jurisprudence with the emphasis being placed on addressing the issue of substantive equality.

Through the interpreting of Charter Rights in alignment with tenets of ILO recommendations, it is clear that the Supreme Court of Canada refers to the ILO in the context of it giving credence to the rights and freedoms fundamental to equality. In a case involving the attempted adoption in 2007 by British Columbia to essentially nullify collective bargaining, it is insightful to take note of the view of the Supreme

¹²⁵⁷ Page 348.

¹²⁵⁸ Namely the Forced Labour Convention 29 of 1930 and the Right to Organise and Collective Bargaining Convention 98 of 1949. See International Labour Organisation 2016 <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::>; Government of Canada 2016 www.news.gc.ca/web/article-en.do?nid=1081459.

¹²⁵⁹ Adopted unanimously by the ILO in Geneva on 10 June 2008.

¹²⁶⁰ Employment promotion, social protection, social dialogue and fundamental rights.

Court in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*.¹²⁶¹ McLachlin CJ stated the following:

... collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees.¹²⁶²

The reference was an undeniable reference to the ILO Convention of the Right to Organise and Bargain. In this context it is ironic that Canada has as yet not ratified the ILO Convention regulating this specific area of collective labour law. This, however, fails to detract from the overall and general normative influence which international law and specifically ILO standards have on Canadian law.

The most relevant ILO standard addressing religious discrimination in the workplace is ILO Convention 111.¹²⁶³ There is no express identification of this ILO convention in any federal or provincial Canadian legislation such as one would find in the EEA, LRA or PEPUDA in South Africa. What does this translate to in terms of the overall equality and specifically religious discrimination jurisprudence? It is submitted that there is nothing to indicate that the lack of express reference to ILO Convention 111 necessarily renders Canadian jurisprudence disadvantageous in the sense that it can be said to be lacking in conceptual growth of addressing fundamental issues such as defining religion, determining the manifestation of religious discrimination and properly addressing substantive equality where discrimination based on religion takes place. Mere ratification, however, of ILO Convention 111 and/or other ILO Conventions would also in and of itself be insufficient. It would be akin to tokenism.¹²⁶⁴ Effect to their substance and spirit would need to be realised in terms of the manner in which equality rights and specifically antidiscrimination interests are protected in the national arena by means of the human rights framework.

¹²⁶¹ [2007] 2 SCC 27.

¹²⁶² Page 412.

¹²⁶³ Ratified by Canada on 26 November 1964.

¹²⁶⁴ See Fudge 2014 *DalLJ* 610; *Health Services and Support - Facilities Subsector Bargaining Association v British Columbia* [2007] 2 SCR 391 para 70; Banks 2012 *CanL&ELJ* 238-244.

4.7.3 Canada and international human rights instruments

In a case dealing with hate speech, Dickson CJC made the following observation in *R v Keegstra*¹²⁶⁵ in relation to Canada's obligations under international law:

Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles underlie the Charter itself ... Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objectives ...¹²⁶⁶

The UDHR,¹²⁶⁷ on which the ICESCR¹²⁶⁸ and the ICCPR¹²⁶⁹ are based, have been ratified and adopted by Canada.¹²⁷⁰ The Declaration has had an historical influence on the drafting of the Canadian Charter and various human rights legislation measures in Canada, including, but not limited to, the OHRCode.¹²⁷¹ Schabas points out that the Supreme Court of Canada referred to the Declaration for the first time in 1976 and by 1998 has cited the Declaration in no less than sixteen judgments.¹²⁷²

The 1981 DEFIRB is notable for the wording it provides in relation to "freedom ... to have a religion or whatever belief...".¹²⁷³ The wording of the DEFIRB in this regard is closely aligned to the remarks made by Dickson CJC in *Drug Mart* in relation to freedom of religion, namely:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.¹²⁷⁴

¹²⁶⁵ [1990] 3 SCR 697.

¹²⁶⁶ Page 750.

¹²⁶⁷ Adopted by the United Nations on 10 December 1948.

¹²⁶⁸ See discussion in subparagraph 2.2.4 above.

¹²⁶⁹ See discussion in subparagraph 2.2.4 above.

¹²⁷⁰ Canada only adopted the Declaration in 2007. See Weber *The Constitution of Canada: A Contextual Analysis* 226. The refusal by Canada to sign the Declaration in December 1948 is charged with issues of policy regarding, *inter alia*, socioeconomic provisions contained in the Declaration which were in conflict with official policy views by Canadian government leaders at the time. For a detailed discussion see Schabas 1998 *McGill LR* 410-425.

¹²⁷¹ See Schabas 1998 *McGill LR* 405-406.

¹²⁷² See Schabas 1998 *McGill LR* 403 and authority cited at fn 15.

¹²⁷³ Article 1.

¹²⁷⁴ Page 95.

ILO Convention 111 is the most germane to the subject matter of this thesis. It is relevant insofar as it establishes minimum international standard or threshold requirements. As its full name suggests, it seeks to address discrimination in the employment or occupation realm.¹²⁷⁵

4.8 Conclusion

Canada can be proud of its egalitarian status in the international arena. At the epicentre of Canadian jurisprudence is the Canadian Charter. Although not a very old instrument it is acknowledged for containing the most fundamental of human rights and freedoms. Canada has sought to address the vertical dimension of human rights concerns through its diverse human rights legislation regime on account of the horizontal application of the Canadian Charter.

The Constitutional and legislative infrastructure is premised on the fact that Canada is a pluralistic multicultural and secular society. Its commitment to celebrating this diversity is evidenced through its underlying ethos of a "living tree" democracy which not only subscribes to inclusivity but is also charged with a mandate of transformative constitutionalism. In this way it seeks to articulate and give expression to the substantive meaning of equality as set out in section 15(1) of the Canadian Charter in general and of human dignity in particular, an inexorable component of the former.

The diverse make-up of Canadian society translates into a reality in terms of which it is a society in great flux subject to constant change with competing values and interests by different role-players. Nowhere is this more apparent than in the workplace where fundamental rights have objectives that are disjointed. When the nature of the inherent requirements of a job limit the fundamental right of employees to practise their religious belief it is a matter which requires to be

¹²⁷⁵ Cheng and Cooney "China's Legal Protection of Workers' Human Rights" 158; Fredman 2013 http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1320950747192/8260293-1320956712276/8261091-1348683883703/WDR2013_bp_Anti-Discrimination_Laws.pdf 15. Also see discussion in subparagraphs 2.2.4, 2.5.3 and 3.3.3 above.

assessed and determined with reference to what is not only reasonable but also rational and proportionate.

The conceptual notion of the duty to accommodate has been employed optimally in Canadian law to expand to a mutual duty of reasonable accommodation. This means that both employee and employer are required to seek ways in which to address the problem and seek a solution. This is to be welcomed since it calls for active engagement and participation on the part of role-players in their relationship. However, the notion has actually been used also as a means to address "adverse" discrimination in a manner that looks less at the strict formal differences between direct and indirect discrimination and focuses more on the full extent to which the employer has taken all possible steps to accommodate short of undue hardship. The rationale for adopting what some may regard as an onerous test in respect of employers, is simply to address the aspect of substantive equality in that whilst a standard may *prima facie* appear to be neutral, it will only pass muster if the employer can demonstrate impossibility to accommodate short of undue hardship.

Whilst Canadian jurisprudence may serve as a useful guideline in the determination of equity jurisprudence in general and religious discrimination in the workplace in particular, account must be had of the conceptual notions applied to such problems in the context of Canadian law.

CHAPTER 5:

JURISPRUDENCE OF SOUTH AFRICAN COURTS IN RELATION TO RELIGIOUS DISCRIMINATION IN THE WORKPLACE

5.1 Introduction

This chapter will examine the South African jurisprudence of courts in relation to religious discrimination in the workplace. In the context of this chapter jurisprudence must be understood to refer to decisions of South African courts. The focus of this study is confined to decisions of the Constitutional Court, Supreme Court of Appeal, Labour Appeal Court and the Labour Court, and, in select instances, decisions handed down by tribunals.¹²⁷⁶

The purpose of this chapter is firstly to establish a conceptual understanding of the approach on the part of our courts in relation to the interpretation of the Bill of Rights. The normative constitutional and legislative framework regulating religious discrimination in the workplace was discussed in Chapter 3. The intention here is to look at the manner in which our courts interpret such framework with particular attention being had to the interpretation of the Bill of Rights which serves as the foundation for the protection of religious freedom.

The second focus of this chapter will be on the adjudicative role played by our courts in relation to equality jurisprudence in South Africa. Equality jurisprudence is conceptually the minimum threshold on which the South African democratic order depends for its viability. As such, an analysis of this will seek to demonstrate how our courts have established normative and conceptual understanding in relation to such issues such as substantive equality and the role played by human dignity. The rationale for doing so is to demonstrate that these normative principles that have been developed and established contribute to our common law in a conceptually

¹²⁷⁶ Including tribunals such as the Commission for Conciliation, Mediation and Arbitration (CCMA). In this regard, see discussion in subparagraph 3.4.3 above.

organic sense, giving impetus to the constant development and growth of our common law. This growth is a vital component of transformative constitutionalism addressing the imperative of social justice. A discussion of this will take place against the backdrop of the interim and final Constitution. It is important to note that the focal area of this study is religious discrimination in the workplace; however, this is a specific area of equality jurisprudence. As a result, it is important to establish a normative understanding of how our courts have come to take conceptual account of the notions of substantive equality. These latter issues remain fundamentally relevant to religious discrimination because they inform the normative framework basis upon which disputes in this regard are approached and essentially determined.

The third area of focus of this chapter will be in relation to specific judgments handed down in workplace religious discrimination in South Africa. The aim of this focus is to establish the normative basis upon which such disputes are being adjudicated, to examine the tests currently being adopted, and to look at the viability of our courts employing a more unified and flexible approach to the reasonable accommodation test akin to what is apparent in Canadian jurisprudence adjudication. From the cases analysed there does appear to be a readiness on the part of judges to consider a broad spectrum of all matters to inform their understanding of how best to adjudicate the dispute before them. It will be argued that in fact there appears to be a move away from the *Harksen v Lane* test to what the Constitutional Court has referred to as a "nuanced context-sensitive" approach.¹²⁷⁷ As we have more reported cases handed down in relation to discrimination matters in general and religious discrimination in the workplace in particular it would appear that there is much value to be gained in the approach as suggested by the Constitutional Court since this permits each and every case to be adjudicated in the most appropriate manner.

¹²⁷⁷ See *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) paras 29-30.

5.2 Interpreting the Bill of Rights

5.2.1 Introduction

The way in which our Bill of Rights is interpreted is crucial to the development, evolution and integrity of our constitutional dispensation. Interpretation is a term which, like any other term, is context specific. In the legal sense, it means the way in which our courts adjudicate disputes that are brought before them with reference to specific legislation. Since all legislation is subject to the supremacy of the Constitution, it must be understood that such legislation should be interpreted through the prism of the values and principles underlying the Constitution. As previously mentioned this section looks at the way in which our courts interpret the Bill of Rights. The purpose is to establish a normative understanding of the Bill of Rights in general and in particular to distil conceptual notions of issues pertaining to equality jurisprudence.

5.2.2 Methods of interpretation

Instrumental to the adjudication of disputes is the manner in which courts interpret submissions, arguments, evidence, documents, legislation and the Bill of Rights. In Chapter 2 reference was made to what was referred to as a generous, purposeful approach adopted regarding the interpretation of fundamental rights.¹²⁷⁸ This, we have seen, is a duty imposed under sections 39(1) and (2) of the Bill of Rights. It is a peremptory duty but the full extent to which this duty is discharged, and, moreover, the distance to which a specific judgment goes in taking into account values and principles which later characterise such judgment as a good judgment depend on the individual make-up of the adjudicating officer, namely their experience in a specific discipline and their sagacity.¹²⁷⁹

Development of the common law and promotion of the spirit, purport and objects of the Bill of Rights, as envisaged in section 39(2), is clearly something that is related to

¹²⁷⁸ See subparagraph 3.3.3 above.

¹²⁷⁹ See Michelman 1995 *SAJHR* 483; Vrancken "Application, interpretation and the limitation of the Bill of Rights" 53-62.

transformative constitutionalism.¹²⁸⁰ The need for transformation is obvious due to the historical context that defined our common law, captured in the following *dictum*:

[It] evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law ... to accord with the Bill of Rights.¹²⁸¹

It is noteworthy to observe that transformation, and hence development of the common law, takes place in a disciplined manner, regard being had to the fact that even legal principles inherited from the legacy of apartheid remain applicable providing they are relevant and do not flout fundamental rights enshrined in the Bill of Rights. This disciplined and somewhat restrained approach of development is in the interest of legal certainty.¹²⁸² Moreover, with regard being had to the separation of powers doctrine, the reality is that the most effective and expedient means of change is the legislature as opposed to the judiciary.¹²⁸³ It has been pointed out that before a court develops the common law, it must:

- (a) determine exactly what the common law position is;
- (b) consider the underlying reasons for it;
- (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development;
- (d) consider precisely how the common law could be amended; and
- (e) take into account the wider consequences of the proposed change in that area of the law.¹²⁸⁴

¹²⁸⁰ For further reading see Budlender 2005 *SALJ* 715; Fagan 2004 *AJur* 117; Langa 2006 *Stell LR* 351.

¹²⁸¹ *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) per Van der Westhuizen J para 36. In relation to the development of the common law, also see *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC); Fagan "Section 39(2) and political integrity" 126.

¹²⁸² *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 37.

¹²⁸³ *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 39.

¹²⁸⁴ *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 38.

In other words, a well-balanced, common-sense approach is what is needed. Where the law is sufficiently developed in a specific area to the extent that it can provide redress in the form of a remedy, it stands to reason that recourse must be had thereto. To the extent that an area of law is lacking or wanting in providing suitable or sufficient relief, and there is no legislative remedy available, then the organic reach of the common law must be developed to extend to such an area.

5.2.3 Purposive interpretation

In the context that the Bill of Rights is a legal instrument and as such a document in the strict sense of the word, it too must be subject to all the customary measures and necessary constraints invoked to ensure the appropriate functioning and operating of a legal system. It means, put differently, that the Bill of Rights is after all a legal instrument as opposed to a literary work of prose or poetry which must then be read in accordance with rules governing these disciplines. As such our courts are enjoined not to interpret in accordance with moral or philosophically charged convictions.¹²⁸⁵ To do so would lead to a variety of subjective accounts of particular versions of the same instrument coloured by each individual judge's political or moral persuasion. Judges are encouraged, instead to be unified in their purpose. In this regard, they are enjoined to employ a purposive interpretative approach.¹²⁸⁶ By this is meant they should read and interpret the fundamental liberties therein contained in a manner which is generously in favour of rights rather than a restrictive interpretation thereof. The rationale for this is that such an approach is less likely to result in a conflict with fundamental rights.¹²⁸⁷ The common sense in this is clear in that the more restrictive an interpretation imposed upon rights, the greater the

¹²⁸⁵ See Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* xxvi-xxvii when referring to the decisions of *S v Makwanyane* 1995 3 SA 391 (CC) para 206 and *S v Zuma* 1995 2 SA 642 (CC) para 18, in which one is reminded of the fact that the Constitution as a legal document must be interpreted as a legal instrument and not merely in accordance with the personal convictions of the judge.

¹²⁸⁶ See Currie and De Waal *The Bill of Rights Handbook* 150; Meyerson *Jurisprudence* 139-141; Ackermann *Human Dignity: A Lodestar for Equality in South Africa* 24; Du Plessis 2011 *PER* 94; O'Regan 2012 *MLR* 1-72; Klare 1998 *SAJHR* 171 ff; Cooke "The road ahead for the common law" 691; Bilchitz and Williams 2012 *SAJHR* 159.

¹²⁸⁷ Currie and De Waal *The Bill of Rights Handbook* 150; Cook 2013 *YJLH* 460-461; Chaskalson 2000 *SAJHR* 200.

likelihood of a finding that their exercise is to be limited in various respects than otherwise. A finding in favour of rights is in any event supportive of the *in favorem libertatis* principle which seeks to advance rather than hinder the expression of human rights.¹²⁸⁸

Some insightful observations concerning constitutional values appears from the case of *S v Zuma*.¹²⁸⁹ In being called upon to decide the constitutional validity of the reverse onus imposed upon accused persons under section 217(1)(b)(ii)¹²⁹⁰ Kentridge AJ, in referring to a previous judgment of Froneman J¹²⁹¹ in which mention was made of the object the new Constitution remedying the "mischief" of the past dispensation through certain values and principles that seek "to give expression to the values it seeks to nurture for a future South Africa",¹²⁹² confirmed that the interim Constitution must be interpreted in a manner that promotes the values underlying a democratic society based on equality and freedom. Kentridge AJ also confirms that since the interim Constitution is ultimately a written document, due account must be taken of the words as expressed by the drafters; however, due to the fundamental rights embodied therein a broad construction is to be preferred.¹²⁹³ The reasoning advanced by Kentridge AJ in this regard is also supported in the judgment by Canadian authority¹²⁹⁴ in the case of *R v Big M Drug Mart Ltd*¹²⁹⁵ wherein Dickson J (later Chief Justice of Canada) held – with reference to the Canadian Charter of Rights – as follows:

¹²⁸⁸ See Michelman 1995 *SAJHR* 483; *S v Makwanyane* 1995 3 SA 391 (CC) para 9; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) para 24; *S v Zuma* 1995 2 SA 642 (CC) para 14; *Soobrameny v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 17; *SANDU v Minister of Defence* 1999 4 SA 469 (CC) para 28.

¹²⁸⁹ 1995 2 SA 642 (SA).

¹²⁹⁰ Of the Criminal Procedure Act 51 of 1977.

¹²⁹¹ *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 635A-638D.

¹²⁹² At para 17.

¹²⁹³ Para 18, with reference to the authority of *Attorney-General v Moagi* 1982 2 *Botswana LR* 124 at 184.

¹²⁹⁴ It is important to point out that the court also has had regard to American and British jurisprudence.

¹²⁹⁵ [1985] 1 SCR 295.

The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and the securing for individuals the full benefit of the Charter's protection.¹²⁹⁶

The test of the "generous" and "purposive" interpretation approach to be adopted when interpreting the interim Constitution, as set out in the *Zuma* case, was authoritatively accepted by Chaskalson P in *S v Makwanyane*¹²⁹⁷ which is also an important decision for pointing out the special place being accorded to human dignity, one of the two most important human rights in the Bill of Rights – the other being the right to life.¹²⁹⁸ The emphasis placed upon human dignity highlights its importance as a right to the essential worth and make-up of a human being. Being treated unfairly on the basis of a religious belief impacts upon the inherent worth and dignity of a human being.¹²⁹⁹ The generous interpretation given to dignity to limit the religious belief which parents held in considering it necessary to discipline their children in private schools by means of corporal punishment was made manifest in the ruling by the Constitutional Court in *Christian Education South Africa v Minister of Education*.¹³⁰⁰

The provision of equality under the interim Constitution¹³⁰¹ reads as follows:

(1) Every person shall have the right to equality before the law and to equal protection of the law.

No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular; race, gender, sex ... religion, conscience, belief ...

Makwanyane is also illuminating for authoritatively asserting the fact that the Constitutional Court's approach toward the Constitution would be transformative in nature as appears from the following *dictum* by Mohamed DJP:

¹²⁹⁶ Page 15.

¹²⁹⁷ 1995 3 SA 391 (CC) para 9.

¹²⁹⁸ Para 144.

¹²⁹⁹ See discussion in subparagraph 2.7 above.

¹³⁰⁰ 2000 4 SA 757 (CC) paras 28-29, 31, 44-53. Also see *S v Williams* 1995 3 SA 633 (CC) where, at para 68, Langa J stated that "[a]n enlightened society will punish offenders, but will do so without sacrificing human decency and dignity".

¹³⁰¹ In terms of s 8.

The South African Constitution is different [from classic documents such as the US Constitution]: it ... represents a decisive break from, and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos, expressly guaranteed by the Constitution.¹³⁰²

Interpretation is also a matter which is often the result of the end-product of how the matter is pleaded by the parties and argued before the court¹³⁰³ as well as the judicial experience and insight of the specific judge.¹³⁰⁴ This interpretation, whether textual or purposive, must promote the values underlying a democratic and open society based on human dignity, equality and freedom.¹³⁰⁵ However, central to the concept of transformative justice must surely be an endeavour when interpreting to do so in a manner consistent with the aim of transforming our society from what it was or is to what it ought to be.

Fundamental to the concept of transformative constitutionalism¹³⁰⁶ is the culture of justification in terms of which all conduct in the constitutional dispensation must be justified. Effectively this translates into meaning that the exercise of all power, whether on the part of an individual, juristic person or an organ of state, is subject to the supremacy of the Constitution and specifically the rule of law.¹³⁰⁷ In other words, unlawful conduct amounts to illegality in terms of the principle of legality. Whilst this concept is notionally closer aligned to the public discipline of administrative law, in general terms it is all-pervasive in the extent of its reach into all spheres of private and public law on account of the fact that ultimately, as previously stated, for the exercise of power to be legal it must be lawful. Conceivably, an employer in the

¹³⁰² Para 487.

¹³⁰³ See *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 11.

¹³⁰⁴ See Pillay 2003 *ILJ* 57; Cameron *Justice: A Personal Account* 12; Fredman 2013 *PubL* 297-298; Bix *Law, Language, and Legal Determinacy* 63-76; Greenawalt "Constitutional and statutory interpretation" 298-299. Cf Dyzenhaus, Ripstein and Reibetanz Moreau *Law and Morality: Readings in Legal Philosophy* 331-333; Lenta 2004 *SALJ* 237, who all argue about the implications of an antimajoritarian influence of jurisprudence in terms of which an unelected branch of government through the means of judicial interpretation imposes its power and influence upon the electorate.

¹³⁰⁵ See Langa 2006 *Stell LR* 351-353; Bishop and Brickhill 2012 *SALJ* 711 ff; Fagan 2004 *AJur* 134-135; Wallis 2010 *SALJ* 690; Budlender 2005 *SALJ* 718; Henrico 2015 *TSAR* 784-803.

¹³⁰⁶ See discussion in subparagraph 2.9 above.

¹³⁰⁷ Section 1(c) of the Constitution.

private sector, or on a smaller level such as the domestic sector, may be said to exercise no public power when employing a domestic worker. However, the employment contract is governed by relevant provisions of the BCEA and LRA. A dismissal on the basis of religious discrimination would bring into play the EEA and/or LRA. Although the dismissal may not constitute an administrative action for purposes of the Promotion of Administrative Justice Act (PAJA)¹³⁰⁸ it is arguably still subject to review in terms of the principle of legality.¹³⁰⁹ The importance and relevance of the principle of legality in this respect is its establishment and assertion of social justice which is the goal of transformative constitutionalism.¹³¹⁰

This interpretation is subject, however, to two principle constraints. In the first instance, whatever limits may appear from the text itself; in the second instance, subject to the doctrine of *trias politica* and the rule of law.¹³¹¹ In this latter instance the judiciary must show due deference to the other two duly elected branches of government and refrain from interfering by way of judicial review. The latter instance

¹³⁰⁸ 3 of 2000.

¹³⁰⁹ Section 1 of PAJA lists a number of exceptions under subparagraphs (aa)-(ii) (the exceptions). If the exercise of public power or the performance of a public function is included in the exceptions it is effectively immune from judicial review as an administrative act. The principle of legality has been introduced into administrative law to enable the exercise of all public power, even if falling within the exceptions of PAJA to be subject to judicial review. In this sense, the principle of legality "mirrors" administrative law and gives impetus to the culture of justification in terms of which the exercise of all power is held accountable through the process of judicial review. See Hoexter 2004 *MacqLJ* 177-179; Currie *The Promotion of Administrative Justice Act: A Commentary* 27, *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) para 144; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 49; *Cape Bar Council v Judicial Service Commission* 2012 4 BCLR (WCC) para 25; *Dunn v Minister of Defence* 2005 ZAGPHC para 38; *Merafong Demarcation Forum v President of the RSA* 2008 5 SA171 (CC) para 167. For cases in which the principle of legality was used for non-administrative action, see *Competition Commission of SA v Telkom SA Ltd* 2000 2 All SA 433 (SCA) para 13 and *Powel v Van der Merwe* 2005 1 All SA 149 (SCA) para 18; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) and thereafter developed as given impetus to by the decisions in *SARFU v President of the RSA* 2000 1 SA 1 (CC); *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the RSA* 2000 2 SA 674 (CC); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC); *Allpay Consolidated Investment Holdings v CEO of the South African Social Security Agency (No. 1)* 2014 1 SA 604 (CC).

¹³¹⁰ See for example *Joseph v City of Johannesburg* 2014 4 SA 55 (CC) para 36; *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No.2)* 2014 4 SA 179 (CC) paras 49-50; Smit 2010 *TSAR*.

¹³¹¹ Sections 1(c) and 165(2); see also *South African Association of Personal Injury Lawyers v Heath* 2000 1 SA 883 (CC) para 46. For further reading see Henrico 2014 *TSAR* 742; O'Regan "A forum for reason: Reflections on the role and work of the Constitutional Court".

is not always a matter which is readily ascertainable on account of the sometimes grey areas between policy and the exercise of public powers and functions.¹³¹² Each and every case is decided in the context and with reference to the facts and circumstances of its own merits and to this end it is important to consider the adjudication of cases conceptually as context-specific.

An examination of our Constitutional Court jurisprudence reveals that the court serves as more than the final arbiter in the adjudication of disputes. There is commitment on the part of the court in the manner in which they interpret the Constitution, to seek to advance the underlying values of a democratic society based on equality, freedom and human dignity.¹³¹³ Such a "purposive" and "generous" approach consistent with a value judgment has been earmarked as aligning itself with the constitutional imperative of equality which is at the heart of our democratic dispensation, the achievement of which is a non-negotiable aspect of the egalitarian society we aspire to achieve.¹³¹⁴

The adoption of such a method also means that the court is placed in the most optimal position to make a finding on the merits by being able to draw on a wealth of values and principles as distilled from statutory interpretation against constitutional imperatives duly informed by relevant ILO instruments and international law.¹³¹⁵

As previously discussed, the rights in the Bill of Rights are not absolute. They are subject to a general limitation of rights under section 36 of the Constitution.¹³¹⁶ The normative tests used in the general limitation of rights, namely rationality,

¹³¹² See para 2.5 above.

¹³¹³ See Currie and De Waal *The Bill of Rights Handbook* 137-138. For further reading on transformative constitutionalism see Klare 1998 *SAJHR* 146; *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC) para 125; De Vos and Freedman *South African Constitutional Law in Context* 95; Davis 2010 *SAJHR* 90-95.

¹³¹⁴ For further reading see Albertyn and Kentridge 1994 *SAJHR* 151.

¹³¹⁵ See Du Plessis 1993 *Stell LR* 63; Abney 1994 *TempLR* 931.

¹³¹⁶ See subparagraph 3.2.3 above. For a discussion on the relationship between s 39(1), ss 9 and 36 see Currie and De Waal *The Bill of Rights Handbook* 237-238; Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* 40-44; Oosthuizen and Russo 2001 *SAJE*.

reasonableness and proportionality, have also previously been discussed.¹³¹⁷ The challenge imposed on those who are called upon to adjudicate disputes is not merely the ability to identify the equality right in issue. The rub lies in the ability to adjudicate conflicting fundamental rights and interpreting such conflict in a manner that is purposive.

An employee's allegation that her right to religious freedom is being unfairly curtailed on account of the IROJ imposed by the employer needs to be determined taking into account a host of factors. The same applies to an organisation which seeks to exclude an applicant for employment on the basis of religious discrimination which the organisation alleges is fair. Adjudicating both conflicting claims of alleged unfair discrimination on the ground of religion demands taking into account normative legal concepts which our law has developed in relation to understanding such discrimination disputes in the context of being on a listed ground (as opposed to an unlisted ground) manifesting itself in the form of direct (as opposed to indirect) discrimination. In addition, the court would need to determine how the conflicting fundamental rights, one on the part of the employee and the other on the part of the employer, must be balanced against each other in arriving at an equitable outcome.

As previously mentioned, cases are "nuanced context-specific", meaning that they present themselves with their own special factual matrix. In this sense each and every case is unique demanding treatment and adjudication upon its own merits. On the other hand, the normative legal principles, such as for example ascertaining a substantive notion of equality, provided they remain valid, become part of our corpus of jurisprudence which remains constant and unchanging and as such becomes a vital aspect which is instrumental to the certainty of the rule of law.¹³¹⁸

¹³¹⁷ See subparagraphs 3.2.2 and 3.2.3 above.

¹³¹⁸ See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of SASSA (No. 1)* 2014 1 SA 604 (CC) para 87 and the authorities therein cited; *S v Dlamini*, *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 4 SA 623 (CC) para 75; Dworkin *Law's Empire* 126-127, 413. Also see Cameron *Justice A Personal Account* 178; De Ville *Judicial Review of Administrative Action in South Africa* 186 and the authorities cited at fn 740; Sachs *The Strange Alchemy of Life and Law* 145.

5.3 Adjudicating equality jurisprudence in South African law

5.3.1 Introduction

As previously stated, the cases examined in this section will not be limited to religious discrimination in the workplace. The rationale for this is that non-religious discrimination cases – to the extent that they have developed normative principles dealing with equality in general and specific normative principles derived therefrom, for example the significance of human dignity or the importance of substantive equality as opposed to formal equality – remain relevant to the overall conceptual imperative of the importance of equality in society.

5.3.2 A brief overview of the predemocratic dispensation

The South African labour legislative framework in general and employment equity in particular is premised on a system steeped in a society marked by historical inequality and discrimination.¹³¹⁹ Prior to the implementation of the former Labour Relations Act (hereafter the 1956 Act)¹³²⁰ an employer was at liberty to refuse to appoint an applicant for employment on the basis of race or even gender.¹³²¹ Laws that would address discrimination in the employment relationship was one of the recommendations from the Wiehahn Commission¹³²² (hereafter the Commission) which stated the following:

... discrimination in the field of labour on the grounds of race, colour, sex, political opinion, religious belief, national extraction or social origin will have to be outlawed and criminalized in South Africa's legal dispensation.¹³²³

¹³¹⁹ See Du Toit *et al Labour Relations Law: A Comprehensive Guide* 653 especially authorities referred to at fn 1; O'Regan 1994 *Empl* 12. Also see *Brink v Kitshoff* 1996 4 SA 197 (CC) where at para 40 O'Regan J refers to the systemic discrimination against black people under the apartheid regime.

¹³²⁰ 28 of 1956.

¹³²¹ See Rycroft and Jordaan *A Guide to South African Law* 38. See fn 220 where the learned authors point out that whilst such discriminatory practices could take place against applicants for employment, discrimination in respect of wage regulation, measures on the basis of gender, race or colour was generally prohibited under various statutory provisions such as s 24(2) of the then Labour Relations Act, s 4(3) of the Wage Act and s 13(5)(a) of the Manpower Training Act. Appointed in 1977.

¹³²³ *The Complete Wiehahn Report* Part 5 para 4.127.14.

The Commission also recommended that employment jurisprudence be developed on the grounds of "fairness and equality" by *fora* such as Industrial Councils and the Industrial Court.¹³²⁴ In this manner the Industrial Court essentially developed the unfair labour practice jurisprudence in the 1980s with reference to discrimination on the basis of race, sex and gender.¹³²⁵ Pursuant to the recommendations of the Commission the Industrial Conciliation Amendment Act¹³²⁶ amended the 1956 Act to refer to an unfair labour practice as "any labour practice which in the opinion of the industrial court is an unfair labour practice".¹³²⁷ The 1979 Act thus clothed the Industrial Court with sufficient jurisdiction to start developing a jurisprudence in recognition of employment and collective labour rights.¹³²⁸ Jurisprudence developed with regard to, for example, dismissals in respect of race;¹³²⁹ sexual harassment;¹³³⁰ age¹³³¹ and pregnancy.¹³³² The case authority that grew from cases dealing with unfair labour practices extended to "discrimination" matters which would later ultimately be labelled as "unfair discrimination".¹³³³ No reported cases relating to discrimination on grounds of religion appear from the Industrial Courts. This does not discount the phenomena of religious discrimination in the workplace. Apartheid policy was closely aligned with mainstream Christian Protestantism to the detriment and marginalisation of other minority religions.¹³³⁴ It is significant to observe the extent to which religious diversity was not provided for in a country that represented a

¹³²⁴ Thompson and Benjamin *South African Labour Law* Vol I Service 43 2002 CC 1-6.

¹³²⁵ Du Toit *et al Labour Relations Law: a Comprehensive Guide* 653; Du Toit 2006 *ILJ* 1311; Cooper 2004 *ILJ* 813-816.

¹³²⁶ 94 of 1979.

¹³²⁷ Cheadle 1980 *ILJ* 200.

¹³²⁸ Mureinik 1980 *ILJ* 113; Thompson and Benjamin *South African Labour Law* Vol 2 Service 43 2002 CC 1-7.

¹³²⁹ *MWU v East Rand Gold & Uranium Co Ltd* 1990 11 *ILJ* 1070 (IC); *NUMSA v Schnaier Metal Industries (Pty) Ltd* 1992 13 *ILJ* 112 (LAC); *SACTWU v Sentrachem Ltd* 1988 9 *ILJ* 410 (IC); *Chamber of Mines v CMU* 1990 11 *ILJ* 52 (IC).

¹³³⁰ *J v M Ltd* 1989 9 *ILJ* 755 (IC); *G v K* 1988 9 *ILJ* 314 (IC); Dancaster 1991 *ILJ* 449.

¹³³¹ *TGWU v SA Stevedores* 1993 14 *ILJ* 1068 (IC).

¹³³² *Randall v Progress Knitting Textiles Ltd* 1992 13 *ILJ* 200 (IC).

¹³³³ Thompson and Benjamin *South African Labour Law* Vol I Service 43 2002 CC 1-6. See Du Toit and Potgieter *Unfair Discrimination in the Workplace* 15; Du Toit "The prohibition of unfair discrimination: applying s 3(d) of the Employment Equity Act 55 of 1998" 142.

¹³³⁴ See Henrard 2001 *JAL* 52; Du Plessis 2015 *JRH* 4; Bilchitz and Williams 2012 *SAJHR* 159-162; Kuperus *State, Civil Society and Apartheid in South Africa: An Examination of Dutch Reformed Church-State Relations* 2.

plurality of cultures and ethnic groups. Legislative and constitutional provisions which address religious discrimination in the workplace now stand as testimony in contrast to the general lack of any equivalent formal statutory mechanism in the pre-constitutional dispensation.¹³³⁵

A significant feature about the development of case law under the Industrial Court dispensation is that although the court was at liberty to develop a somewhat robust jurisprudence given the open-ended definition of an unfair labour practice, the paradox has been pointed out of the paucity of discrimination claims arising in a society where inequality was entrenched throughout the political and socioeconomic spectrum of the country. This is captured by O' Regan who states the following:

Perhaps the most surprising aspect of our law on equality is that, given the deeply divided nature of our society, there is little of it. The unfair labour practice has provided a basis for equality litigation since 1981, but only a handful of cases have been brought to court. Where are the discrimination cases, the equal pay suits and harassment litigation? Other countries with a less entrenched pattern of discriminatory behaviour are beset with anti-discrimination litigation.¹³³⁶

Reasons given for this pattern unique to South Africa have ranged from employees accepting entrenched discrimination as part of the working environment to union officials not being sufficiently skilled in litigation and lastly to the difficulties and costs associated with litigation.¹³³⁷

5.3.3 The influence of the interim Constitution on equality jurisprudence in South Africa

The interim Constitution¹³³⁸ came into effect on 27 April 1994. It also ensured that equality took centre stage in our law by providing that everyone is entitled to equal protection and benefit under the law.¹³³⁹ This notion of equity was reinforced by the express prohibition against unfair discrimination¹³⁴⁰ and measures that would be

¹³³⁵ See discussion in subparagraph 2.4.2 above.

¹³³⁶ O'Regan 1994 *Empl* 13; see also O'Regan 1994 *AJur* 69.

¹³³⁷ O'Regan 1994 *Empl* 23.

¹³³⁸ Act 200 of 1993.

¹³³⁹ Section 8(1) and (2).

¹³⁴⁰ Section 8(3).

adopted to achieve the protection and advancement of persons disadvantaged by unfair discrimination.

Pursuant to the passage of the interim Constitution the Industrial Court continued to preside over discrimination disputes; however, under the constitutional dispensation such claims were required, under the provisions of section 35(3), to be determined with reference to the "spirit, purport and objects" of the Bill of Rights contained in the interim Constitution.¹³⁴¹ In *Association of Professional Teachers v Minister of Education*¹³⁴² the Industrial Court held that:

...in exercising its unfair labour practice jurisdiction the Industrial Court will also be called upon to infuse the very wide definition of the unfair labour practice definition with meaning in accordance with the provisions of the chapter of the Constitution setting out our Bill of Rights.¹³⁴³

Similar views were expressed in *George v Liberty Life*¹³⁴⁴ in which the court stated:

In giving context to the unfair labour practice, it is in my view, imperative to take into account the values of the broader community. An important source of such values, which will guide this court, are the rights enshrined in the Constitution.¹³⁴⁵

Reference to "values of the broader community" is consistent with the court taking into account the broader nature and scope of variables comprising a pluralistic society such as South Africa. This approach would also be conducive to a meaningful, purposive and transformative approach to adjudication of equality cases.

The reference by Kentridge AJ in *Zuma* to substantive equality¹³⁴⁶ in the context of the right to a fair trial is relevant to this thesis given that the manner in which

¹³⁴¹ See Thompson and Benjamin *South African Labour Law* Vol 2 Service 43 2002 CC 1-9 especially fns 58-59.

¹³⁴² 1995 16 /LJ 1048 (IC).

¹³⁴³ At para 56.

¹³⁴⁴ 1996 17 /LJ 571 (IC).

¹³⁴⁵ Page 584.

¹³⁴⁶ Para 16.

equality is adjudicated contributes to a general normative understanding of the notion of equality in our jurisprudence.¹³⁴⁷

The democratic evolution of South Africa demands constant dialogue about our hopes and aspirations as a society diverse in our cultures, beliefs and opinions. Our plural and predominantly secular society is however united in one phenomenon. This is the history of a past steeped in racial segregation and deeply rooted social, political and economic injustices. The evolution demands that we transform into a society where actions are justified on the basis of equality, freedom and human dignity.

The following *obiter* statement by Moseneke ACJ is apt in this regard:

The equality jurisprudence of this Court remains a vital part of our democratic project, as does the right to association and practice one's religion.¹³⁴⁸

The need to address conduct which subjects human beings to unfair treatment will always feature high in terms of the human rights and equality agenda.¹³⁴⁹ In a matter concerning the issue of race segregation and apartheid, the comments by the Constitutional Court in *Brink v Kitshoff*¹³⁵⁰ were that the "deep scars of this appalling [apartheid] programme are still visible in our society"¹³⁵¹ and that they are a significant reminder of the historically fractured society which constitutes South Africa.

Issues of substantive as opposed to formal equality and the extent to which human dignity should be taken into account when determining cases of unfair discrimination¹³⁵² are issues which are fundamentally important to the normative understanding of equality jurisprudence. The issue of human dignity, as being a central and important consideration of informing the decision as to whether

¹³⁴⁷ See discussion in subparagraph 3.2 above.

¹³⁴⁸ *De Lange v Presiding Bishop of the Methodist Church* 2016 1 SA 1 (CC) para 31.

¹³⁴⁹ See Dugard 1971 *SALJ* 181; *S v Makwanyane* 1995 3 SA 391 (CC) para 262.

¹³⁵⁰ 1996 4 SA 197 (CC).

¹³⁵¹ Per O'Regan para 40.

¹³⁵² Ackermann *Human Dignity: A Lodestar for Equality in South Africa* 56 ff. Also see *AZAPO v President of the RSA* 1996 4 SA 671 (CC) para 1.

differential treatment constitutes unfair treatment continues to play a dominant role in adjudication. For Kant, human dignity could be described as "a quality of intrinsic, absolute value, above any price, thus excluding any equivalence".¹³⁵³ In *Prinsloo v Van der Linde*¹³⁵⁴ a constitutional challenge was launched against a provision in the Forest Act¹³⁵⁵ (the Act) which presumed negligence in certain circumstances in relation to the prevention and control of fires. Landowners outside of designated fire control areas were encouraged but not required to embark on fire control measures. A fire had started on the applicant's land in respect of which damages were claimed. The applicant challenged the Act on the basis that it contravened his constitutional right to be presumed innocent and right to equality under section 8 of the interim Constitution. In spite of dismissing the applicant's claim, the Court¹³⁵⁶ made the following observation in relation to human dignity:

The proscribed activity is not stated to be "unfair differentiation" but is stated to be "unfair discrimination". Given the history of this country we are of the view that "discrimination" has acquired a particularly pejorative meaning relating to unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as *not having inherent worth*, as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were *denied recognition of their inherent dignity*. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of *other forms of discrimination* such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination ... in the context of section 8 as a whole, principally means treating persons differently in a way which *impairs their fundamental dignity as human beings*, who are inherently equal in dignity.¹³⁵⁷

The above *dictum* highlights the crucial link between human dignity and unfair discrimination. It is premised on the fact that unfair discrimination is not only objectionable due to the fact that it is based on differential treatment relating to

¹³⁵³ Quoted in Goodman 2005-2006 *NebrLR* 749; see Schauer "Speaking of Dignity" 189; Carmi 2007 *UPennJCL* 974-975. Also see discussion in paragraph 2.7 above.

¹³⁵⁴ 1997 6 BCLR 759 (CC).

¹³⁵⁵ 122 of 1984.

¹³⁵⁶ Per Ackermann, O'Regan and Sachs JJ.

¹³⁵⁷ Para 31. Emphasis added.

attributes or characteristics innate and immutable to individuals, but that it impacts negatively upon their sense of human worth or value as an individual.

The imperative of human dignity, and the essence of respecting human dignity as an essential ingredient for the "achievement of [a] society in the context of our deeply inegalitarian past" was pointed out by the Constitutional Court in *President of the RSA v Hugo*:¹³⁵⁸

In *Prinsloo v Van der Linde & Another*¹³⁵⁹ Ackermann J,¹³⁶⁰ when considering the meaning of the terms "equality" and "unfair discrimination", contextualizes such concepts with reference to the history of South Africa where discrimination has taken on a pejorative meaning due to the fact that persons were unequally treated merely on the basis of "attributes and characteristics attaching to them".¹³⁶¹ As a result, unfair discrimination has come to be conceived of in terms of "treating persons differently in a way that impairs their fundamental dignity as human beings, who are inherently equal on dignity".¹³⁶² The extent to which human dignity is earmarked as a significant aspect of unfair discrimination is noteworthy. It is submitted that when regard is had to the cases on religious workplace discrimination disputes the issue of the impact which the unfair discrimination has had upon the victim is a common concern appearing as a thread throughout the jurisprudence.¹³⁶³

In addition, the following was observed by Goldstone J in *Hugo*:

The prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of a deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be overlooked.¹³⁶⁴

At the forefront of the above reference is acknowledgement of human dignity and equality as foundational tenets of fair treatment. In addition, there is a notion of fairness of treatment, alternatively, a society in which persons (employees) are not

¹³⁵⁸ 1997 4 SA 1 (CC).

¹³⁵⁹ 1997 3 SA 1012 (CC).

¹³⁶⁰ Writing the judgment for the majority of the Constitutional Court.

¹³⁶¹ Para 31.

¹³⁶² Para 31.

¹³⁶³ Para 41.

¹³⁶⁴ Para 41.

unfairly discriminated against on grounds of them having immutable attributes or characteristics comprising their individual make-up.

Claims of unfair discrimination must be considered against the overarching values of the right to equality and human dignity.¹³⁶⁵ Suffering the impunity of religious unfair discrimination adversely impacts upon the individual's right to equality and human dignity.¹³⁶⁶ Hence, it comes to the fore as a material aspect of equality. In this sense one cannot consider equality without taking into account the issue of human dignity: the two are inexorably entwined – the one informing the other.

Various scholars have questioned the role played by dignity in equality jurisprudence; essentially the contention being that it is a vacuous concept which is at best elusive, incapable of precise valuation and a nebulous concept which complicates rather than simplifies equality jurisprudence and the adjudication thereof.¹³⁶⁷ However, as pointed out in the above *dicta*, given the context in which unfair discrimination must be seen in South Africa, namely the historical background in which individuals were objectified which conduct undeniably impacted upon their worth as human beings, it is understandable and reasonable that human dignity has a significant role to play in equality jurisprudence in South Africa.

Moreover, the normative concept of unfair discrimination in the South African context sways one toward thinking of the notion along the lines of racial and ethnic discrimination. The reality, however, is that unfair discrimination continues to manifest itself in various forms. Persons suffering from HIV and AIDS or from a physical disability, or having a different sexual orientation are but three examples of grounds upon which many people in our society suffer the prejudice and

¹³⁶⁵ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 20. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 326; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31; *Brink v Kitshoff* 1996 4 SA 197 (CC) para 42; *Harksen v Lane* 1998 1 SA 300 (CC) para 49; *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 73-75; Albertyn "Equality" 105; Fagan 1998 *SAJHR* 220; Ackermann *Human Dignity: Lodestar for Equality in South Africa* 21-71.

¹³⁶⁶ For further reading see Henrico 2014 *Obiter* 24.

¹³⁶⁷ See O'Mahony 2012 *IJCL* 551-574.

preconceived notions held by others regarding their person and are unfairly discriminated against on such grounds.

5.3.4 South African equality jurisprudence under the final Constitution

Equality, freedom and human dignity have come to play important roles in the constitutional dispensation and in fact these three imperatives inform three material facets to the general limitation of rights enquiry. The underlying premise therefore is that these were fundamental freedoms that were historically denied to the majority of South Africans. They are also freedoms which define a democratic dispensation.¹³⁶⁸

As previously discussed, equality is conceived of in the substantive as opposed to the formal sense.¹³⁶⁹ The commitment to substantive equality is underscored by a concurrent commitment to transformation from a culture of authority and a society marred by racial division to a culture of constitutionalism, the progressive realisation of socioeconomic rights and acknowledging a rights culture where conduct is judged and adjudicated in terms of the rule of law and ultimately the extent to which it advances and transforms South African society into the democracy upon which the Constitution is premised.¹³⁷⁰ This reasoning is borne out in the following *dictum* by O'Regan J in *Bato Star Fishing v Minister of Environmental Affairs and Tourism*.¹³⁷¹

But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is

¹³⁶⁸ Thompson and Benjamin *South African Labour Law* Vol I Service 43 2002 CC 1-12 especially the authorities at fn 77; Albertyn and Kentridge 1994 *SAJHR* 150. Also see *Introduction to Explanatory Memorandum to the Employment Equity Bill* (published 01 December 1997) (GG 18481 vol 390).

¹³⁶⁹ See subparagraph 2.6.2 above.

¹³⁷⁰ Roux 2009 *Stell LR* 258-285.

¹³⁷¹ 2004 4 SA 490 (CC).

that the process of transformation must be carried out in accordance with the Constitution.¹³⁷²

The right to equality as expressed in terms of section 9 of the Constitution is made all the more emphatic by references in subsections (3) and (4) to the fact that neither the state nor any other person may unfairly discriminate directly or indirectly against anyone on the basis of religion.¹³⁷³ As previously discussed, mere differentiation does not constitute discrimination in the normative legal sense of the word. Notionally, it is important to conceive of the distinction between "discrimination" in the pejorative (hurtful) and non-pejorative (non-hurtful) sense of "differentiation" (mere distinction). Differentiation in the pejorative sense translates into the notion of "unfair discrimination".¹³⁷⁴ The need to address unfair discrimination can be seen as the need to address the imperative of equality guaranteed in terms of section 9 of the Constitution. But, as previously stated, it is important that effect is given to a substantive as opposed to a formal notion of equality. This is captured in the *dictum* by Goldstone J in the *Hugo* case where the following is stated:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.¹³⁷⁵

A discrimination case where dignity was highlighted by the Constitutional Court as a significant aspect of the feature of the impact which the unfair discrimination had upon the individual is the case of *Hoffman v South African Airways*.¹³⁷⁶ In dealing with whether or not the airline's policy had discriminated against the applicant on the basis of his HIV-positive status, Ncgobo J made the following observation:

¹³⁷² Para 76.

¹³⁷³ Other grounds as listed under s 9(3) include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, culture, language and birth.

¹³⁷⁴ See Lenta 2009 *SALJ* 835; Van der Vyver 2011 *PER* 350; Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 56. Also see Henrico 2015 *Obiter* 288; Thompson and Benjamin *South African Labour Law* Vol I Service 43 2002 CC 1-27 and the authorities cited at fn 169.

¹³⁷⁵ Para 41.

¹³⁷⁶ 2000 1 SA 1 (CC).

At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include ... the human dignity of the victim.¹³⁷⁷

Consequently, whilst substantive equality and human dignity are not essential to determining whether or not unfair discrimination has taken place, they are conceptually the *raison d'être* informing the end purpose of the determination.

5.4 Discussion of cases on religious discrimination

Because law as a hybrid embodies a close-knit unity between arts and science which must constantly advance and transform to meet the imperatives of a pluralistic society, it is argued that a context-sensitive approach toward adjudication is the most desired method of adjudication. As already highlighted in terms of the importance of interpretation, the implied values and principles of the Bill of Rights need to be made explicit.¹³⁷⁸

The only way to do so is by means of our courts interpreting the competing interests in religious discrimination disputes in a manner that gives effect to and most appropriately articulates the values of the Constitution not merely to give notional effect thereto but to achieve a purpose, namely to transform our society from its former state of intolerance to a state in which we may celebrate and accommodate diversity.¹³⁷⁹ A consequence of a transformative mode of adjudication is that it is capable of injecting certainty into the legal system – certainty that religious differences will, where possible and, depending on the inherent requirements of the job, be accommodated. Certainty is an affirmation and confirmation of the rule of law which is foundational to our constitutional democratic order.¹³⁸⁰ It is against this

¹³⁷⁷ Para 27.

¹³⁷⁸ See the comment made by Sachs J in *Minister of Health v New Clicks* 2006 2 SA 311 (CC) para 580.

¹³⁷⁹ See Mureinik 1994 *SAJHR* 32; Smith 2014 *AHRLJ* 611; Rautenbach 2010 *JLP* 152; McCrudden 2008 *EJIL* 691. *Cf* Roux 2009 *Stell LR* 258; Van Marle 2009 *Stell LR* 297.

¹³⁸⁰ Section 1(c) of the Constitution. For further reading see Fallon 1997 *ColLR* 7; *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of the SASSA (No.1)* 2014 1 SA 604 (CC) para 87.

backdrop that cases which are significant to discrimination in general and religious discrimination in particular are required to be examined.

Examination of such cases reveals that no "universal" or "formal" test has been adopted by our courts. Instead, it is submitted that a "nuanced context-sensitive" approach has been adopted indicative of a transformative form of adjudication inasmuch as it seeks to tease out the competing interests of the parties in the employment relationship and advance same in the best possible manner that speaks to the underpinning values of the Bill of Rights in general, but in particular the issue of accommodating religious diversity.

The more judicial interpretations and reflections we have on the issue of religious discrimination in the workplace that transcend the otherwise narrow scope of a specific formal test, the greater this can influence the corpus of jurisprudence which can give effect to a culture of transformation¹³⁸¹ from a system of intolerance of differences to a system in which we can protect and foster the rights of a diverse culture and proximate as close as possible tolerance of differences in working toward a more tolerant society. This has particular relevance and importance to the workplace which is required essentially to foster an imperative of mutual trust and cooperation beneficial to both employee and employer. However, maintaining such a relationship must always be checked against the reality of the inherent power imbalance of the employment relationship.

As previously mentioned, the so-called *Harksen* test¹³⁸² has influenced the approach to adjudication of discrimination disputes,¹³⁸³ which has also been the subject matter of much criticism.¹³⁸⁴ However, a more "nuanced context-sensitive" approach appears to be evolving. In terms of this jurisprudence it is argued that our courts should be encouraged to continue to do so as opposed to applying the test that was

¹³⁸¹ See Hoexter and Olivier *The Judiciary in South Africa* 80-81.

¹³⁸² 1998 1 SA 300 (CC).

¹³⁸³ See subparagraph 3.4.3 above.

¹³⁸⁴ See subparagraph 3.4.3 above.

applied in *Harksen*. As is evidenced in the cases discussed,¹³⁸⁵ a wide variety of factors are taken into account when determining unfair discrimination disputes. More significantly, account is had of the impact which the unfair discrimination has had upon the human dignity of the victim (in most instances the employee).¹³⁸⁶ It is argued that our equality jurisprudence is optimally advanced by our courts continuing to embrace an approach that considers all factors necessary to bring to the matter the most mature and best finding possible.

What is to be understood by a "nuanced context-specific" approach? In a sense, this demands a casuistic method of interpretation of each and every dispute. Collectively, decisions in this regard contribute to a rich tapestry of jurisprudence being developed in support of workplace religious discrimination disputes.¹³⁸⁷ It also addresses the issue of constitutional transformation¹³⁸⁸ inasmuch as every decision that is made which interprets the context of the facts in the milieu of the Bill of Rights¹³⁸⁹ contributes to the transformation of the South African legal system to a culture of justification.¹³⁹⁰ Some guidelines that can inform a "nuanced context-specific" approach may be, but not necessarily limited, to the following:

- determining the claim on the basis upon which it has been pleaded before the court;
- interpreting the applicable equality legislative provisions¹³⁹¹ (as informed by constitutional values and principles) relevant to the claim;
- interpreting any defence to the aforesaid claim, taking into account the necessary constitutional and international imperatives;¹³⁹²
- by assessing the unfair discrimination dispute not through a prism of strict differentiation as to whether the distinction took place on a listed or unlisted

¹³⁸⁵ See subparagraph 5.4.6 below.

¹³⁸⁶ See discussion in subparagraphs 2.7.1 and 2.7.2 above.

¹³⁸⁷ For further discussion see Henrico 2012 *Obiter* 503.

¹³⁸⁸ See discussion in subparagraphs 2.9.2 to 2.9.5 above.

¹³⁸⁹ In this regard see discussion on importance of generous and purposive interpretation in subparagraphs 3.3.1 to 3.3.3 above.

¹³⁹⁰ See discussion in subparagraphs 2.8.2 and 2.8.3 above.

¹³⁹¹ Namely the EEA, LRA or PEPUA.

¹³⁹² See discussion in paragraphs 3.3 and 3.4 above.

ground, but rather looking at the overall effect of the differentiation on the human dignity of the individual concerned;

- assessing the claim and defence, by means of a process of rationality and reasonableness, which by necessity demands that regard is also had to what is justified and proportionate,¹³⁹³ where a distinction has been made, to limit the religious freedom for reasons relating to the IROJ or in certain instances even the operational requirements of the employer;¹³⁹⁴
- having regard to a code of good practice on religious discrimination which serves as a guideline in the interpretation of the adjudication of conflicting fundamental rights;¹³⁹⁵
- knowledge and awareness on the part of the employer must be taken into account in assessing what would have been the appropriate steps for the employer to take given the facts and circumstances to address the claim of religious discrimination;¹³⁹⁶
- recognising the benefits and advantages to be derived by using mutual accommodation,¹³⁹⁷ and
- any other factor(s) which may be relevant to the facts and circumstances of each case.

The argument in favour of a "universal" or "formal" test could be that practitioners and judges alike can benefit from looking no further than the criteria of such a test, if one existed. A measure of certainty can also be gained from a uniform test. However, the argument against usage of such a test is that it unduly regulates adjudication in a manner that is artificial. Each case is required to be determined on its own merits. Since judges are only subject to the Constitution and the law¹³⁹⁸ they are at liberty, and in fact charged with, when interpreting legislation or the Bill of Rights to do so in a manner that promotes the values underlying a democratic

¹³⁹³ See discussion in subparagraphs 3.2.2 and 3.2.3 above.

¹³⁹⁴ See discussion in subparagraphs 3.4.3 to 3.4.5 above.

¹³⁹⁵ See discussion in subparagraph 6.7.2 below.

¹³⁹⁶ See discussion in subparagraphs 3.2.3 and 3.4.3 above and 5.4.6 below.

¹³⁹⁷ See discussion in subparagraph 3.4.4.1 and 5.4.5 above.

¹³⁹⁸ Section 165 (2) of the Constitution.

society based on human dignity, equality and freedom.¹³⁹⁹ This is not to discount the important role of *stare decisis* which is fundamental to our case law. In point of fact, the *stare decisis* principle continues to promote certainty and also contributes to the development of jurisprudence. However, a "nuanced context-sensitive" approach by its very name implies that no two cases should be decided or adjudicated in a restrictive manner. The factual matrix of each case is content-specific and must be adjudicated with sensitivity or full awareness to all relevant legal principles that will optimally address the dispute in question. A "nuanced context-sensitive" approach also aligns itself more closely with substantive equality. By adjudicating each case as already mentioned, greater allowance is made for addressing all disputes on their different merits as opposed to having them determined with reference to a "universal" or "formal" test.¹⁴⁰⁰

Prior to *Harksen*, the Constitutional Court in *Prinsloo v Van der Linde*¹⁴⁰¹ noted the following with reference to the word "discrimination" in the Constitution:

Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.¹⁴⁰²

More recently, an interesting reference in support of the *Harksen* case appears from a Labour Court judgment¹⁴⁰³ in the matter of *Zabala v Gold Reef City Casino*.¹⁴⁰⁴ The applicant's claim against her employer was premised on alleged unfair discrimination in terms of section 187(1)(f) of the LRA. The applicant alleged that her dismissal was for reasons relating to her belief, conscience and culture. Pillay J accepted that the alleged ground of discrimination constituted a listed ground since it was premised on a belief. In the result, the court invited both parties to make submissions on the "formula prescribed for analysing discrimination cases" as set out in the *Harksen* case. The applicant's representative's objection to the *Harksen* test being applied *in*

¹³⁹⁹ Sections 39(1)(a) and (2) of the Constitution.

¹⁴⁰⁰ See discussion in subparagraphs 2.6.2 and 3.4.3 above.

¹⁴⁰¹ 1997 3 SA 1012 (CC).

¹⁴⁰² Para 31.

¹⁴⁰³ In Braamfontein, Johannesburg; handed down on 21 August 2008.

¹⁴⁰⁴ 2009 1 BLLR 94 (LC).

casu on the basis that it related to the vertical application of the then section 8 of the interim Constitution was met with Pillay J's statement that the argument was without merit and that *Harksen* had been followed by numerous decisions of all the courts¹⁴⁰⁵ and had as yet not been set aside. Pillay J went on to find that the applicant had failed to establish that the differentiation related to any grounds of discrimination, which resulted in the dismissal of the claim.

It is submitted that from the cases analysed in this chapter there is no evidence that the *Harksen* test has continued to be adopted consistently as a patina by our courts in the determination of discrimination disputes or workplace religious discrimination disputes in particular. The fact that *Harksen* has contributed to our equality jurisprudence is undeniable. In a sense, the value thereof is also evidenced by the fact that the *Harksen* decision has as yet not been set aside, as correctly pointed out in the *Zabala* case by Pillay J. However, the mere fact that *Harksen* has not been set aside should not be seen in isolation. *Harksen* has been the subject of much criticism.¹⁴⁰⁶ The cogency of such criticism is underscored by the fact that our courts have, as previously stated, not been consistent in applying the so-called Harksen test.

5.4.1 Attempting to define "religion" in a secular society

The following case is not workplace-related. It is a case concerning the constitutional validity of legislation banning the sale of alcohol on Sundays, generally viewed as a Christian day of rest. Its relevance for religious discrimination disputes lies in the normative meaning to be attached to the concept of religion in a secular society.¹⁴⁰⁷

In *S v Lawrence*, *S v Negal*; *S v Solberg*¹⁴⁰⁸ Solberg had been convicted of contravening the Liquor Act¹⁴⁰⁹ by selling alcohol on a Sunday. In considering the constitutional validity of the conviction, the Constitutional Court was called upon to

¹⁴⁰⁵ See discussion in subparagraph 3.4.3 above.

¹⁴⁰⁶ See discussion in subparagraph 3.4.3 above.

¹⁴⁰⁷ See discussion in para 2.4 above.

¹⁴⁰⁸ 1997 4 SA 1176 (CC).

¹⁴⁰⁹ 27 of 1989.

consider whether the prohibition of selling alcohol infringed upon Solberg's rights to freedom of religion and economic activity¹⁴¹⁰ under the interim Constitution.¹⁴¹¹ Chaskalson P, in conceding being unable to offer a better definition of freedom of religion, referred to the Canadian authority of *R v Big M Drug Mart Ltd*¹⁴¹² wherein Dickson CJC stated the following:

The essence of the concept of religion is the right to entertain such religious beliefs as a person [selects], the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.¹⁴¹³

Central to this definition is that religion is a personal, subjectively held belief which by nature any individual has the right to exercise free of any restrictions. From the judgment emerges a close textual alliance or neighbourliness between the concept "religion" and "belief" which appears in the wording of the definition of freedom of religion referred to in section 15 of the Constitution. It is submitted that "religion" is informed by "belief" taking into account the spiritual dimension of an entity being worshipped. Moreover, reference to "religion" as a concept rather than a restrictive term demands that "religion" be viewed through a multidimensional prism consistent with a diversity of views to be found in a secular and pluralistic society such as South Africa which we are demanded and encouraged to embrace in our democratic order.¹⁴¹⁴ *S v Lawrence* is significant on account of it examining what is meant by the term "religion", and particularly within the context of a secular pluralistic South Africa.

Another case which merits attention in this respect is *Prince v President of the Law Society of the Cape of Good Hope*.¹⁴¹⁵ As previously mentioned, with reference to *R v*

¹⁴¹⁰ Sections 14 and 26, now ss 15 and 22 of the Constitution respectively. S 14(1) of the interim Constitution provided the following: "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning." Save for the reference to academic freedom, the remaining content of s 14(1) of the interim Constitution came to be adopted by s 15(1) of the Constitution.

¹⁴¹¹ 200 of 1993.

¹⁴¹² 1985 1 SCR 295.

¹⁴¹³ Para 92.

¹⁴¹⁴ For further reading see Henrico 2015 *TSAR* 784-803.

¹⁴¹⁵ See discussion in subparagraph 2.2.3 above.

Big M Drug Mart Ltd Sachs J attempted to garner a deeper and fuller understanding of the term "religion".¹⁴¹⁶

What emerges from the *dictum* are similarities between the description given by Rumpff CJ in 1975 in the matter of *Gallo*¹⁴¹⁷ of religion going beyond the bounds of our notion of rationality, and Sachs J in *Prince* stating that religion can even be offensive to rationality. *Prince* enforces the concept that religion as a notion cannot be conceived of in isolation. To be properly understood, we must also take into account issues of "faith" and "belief", which value or reference systems need not necessarily be logical or rational. As previously discussed, we saw how in *Prince*, Ngcobo J emphasised the importance of human dignity and the significant role it assumed in contextualising the right to freedom of religion.¹⁴¹⁸ Accordingly, actions of religious fundamentalists who fervently believe in using their bodies or means of terror to hurt or kill others in the name of religious freedom can never be countenanced or tolerated.¹⁴¹⁹

In a workplace-related matter, the Labour Court¹⁴²⁰ had an opportunity to give a judgment relating to an unfair discrimination claim for reasons relating to conscience. The case in question is *Motaung v Department of Education*.¹⁴²¹ The applicant, who held the position of Director: Higher Education, was in the employ of the Department of Education. The applicant alleged she had been subjected to unfair discrimination for a lengthy period of time for refusing to obey the instruction given to her by her superior to disregard the regulatory framework governing private higher education institutions. In her mind, she was being requested not to comply with legal obligations imposed on her, resulting in her contravening various pieces of relevant national legislation. On account of her refusal to ignore the necessary regulatory framework she was subjected to various prejudicial treatments by her superiors

¹⁴¹⁶ See discussion in subparagraph 2.2.3 above. See also *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 16.

¹⁴¹⁷ *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 6 SA 329 (SCA).

¹⁴¹⁸ See discussion in subparagraph 2.2.3 above.

¹⁴¹⁹ See discussions in subparagraphs 2.3.2, 2.7.2 and 2.8.3 above.

¹⁴²⁰ Sitting in Braamfontein, Johannesburg.

¹⁴²¹ 2013 34 /LJ 1199 (LC). Judgment delivered on 15 October 2012.

which she would not have had to suffer had she complied with their "unlawful instructions".¹⁴²² The applicant sought relief against the respondent on the basis of sections 6(1) and (3) of the EEA.¹⁴²³ In determining what constitutes "conscience" for purposes of establishing the validity of the applicant's claim, Le Grange J observed the following:

Both in the EEA and in section 9(3) of the Constitution ... conscience and belief follow closely on the heels of religion on the list of prohibited grounds of discrimination. In the commentary by the authors of Constitutional Law of South Africa, the following is stated in relation to discrimination on the basis of religion, conscience and belief: "protection against discrimination on the basis of religion includes protection of individual and group identification with a particular religion as well as practices and beliefs in terms of that religion. Belief and conscience may extend to other value systems part of, or separate from, faith-based systems of religion. Discrimination on the basis of conscience might result where a person is required by law to do something that contradicts their values or ethics."¹⁴²⁴

Upholding the applicant's claim of unfair discrimination on the basis of conscience is not a finding in respect of religious discrimination. The case is relevant in respect of the close association drawn between the notional concepts of conscience and religion which underscores their close association in the consolidated fundamental freedoms given effect to in section 15(1) of the Constitution.¹⁴²⁵

5.4.2 Challenges facing religious freedom in a secular society

The right to religious freedom in isolation or as practised in the context of persons sharing similar religious beliefs and views poses no problems. It is a matter of contention only where such rights are sought to be exercised in circumstances that are at odds or different to the beliefs held by the individual in question. A few examples will be considered in this regard.

The *Pillay* case, as discussed below, is one instance where the right of a school pupil to wear a nose stud in accordance with her religious and cultural beliefs struck a

¹⁴²² Paras 2-3.

¹⁴²³ Para 10.

¹⁴²⁴ Para 10(f).

¹⁴²⁵ See subparagraphs 2.2.2, 2.2.3 and 2.2.8 above. Also see Grogan *Workplace Law* 110 especially the authority at fn 26.

discordant note with the dress and uniform code of the secular school which she attended. Seeking a way in which to balance the right to practice one's religious freedoms and limiting such freedoms in relation to the rules and regulations of an organisation such as an educational institution which is secular by nature is not simple, and effectively calls for an assessment to see to what extent the rule prohibiting the manifestation of religious or cultural symbols is reasonable, rational and necessary.

Another example which comes to mind is where an employee is a Rastafarian and in keeping with his religious belief considers it necessary to wear his hair in a Tam. However, an inherent requirement of his job as a security officer is that in keeping with a uniform appearance and the "concept of discipline and order" all males and females, regardless of their religion, must cut their hair very short and wear a tight-fitting cap. The mere fact that it is an IROJ does not mean that the limitation on the employee's right to practice his religious freedom is reasonable, rational or even justifiable. This is said on account of the fact that in a multicultural plural society suitable measures must be taken to tolerate (accommodate) a diversity of traditions, cultures and views. However, the overarching *caveat* to this must always be that it causes no harm to others in that it does not impair their fundamental right to human dignity.¹⁴²⁶

The above are but two examples which pertain to inherent tensions that may arise from a conflict between the manifestation of a religious freedom in a secular society whether it be non-workplace related or in the workplace. The manifestation of the religious freedom can impact upon dress code requirements which in turn impacts upon the IROJ.¹⁴²⁷ It can even have a potential impact upon the employer's operational requirements.¹⁴²⁸ The implications of these inherent tensions are far-

¹⁴²⁶ See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 76-77; Bilchitz 2011 *JHSuzmF* 14; Hunter *Indirect Discrimination in the Workplace* 161-182.

¹⁴²⁷ Discussed in subparagraph 5.4.4 below.

¹⁴²⁸ Discussed in subparagraphs 5.4.5 and 5.4.6 below.

reaching. Consequently, the demand for these tensions to be addressed by way of adjudication in a "nuanced context-sensitive" manner is most significant.¹⁴²⁹

5.4.3 Religion as a way of life and not a mere belief

The implications for religion conceptually being a way of life and not merely a belief have far-reaching implications¹⁴³⁰ since, as we see in the *Prince* case, it can give rise to the "way of life" conflicting with the so-called *mores* of society demonstrated through, for example, legislation banning the use of dagga. In addition, there is also a conflict with, for example, other mainstream religions such as Christianity who do not see the smoking of dagga as being part of the way they lead their lives as followers of the Christian faith. But who is to say that the mainstream way of life is one which must be favoured against the Rastafarian way of life? Surely this is a decision not to be thrust upon any person through the "moral judgment" of any other person, but through a deliberate informed decision made on the part of the individual.

Another factual matrix that must be considered in this context is the role played by religious organisations to fairly discriminate against job applicants on the basis that the applicant is not a member of the organisation, a right which the organisation can exercise under the general and specific limitation clauses respectively.¹⁴³¹

The relevance of religious freedoms in our pluralistic society in this regard demonstrates that whether these freedoms are asserted in the greater civil society or particularly in the context of the workplace,¹⁴³² there is a clamant need in our pluralistic multicultural society to tolerate a diversity of interests, from mainstream to minority, in the process of transforming our society to a culture of celebration of differences and inclusiveness subject to the *caveat* that one cannot exercise a right where it is harmful to another person.

¹⁴²⁹ Discussed in subparagraph 5.4.6 below.

¹⁴³⁰ See Govindjee "Freedom of religion, belief and opinion" 114.

¹⁴³¹ In terms of s 31(2), as read with s 36 of the Constitution.

¹⁴³² As will appear more fully from a discussion of the cases below.

The appellants¹⁴³³ in *Christian Education South Africa v Minister of Education*¹⁴³⁴ who challenged the constitutionality of legislation that would prohibit corporal punishment had contended that corporal punishment was central to their Christian ethos and freedom of religion.¹⁴³⁵

As previously discussed,¹⁴³⁶ "religion" is not a self-standing notion. At the very least, it is understood to constitute a spiritual belief. At the very most, it must notionally be understood to also include a way by which persons can live their lives, express their conscience, culture, self-worth and their self-worth as individuals, namely human dignity. Religion must, it is argued, be given a generous, broad understanding to give due recognition to the constitutional enshrinement of the right to religious freedom.¹⁴³⁷

Although a non-workplace related case, *MEC for Education: Kwazulu Natal v Pillay*¹⁴³⁸ provides impetus to our jurisprudence in its reasoning that "religion" must be understood in the context of strong associational ties not only with "faith" and "belief" of an individual but also with "traditions", "culture" and "beliefs" of the community associated with the identity of the individual. The case recognises a link between "culture" and "religion". Put differently, a cultural belief held by an individual is as deserving of protection as a religious belief. The importance of this notion is relevant to the fact that for certain persons, expression of freedom of religion extends beyond a merely held spiritual belief. It includes and is deeply rooted in cultural traditions and beliefs. As such, religious freedom must be understood to include both cultural and spiritual beliefs.¹⁴³⁹

¹⁴³³ A voluntary association of Christian schools in South Africa representing 14 500 pupils with the aim "to promote evangelical Christian education".

¹⁴³⁴ 2004 SA 757 (CC).

¹⁴³⁵ See discussion in subparagraph 2.2.3 above.

¹⁴³⁶ See discussions in subparagraphs 2.2.3 and 2.5.3 above.

¹⁴³⁷ See discussion in subparagraphs 2.2.8, 2.5.4 above and 6.2.6 below.

¹⁴³⁸ 2008 1 SA 474 (CC). Also see discussion in subparagraph 2.2.3 above. The case is also significant since it was the first time the Constitutional Court decided a discrimination dispute in terms of PEPUDA.

¹⁴³⁹ See discussion in subparagraphs 2.2.3 and 2.2.8 above.

To what extent, if any, can it be argued that it is settled law that "religion is a matter of faith and belief"?¹⁴⁴⁰ It is submitted that whilst no universal definition exists for "religion"; the debate concerning the definition is, however, universal.¹⁴⁴¹ The noticeable lack of a so-called "dictionary definition" of the term should sound no alarm owing to the complex nature of the concept. The concept of "religion" is more case specific than it is text specific. It would be uncommon for the Constitutional Court, as the highest court of the Republic,¹⁴⁴² or any other court¹⁴⁴³ for that matter, to impose a literal definition of a term as a *panacea* of understanding freedom of religion. In giving effect to the right to freedom of religion, conceptually "religion" has been interpreted alongside clusters of other rights such as "belief", "conscience" and "culture". Moreover, human dignity has come to play an important role in informing the interpretation of "religion" as a concept in the context of religious freedom. Our courts have teased out interpretations of "religion" consonant with the values and principles underlying the Constitution. To have imposed upon "religion" a formal interpretation akin to a dictionary definition would spell stultification for future cases varied in their depth and breadth of circumstances wherein courts are required to establish the context in which the term has been used.¹⁴⁴⁴ This much was borne out in the *Pillay* matter where the Court's concern was not simply to define "religion"¹⁴⁴⁵ but instead bristled with conceptual difficulties arising from religion's cross-pollination with the definition of culture.¹⁴⁴⁶ The competing values and interests arising from the text of the Constitution impose an interpretive duty upon our courts

¹⁴⁴⁰ Per Sachs J in *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 792 (CC) para 97.

¹⁴⁴¹ See Wald 2007 *CLLPJ* 477; Supiot 2009 *CLLPJ* 645; Gunn 2003 *HarvHRJ*. For example, does religion reach beyond traditional belief in a divine being or deity to include other philosophical beliefs (for example on issues such as death, life, morality and lifestyle choices, e.g. pacifism or atheism)? See Watson *EU Social and Employment Law Policy and Practice in an Enlarged Europe* 494; Quinn 2003 *HarvHRJ*.

¹⁴⁴² Section 167(3)(a) of the Constitution.

¹⁴⁴³ Since the courts are the ultimate guardians of the Constitution per Langa CJ in *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) para 33.

¹⁴⁴⁴ See Dworkin *Life's Dominion* 119. Also see discussion in subparagraphs 2.2.2, 2.2.3 and 2.2.8 above.

¹⁴⁴⁵ In terms of ss 9 and 15 of the Constitution.

¹⁴⁴⁶ In terms of s 9(3) of the Constitution.

which transcend viewing the concept of "religion" through the confines of a mere strict definition.¹⁴⁴⁷

What emerges from the *Christian Education* and *Pillay* cases is that religion is not confined to a mere belief or doctrine or even a conscience. For many individuals it is what defines the way and the manner in which they live their lives. It lends shape and form to their lifestyles. The relevance of this to religious discrimination in the workplace is in the context of, for example, the observances of specific times and periods. Consider the Code of Good Practice on the Arrangement of Working Time (hereafter the Code of Working Time).¹⁴⁴⁸ The objectives of the Code of Working Time are:

to provide guidelines to employers and employees concerning the arrangement of working time and the impact of working time on the health, safety and family responsibilities of employees.¹⁴⁴⁹

The aforesaid objectives are suitably understandable regard being had to the overall common law obligation imposed upon an employer to provide a safe working environment. However rational such objectives may be, they may not always be conducive and tailored to match the individual needs of specific employees whose religious lifestyles require of them to engage in religious practices during what is commonly regarded as normal working hours. How does an employer address the demands of an individual employee or several employees with different religious practices who request time off at various stages to observe religious practices the timing of which may not accord with normal working hours. In addition, it is also the mainstream Christian calendar which dictates when holidays (public and religious) are due to employees in the workplace. This hardly makes provision for non-mainstream religious employees who seek time off to practice their religious observances to which they are no less deserving than mainstream religious

¹⁴⁴⁷ See Currie and De Waal *The Bill of Rights Handbook* 147-148; Henrico 2015 *TSAR* 784-803. See also discussion in subparagraph 2.2.8 above.

¹⁴⁴⁸ In terms of s 87(2) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA). In terms of s 6(2) of the BCEA, it is not applicable to senior managerial employees or employees earning above the minimum threshold income of R205 433,30 *per annum*, thus such persons are excluded from this provision. See Van Niekerk *et al Law@work* 102.

¹⁴⁴⁹ Clause 1 of the Code of Working Time.

observers. These issues raise fundamental problems relating to competing interests. What is reasonably expected of an employer to do in order to meet the demands of claims made in the name of religious freedom cannot always be a simple matter.¹⁴⁵⁰ Making allowances for some employee rather than for others on the basis of claims of religious freedom may well give rise to claims of unfair discrimination (whether on a direct or indirect ground). How to address such concerns can only be assessed with reference to the normative regulatory framework.¹⁴⁵¹ However, the adjudication thereof is a constant dynamic in terms of which competing interests must be balanced.¹⁴⁵²

5.4.4 Discrimination and the inherent requirements of the job

Reference is made to another case in which discrimination was made on the basis of sexual orientation. This is non-workplace related on account of the fact that the applicant provided services to the organisation as an independent contractor. On this basis, the applicant did not qualify for protection that would otherwise have been afforded a worker in terms of either the EEA or the LRA. The case holds relevance for religious discrimination disputes due to the fact that the court refers to principles which inform our normative understanding of the adjudication of unfair discrimination disputes.

The case is *Strydom v NG Gemeente Moreleta Park*.¹⁴⁵³ The applicant had been appointed as an independent contractor in the position of organist and music teacher. When it came to the attention of the governing body of the school that Strydom was in a same-sex relationship, the church summarily terminated the contract of services of Strydom. Since the applicant was not an employee he claimed unfair discrimination against the church on the basis of sexual orientation in terms of PEPUDA.¹⁴⁵⁴ The church attempted to defend the claim by arguing it was an IROJ, as

¹⁴⁵⁰ See Hunter *Indirect Discrimination in the Workplace* 11 ff.

¹⁴⁵¹ As discussed in Chapter 3.

¹⁴⁵² See discussion in subparagraphs 2.2.8 and 5.4 above.

¹⁴⁵³ 2009 30 *ILJ* 868 (EqC). In this case the *Harksen* test was not considered.

¹⁴⁵⁴ Although the case falls within the parameters of PEPUDA and thus outside the employment relationship, the relevance to the subject matter of this article is the extent to which the church

a music teacher or organist, that such person could not be in a homosexual relationship since it was not congruent with the church's doctrine and its constitutional right to freedom of religion.¹⁴⁵⁵ Strydom only taught music to the students and at no stage occupied a leadership position. The court considered the adverse impact the termination of the contract had on Strydom's dignity¹⁴⁵⁶ which was also linked to his depression, not being gainfully employed and having to sell his piano.¹⁴⁵⁷ The impairment of dignity was attributed to Strydom being discriminated against on the basis of his sexual orientation. The case is significant by reason of the fact that it takes account of Strydom's right to equality and human dignity in a pluralistic society in which diversity should be celebrated.¹⁴⁵⁸ Once again we see the emphasis placed by the court, in adjudicating the matter, on the significance of human dignity as forming an essential dimension of the right to equality.

The following case deals with religious discrimination in the workplace. In *FAWU v Rainbow Chicken Farms*¹⁴⁵⁹ the applicants alleged they had been automatically dismissed for reasons relating to their religious belief. The applicants were employed as butchers by the respondent on account of the fact that the respondent's chickens were slaughtered in accordance with Halaal standards. The applicants refused to work on *Eid ul Fitr*, a Muslim holiday, but not an official public holiday. There was a collective agreement in place according to which employees were only entitled to government gazette holidays which did not include the aforesaid Muslim holiday. The employees informed the respondent that they would rather work on a Saturday in

raised, as a defence, the IROJ in addition to the consideration of the impact of unfair discrimination upon equality and human rights. For further discussion see De Freitas 2012 *SAJHR* 258-272.

¹⁴⁵⁵ Para 15.

¹⁴⁵⁶ Para 33, where a link is made between the impairment of dignity due to the nature of the discrimination which was all-encompassing.

¹⁴⁵⁷ Para 33.

¹⁴⁵⁸ At para 25 Basson J stated that "the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise, his right to dignity is seriously impaired due to the unfair discrimination."

¹⁴⁵⁹ 2000 1 BLLR 70 (LC).

addition to overtime to prevent time being lost by them not working on *Eid ul Fitr*.¹⁴⁶⁰ They failed to report for work on the Muslim holiday pursuant to which they were found guilty of refusing to collectively work in accordance with their contract. The applicants contended their dismissals were automatically unfair. The respondent, however, contended that the conduct on the part of the applicants constituted unprotected strike action.¹⁴⁶¹ Their allegation and claim at the CCMA that their dismissal was unfair was dismissed.¹⁴⁶² On review before the Labour Court, the applicants persisted that their dismissals were automatically unfair in terms of section 187(1)(f) of the LRA.¹⁴⁶³ Although this was not pertinently contended on the part of the applicants, Revelas J's interpretation of their claim under the aforesaid section is to recite the entire provision of section 187(1)(f) which sets out the listed grounds upon which if an employee is unfairly discriminated against and dismissed, would amount to an automatically unfair dismissal.¹⁴⁶⁴ Revelas J made the following observation:

The individual applicants *were specifically employed because they are Muslims*. It is an *operational requirement*. Consequently I do not believe that the respondent's conduct, by not consenting to giving the butchers the day off on Eid, amounts to unfair discrimination as envisaged by section 187(1)(f) of the Act.¹⁴⁶⁵

A rudimentary problem with the above *dictum*, some may argue, is the terminology employed by Revelas J. In the context of looking at the nature of the respondent's work, namely slaughtering chickens in accordance with Halaal standards and the employment of employees who were Muslim do to such work, it is more appropriate to refer to the IROJ. Conceptually, given the nature of the business of the employer,

¹⁴⁶⁰ See discussion on Canadian jurisprudence in this regard in subparagraphs 4.5.5 and 4.6.3 to 4.6.4 above.

¹⁴⁶¹ Paras 1-17.

¹⁴⁶² Para 17.

¹⁴⁶³ Para 17.

¹⁴⁶⁴ Para 17.

¹⁴⁶⁵ Para 21. Emphasis added. It is important to note the basis upon which the employer took the applicants into his employ. It was because they were Muslim. This case emphasises the fact that in certain instances, due to the nature of the job in question, the employer is acutely aware of the nature of the employee's religion. Given the employer's knowledge of the faith of the applicants in *FAWU* it is unlikely that this was used as a basis upon which to discriminate against the employees.

to sell Halaal chickens to Muslim customers, it was imperative that the chickens were not only slaughtered in accordance with specific procedures, but that they were handled and slaughtered by Muslim employees, as opposed to non-Muslim employees. The employer would have been at liberty to employ employees on this basis, and insist that they are members of the Muslim faith since this would have been the employer's constitutional right (as a business entity) to associate itself with individuals of the same faith in accordance with the provisions of section 15(1) of the Constitution.¹⁴⁶⁶ Moreover, it is well known that "operational requirements" in the context of labour jurisprudence must be understood with reference to its statutory definition set out in section 213 of the LRA.¹⁴⁶⁷ The use of the term "operational requirements" is decidedly misplaced in the overall notional and conceptual framework of the analysis of unfair discrimination disputes and in particular the determination of grounds for justifications regarding the limitation of religious freedom in the workplace by an employer. From discussions throughout this study it is clear that the only conceivable and permissible basis upon which religious freedoms may be limited are in instances of the IROJ,¹⁴⁶⁸ alternatively in instances of affirmative action or advancing the interests of designated persons.¹⁴⁶⁹ Addressing a tension arising from religious freedom on the part of an employee and the "operational requirements" on the part of an employer demands that the latter be considered in a functional context. First, a so-called "inherent needs" context where the nature of the employer's business requires Halaal produce to a designated clientele, namely customers of the Islam faith. Second, a so-called "inherent requirement" context where due to the nature of the first requirement the produce which is sold to the Islamic customers is slaughtered in accordance with specific Halaal standards. In a sense, the aforesaid operational requirements are interdependent in that they cannot exist in isolation. To require or expect that they

¹⁴⁶⁶ See discussion in subparagraphs 2.3.1 and 2.3.2 above.

¹⁴⁶⁷ Which means "requirements based on the economic, technological, structural or similar needs of an employer".

¹⁴⁶⁸ See subparagraph 3.4.3 above.

¹⁴⁶⁹ These are statutory grounds of justification in terms of s 6(2)(a) of the EEA or s 14(1) of PEPUDA respectively which fall outside the ambit of this study.

do, would translate effectively into the operational demise of the employer's business.

FAWU alerts one to the important role played by rationality when determining reasonableness and justifiability in the adjudication of competing fundamental rights.¹⁴⁷⁰ Gauging whether a distinction has taken place on grounds of religion, and determining the unfairness thereof can only properly be assessed with regard to adopting the reasoning¹⁴⁷¹ consistent with a "nuanced context-sensitive" approach.¹⁴⁷² An important aspect of this assessment is also to take due account of the knowledge on the part of the employer.¹⁴⁷³

The emphasis of the importance of the IROJ¹⁴⁷⁴ appears from the following case which is also workplace related. *Dlamini v Green Four Security*¹⁴⁷⁵ dealt with the dismissal of security guards who refused to shave their beards. The applicants contended that a beard was an inherent tenet of their religious belief. The applicants alleged their dismissal was a dismissal under section 187(1)(f) of the LRA.¹⁴⁷⁶ It must be recalled that a defence to a claim under section 187(1)(f) is that a dismissal is regarded as fair if the reason is based on an IROJ.¹⁴⁷⁷ Pillay J took account of the fact that the applicants had pleaded their case in terms of the LRA and that litigants were in general encouraged to rely on national legislation instead of relying directly on the Constitution.

In determining whether there had been discrimination,¹⁴⁷⁸ Pillay J also considered whether the shaving of beards as demanded by the employer was an IROJ which would not be deemed to be discrimination in terms of the provisions of article 1(2) of

¹⁴⁷⁰ See discussion in subparagraphs 3.2.1 to 3.2.4 above.

¹⁴⁷¹ See discussion in subparagraphs 3.2.2 and 3.3.3 above.

¹⁴⁷² See discussion in subparagraphs 2.2.2 and 5.4 above.

¹⁴⁷³ See discussion in subparagraph 3.4.3 above.

¹⁴⁷⁴ See discussion in subparagraph 4.4.1 above.

¹⁴⁷⁵ 2006 11 BLLR 1074.

¹⁴⁷⁶ Para 10.

¹⁴⁷⁷ Section 187(2)(a). See subparagraphs 3.4.3 and 3.4.5 above.

¹⁴⁷⁸ Paras 15-29.

ILO Convention 111.¹⁴⁷⁹ The manner in which Pillay J adjudicated the dispute raises some significant aspects regarding religious discrimination in the workplace. This is on account of several reasons. Firstly, whilst the applicants failed to demonstrate a strict adherence to their faith (due to the fact that evidence showed they were selective in the religious practices they followed), the court made a point of stating that minority religious groups were as deserving of protection as were bigger groups.¹⁴⁸⁰ Regarding proof of justification (which would be a defence against unfair discrimination) the court noted that the IROJ applied to all employees and not just the applicants.¹⁴⁸¹ In establishing justification, Pillay J referred to the so-called "strict scrutiny" test applied by the US Courts and duly took account of the extent to which, when applied, the test requires proof that a measure which restricts religious freedom must serve a "compelling State interest" which was rejected by the Court in *Christian Education* in favour of a "nuanced context-sensitive" balanced approach.¹⁴⁸² The court proceeded to examine justification, or a limitation of the religious rights in terms of the wording provided by article 1(2) of ILO Convention 111 as well as the equivalent provision in Canadian law known as BFOR.¹⁴⁸³ Pillay J went on to look at the employment of the reasonable accommodation test by the minority judges in the Canadian case of *Bhinder*. The reference by Pillay J to *Bhinder* which dealt with indirect discrimination is understandable since the facts in Dlamini also gave rise to considerations of indirect discrimination.¹⁴⁸⁴ However, *Bhinder* had effectively been overruled by the Supreme Court of Canada in *Central Alberta Dairy Pool*¹⁴⁸⁵ by 1990 and later confirmed in the *Meiorin* case¹⁴⁸⁶ which sought to unify the distinction in Canadian law between direct and indirect discrimination in addressing the issue of

¹⁴⁷⁹ Paras 38-40, 67.

¹⁴⁸⁰ Para 22, drawing on the authority of *Prince* (para 132) and *Christian Education* (para 25).

¹⁴⁸¹ Para 27.

¹⁴⁸² Para 30 referring to paras 29-30 of *Christian Education*. The rejection of such test is also consistent with Canadian jurisprudence which does not suggest any support for a "compelling state interest" or similar based standard. See discussion in subparagraphs 4.4.1, 4.5.2, 4.5.3 and 4.6.3 above.

¹⁴⁸³ See discussion in subparagraphs 4.4.1 and 4.5.2 above.

¹⁴⁸⁴ Para 7.

¹⁴⁸⁵ See discussion in subparagraphs 4.6.3 above.

¹⁴⁸⁶ See discussion in subparagraph 4.6.3 above.

substantive equality.¹⁴⁸⁷ Whilst Pillay J takes account of conceptual notions of having to deal with toleration and accommodation in a secular society, her rationale for placing so much emphasis on the Canadian decision of *Bhinder* appears to be somewhat misplaced given the aforesaid Canadian Supreme Court decisions.¹⁴⁸⁸ Moreover, despite the fact that the claim was pleaded on the basis of a contravention of national legislation, the court approached the matter from a constitutional stance borne out by the dictum that "the source of the right [allegedly infringed] is the Constitution".¹⁴⁸⁹

Pillay J nevertheless proceeded to enquire how to effectively strike a balance between competing interests: on the one hand, that of religious freedom; on the other, protecting the interests of the business. To assess this balance, due account had to be taken of notions of reasonableness and rationality and to the extent that both interests could be tolerated and accommodated. In this respect Pillay J drew on the authority of the *Lawrence* case¹⁴⁹⁰ and observed as follows:

Society in general and workforces in particular can cohere if everyone accepts that certain basic norms and standards are binding. Workers are not automatically exempted from by their beliefs from complying with workplace rules [Christian Education para 35]. If they wish to practise their religion in the workplace, an exemption or accommodation must be sought.¹⁴⁹¹

Pillay J accordingly found the IROJ requiring employees to be clean-shaven to be justified.¹⁴⁹² The manner in which Pillay J arrives at her conclusion may be criticised. The main criticism, as previously stated, is the misplaced emphasis accorded to the *Bhinder* decision. Notwithstanding, it should be acknowledged that Pillay J adjudicated the matter in a "nuanced context-sensitive" approach. This much appears from the fact that a mere reading of the wording of section 187(2)(a) gives no indication as to how to establish fairness in relation to the IROJ. However, in her analysis of the law, both national and international, she in substance gave effect to

¹⁴⁸⁷ See discussion in subparagraphs 2.6.2 and 4.5.3.2 above.

¹⁴⁸⁸ See discussion in subparagraph 4.6.3 above.

¹⁴⁸⁹ Para 10.

¹⁴⁹⁰ Para 31, referring to para of 122 of the *Lawrence* case discussed in subparagraph 2.2.3 above.

¹⁴⁹¹ Para 32.

¹⁴⁹² Para 67.

the purpose of the LRA as set out in sections 1(a) and (b) which was to give effect to the rights in the Constitution and the ILO obligations respectively.¹⁴⁹³ Without accounting for the concept of reasonable accommodation articulated in terms of PEPUA, Pillay J nevertheless incorporated it as a necessary means of assessing the extent to which the limits on the freedom of religion could be justified with reference to the IROJ.

The issue of reasonable accommodation was never called into question since it was never alleged that the respondent failed to reasonably accommodate.¹⁴⁹⁴ *Harksen* was never used as a means by which the court established the existence (or extent) of unfair discrimination. The so-called bifurcated approach by the court can be criticised for not determining the case on the basis of the manner in which it was pleaded before the court.¹⁴⁹⁵ However, Pillay J's regard to ILO Convention 111 is to be welcomed since same is consistent with the tenets of section 39(2) of the Constitution.

5.4.5 Discrimination and impetus to reasonable accommodation

Another case relating to workplace-related religious discrimination is *Lewis v Media24 Ltd*.¹⁴⁹⁶ It is a matter of the Labour Court¹⁴⁹⁷ before Cheadle AJ. The applicant brought an application for damages basing his claim on alleged unfair discrimination on the basis of his cultural and political beliefs for which he sought application. The application was brought pursuant to section 50(2)(a) of the EEA. Essentially the applicant claimed that the publication business of the respondent targeted areas in "previously segregated areas" which constituted "racial profiling" and upholding

¹⁴⁹³ In the latter instance specific attention was paid to the provisions of ILO Convention 111.

¹⁴⁹⁴ Para 70.

¹⁴⁹⁵ See *King v King* 1971 2 SA 630 (O). See also Daniels and Beck *Beck's Theory and Principles of Pleadings in Civil Actions* (Butterworths 2002) 46 and the authorities cited at fn 18; Cilliers, Loots and Nel *Van Winsen and Herbstein The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 238 and the authorities cited at fn 64. Also see the remarks by Langa CJ to the effect that "[w]hatever we think of the wisdom of her election ... we [the court] must evaluate the claim as it is presented to us" in *Chirwa v Transnet Limited* 2008 4 SA 367 (CC) para 159.

¹⁴⁹⁶ 2010 31 /LJ 2416 LC.

¹⁴⁹⁷ Cape Town.

"racial divisions" in society.¹⁴⁹⁸ These policies, according to the applicant, discriminated against his religious and political views.¹⁴⁹⁹ The second basis of the claim was that the respondent had forced the applicant to work on the Jewish Shabbat (Friday night to Saturday night)¹⁵⁰⁰ knowing that he (the applicant) was Jewish, and that his employment was terminated when he refused to work on the Shabbat.

A perusal of the judgment reveals that Cheadle AJ, in considering the dispute, had regard to the equality provisions of section 9 of the Constitution.¹⁵⁰¹ He duly noted the fact that whilst PEPUDA applied to non-employment situations, the EEA was the national legislation giving effect to the aforesaid constitutional right.¹⁵⁰² The claim in question was identified as one of direct discrimination, but for reasons set out in the judgment, the applicant failed to prove a link between the difference in treatment and the alleged ground of discrimination, namely religious or political views.¹⁵⁰³ Based on the evidence before the court, essentially what the court had to find was whether the employment practices relating to alleged racial profiling and working times discriminated against the applicant on the basis as alleged.¹⁵⁰⁴ Cheadle AJ took account of the test in *Harksen* regarding the applicant proving discrimination on a listed ground, which then shifts the onus of proof to the respondent to show that the discrimination was for a fair reason relating to an IROJ or for affirmative action purposes.¹⁵⁰⁵ The applicant's credibility was questioned as was the general poor impression he made on the court.¹⁵⁰⁶ The applicant was neither able to establish on a balance of probabilities that the respondent had knowledge¹⁵⁰⁷ of the applicant's

¹⁴⁹⁸ Para 2.

¹⁴⁹⁹ Para 2.

¹⁵⁰⁰ In Judaism this is the day of rest.

¹⁵⁰¹ Para 32.

¹⁵⁰² Para 33.

¹⁵⁰³ Para 42.

¹⁵⁰⁴ Para 47.

¹⁵⁰⁵ Para 48.

¹⁵⁰⁶ Paras 96-99, 119.

¹⁵⁰⁷ In this regard it is significant to take account of the unawareness or absence of knowledge on the part of the employer of the employee's religion, compared to the full awareness on the part of the employer of the religious beliefs of the employees in the *FAWU* case as discussed above. Also see discussion in subparagraphs 3.2.3 and 3.4.3 above, in addition to 5.4.6 below.

religious affiliations nor that requiring him to work on a Friday night was in breach of the applicant's religious beliefs and practices.¹⁵⁰⁸ Although the court dismissed the application, it is noteworthy to take account of what was observed in relation to the duty of accommodation. Cheadle AJ stated:

Without deciding whether an employer is obliged to accommodate an employee's observance of a religious practice even if the employee does not himself observe it in a manner contemplated by the religion, an employer may surely raise the question over whether a commitment to observe a religious practice is genuine. Without deciding whether the Applicant's observance of the Shabbat on Friday nights is in accordance with his religious and cultural practice, it is not offensive for the Respondent to enquire into the manner and justification of his observance of the practice, particularly in the context where the Applicant does not regard working on the rest of the Shabbat, namely on Saturday. It is not a simple matter of employee choice. Accommodation of religious minorities may require operational changes, which may affect the hours of work of other workers. Such changes are only justifiable if the employee's observance of his religion is genuine and in line with religious practice. Accordingly, doubt expressed as to the employee's religious commitment may be hurtful but does not on that ground alone constitute discrimination.¹⁵⁰⁹

The judgment shows attentiveness on the part of Cheadle AJ of the legislative framework in terms of which the dispute was adjudicated, but against the necessary constitutional imperatives that also had to be taken into account. Whilst effect was given to the *Harksen* test, this was only to the extent of enquiring whether the applicant had established a case of direct discrimination that would give rise to the onus of proof shifting to the respondent to show that the discrimination was justified. The judgment contributes more to religious discrimination jurisprudence inasmuch as it contextualises reasonable accommodation. Whilst Cheadle AJ appears to recognise the need to embrace all forms of religious freedom, even if it is in respect of religious minorities, as Pillay J articulated in *Dlamini*, Cheadle AJ adopts what can only be referred to as a common-sense and logical approach in respect of how IROJ are to be assessed simultaneously with conceptual notions of accommodation when confronted with conflicting fundamental interests. The view by Cheadle AJ is very similar to that of Pillay J in *Dlamini*. It would appear that notionally minority religions have as much right to be protected as any other religious group. However, the

¹⁵⁰⁸ Para 126.

¹⁵⁰⁹ Para 128.

extent to which an employer can be expected to accommodate religious beliefs on the part of an employee will also be determined by the sincerity of those beliefs. It must be recalled that in the *Dlamini* case the applicants were selective as to what tenets of their religion they observed. Whilst they insisted on growing their beards – contrary to the IROJ – they were not as insistent when it came to attending church services. Similarly, in *Media24*, one cannot help but reflecting on to what extent the judgment may have found differently, and perhaps in favour of the applicant, had evidence shown the applicant to be not necessarily orthodox but at the very least more consistent with his religious observances and practices.

Another case which deals with workplace-related religious discrimination which manifests itself in the form of a cultural belief, is *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*.¹⁵¹⁰ The appellant in this case dismissed the respondent for being absent from duty without permission. Her dismissal took place pursuant to a disciplinary hearing. The respondent referred a dispute to the CCMA who upheld her claim on the basis that her absence from work was for reasons beyond her control. Both the Labour Court and Labour Appeal Court agreed with the decision of the CCMA commissioner.¹⁵¹¹ The appellant contended that the respondent wilfully absented herself from work thereby disobeying a lawful instruction. On the other hand, the respondent claims she had no option but to attend a traditional course to be trained as a sangoma in response to a calling from her ancestors.¹⁵¹² Initially there was a willingness on the part of the appellant to accommodate the respondent's request to attend these training sessions, but eventually such request was withdrawn on account of the fact that the appellant was very busy, short-staffed and needed the services of the respondent to provide proper services to its (the

¹⁵¹⁰ 2014 35 /LJ 209 (SCA). The case is relevant to South African equity jurisprudence and specifically religious discrimination on the basis that the employee's "perminitions" to undergo training as a traditional healer was a personally held cultural belief which our courts have acknowledged are constitutionally protected, see paras 22 and 25-28. Also see *Lawrence* para 35; *MEC for Education: Kwazulu Natal v Pillay* para 47; *Christian Education SA v Minister of Education* 1999 2 SA 83 (CC) paras 33-34; Stone "'Speaking with our spirits': The representation of religion in Marlene van Niekerk's *Agaat*". Also see discussion on the close association between cultural way of life, beliefs and religion in subparagraphs 2.2.1 to 2.2.4 and 2.2.8 above.

¹⁵¹¹ Para 1.

¹⁵¹² Para 2.

appellant's) guests.¹⁵¹³ It is at this point where relations between the parties became acrimonious in that the respondent ignored warnings by the appellant to attend and present herself for duty or face disciplinary action. Evidence at the disciplinary hearing on the part of the respondent was to the effect that she was seriously ill meaning that she was being "disturbed in her spirits", but this did not prevent a finding against her by the chairperson resulting in her dismissal.¹⁵¹⁴ Navsa JA¹⁵¹⁵ took account of the fact that the appellant initially was prepared to accommodate the cultural beliefs; however, at the disciplinary hearing it appears neither the appellant nor the chairperson were willing to accept that such beliefs were sufficient to induce a form of illness on the part of the respondent and neither did a letter from a sangoma to this effect suffice.¹⁵¹⁶

In considering the merits of the appeal, Navsa JA took account of the fact that traditional belief systems common to the respondent which were related to the culture, customs, ideas and social behaviour of our country cannot be disputed. He also noted that religious beliefs as part of "customs, ideas and social behaviour"¹⁵¹⁷ are not to be evaluated according to "the acceptability, logic consistency or comprehensibility of the belief".¹⁵¹⁸ In this regard he not only referred to the *POPCRU* decision but also took cognisance of the need of up to 80 per cent of people in South Africa who utilise traditional medicines.¹⁵¹⁹

In upholding the finding of the LAC which dismissed the appeal of the appellant the SCA also found no basis upon which to uphold the appeal and accordingly dismissed the appeal. Essentially to its finding in this regard was the following observation:

¹⁵¹³ Para 6.

¹⁵¹⁴ Paras 11-12.

¹⁵¹⁵ Brand, Leach, Willis JJA and Zondi AJA concurring.

¹⁵¹⁶ Para 21.

¹⁵¹⁷ Para 23.

¹⁵¹⁸ Para 27.

¹⁵¹⁹ Paras 23-26.

... the appellant could have explored with the respondent alternatives to her taking leave at the time, such as her attending the course when it was convenient to accommodate her request if possible.¹⁵²⁰

This case also raises the important issue of the adverse impact which the employee's conduct, in the expression of her fundamental right, had on her co-employees. Evidence before the court was that the business was short-staffed and as such required the services of the employee to meet the demands of the guests. Although this was a fact merely mentioned in the judgment, it is an important aspect of the extent to which the employee's reluctance to explore alternatives suggested by the employer, also impacted negatively upon co-employees.

An *obiter* remark made by the court is worth mentioning. With regard to the adjudication of religious disputes by secular courts, Navsa JA observed as follows:

There is one aspect of the commissioner's ruling that is incorrect: he impermissibly attempted to explain the meaning of traditional healing by embarking on a biblical discourse and equating the concept with a biblical parable. *Secular authorities, including courts and tribunals, should avoid attempting to resolve civil disputes by applying reasoning that involves interpreting and weighing religious doctrine.*¹⁵²¹

In support of the latter part of the aforesaid *dictum*, Navsa JA relied on the decision by the High Court in *Christian Education SA v Minister of Education*.¹⁵²² An inherent flaw in Navsa JA's reasoning regarding the caution against secular courts "attempting to resolve civil disputes" by applying reasoning in relation to referencing religious doctrine is that it imposes an undue fetter on the discretion of the adjudicating official (whether a judge or arbitrator). The adjudication of the extent to which a fundamental right such as religious freedom should be limited in a workplace does require an assessment and balancing of competing interests. This leads to the inescapable fact that regard must be had to the nature of the religious doctrine in question. As we saw in the *Dlamini* case the religion, though a minority practice in comparison to mainstream religions, was deserving of respect and protection. However, had the applicants in the case demonstrated a more consistent observance

¹⁵²⁰ Para 30.

¹⁵²¹ Para 32. Footnotes excluded. Emphasis added.

¹⁵²² 1999 4 SA 1092 (SE).

to their tenets of belief¹⁵²³ it may and could have led to the employer being required to take further measures to seek to accommodate their religious beliefs.

Essentially what is required, is that when assessing conflicting disputes, and particularly in determining the nature of the religious belief,¹⁵²⁴ the lens through which the court must view the dispute must not be a religiously coloured lens, but one which is neutral. Neutrality is a guarantee against preconceived notions and an effective means of giving effect to the rule of law by advancing and encouraging judicial reasoning premised on sound principles and integrity.¹⁵²⁵

The determination and adjudication of religious disputes in the workplace is not a simple matter. This is evident from the following observations made by Sachs J in the Constitutional Court decision of *Christian Education*:

Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.

The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and which are secular and open to regulation in the ordinary way.¹⁵²⁶

Determining if an activity is necessarily "religious" and therefore worthy of protection under the Bill of Rights may sometimes demand that the particular religious doctrine is "interpreted and weighed" to determine firstly whether it constitutes in the first instance a religiously held belief, practice, conscience or way of life in respect of which at the very minimum the applicant must profess a sincere belief in the religion in respect of which the protection is claimed.¹⁵²⁷ Irrespective of the "irrationality" or

¹⁵²³ This inconsistency was also apparent and noted by the court in *Media24*.

¹⁵²⁴ The term is used in the broadest sense to include all the associational rights referred to in s 15(1) which can notionally define religion as discussed in subparagraph 2.3.1 and 2.3.2 above.

¹⁵²⁵ See discussion in subparagraphs 2.8.2 and 2.8.3 above.

¹⁵²⁶ Paras 33-34.

¹⁵²⁷ See *Pillay* at para 52.

"bizarreness" thereof, the religion is not disqualified from protection.¹⁵²⁸ Thus, to the extent that the religious doctrine calls for an assessment to determine whether the applicant holds a sincere belief, it appears only necessary and reasonable that such queries be advanced.

Navsa JA's finding that the appellant failed to take sufficient steps to accommodate the respondent is noteworthy. It is not clear upon what basis the respondent based her claim for unfair dismissal before the CCMA; in other words, whether she relied on the provisions of the EEA or the LRA does not appear from the judgment of the SCA. Whether any additional steps to accommodate the respondent would have imposed undue hardship on the appellant does not appear from the judgment. Whilst the SCA made no mention of any duty upon the respondent to also seek ways in which to accommodate the situation, it is significant to take account of the reasoning of the decision of the Labour Appeal Court (LAC) in this regard.

The LAC dismissed the appeal against the finding of a commissioner. Effectively, the LAC supported the commissioner's finding of endorsing the employee's right to have been permitted to take leave, albeit unpaid, in order to complete the "traditional healer's course". Without expressly engaging the accommodation test as set out under section 14 of PEPUDA, the LAC stated the following:

It was contended further that the effect of the commissioner's finding and award is to open the floodgates to "malpractices that operate towards turning the work environment into total disarray, contrary to the letter and spirit of labour legislation". It will be disingenuous of anybody to deny that our society is characterized by a diversity of culture, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognizes these rights and practices ... What is required is *reasonable accommodation of each other to ensure harmony and to achieve a united society*.¹⁵²⁹

The reasoning by the LAC in this regard is encouraging inasmuch as it refers to the notion of a reasonable accommodation. As previously submitted, with reference to the mutual accommodation test in Canadian law, a duty is imposed on both parties in

¹⁵²⁸ See *Lawrence* para 92; *Prince* paras 42-43.

¹⁵²⁹ Para 26.

the employment relationship to seek a workable solution to the problem. It is submitted that this notion of a reasonable accommodation test extending responsibilities to both parties in the employment relationship is a noteworthy application of the duty of accommodation. In principle, by extending it to both parties, it is conceptually not a notion that is novel to South African labour law. We see that a consequence of the fact that both parties are entitled to fair labour practices under section 23(1) of the Constitution has translated into a mutual duty resting on parties in, for example, an operational requirement dispute to seek workable alternatives to a dismissal.¹⁵³⁰

5.4.6 A more context-sensitive approach toward religious discrimination

The following cases are considered for two reasons. Firstly they both have to do with religious discrimination in the workplace. Secondly, in terms of the totality of factors taken into account, they give effect to what has previously been referred to as the "nuanced context-sensitive" approach required in equality discrimination adjudication.

In *SACTWU v Berg River Textiles, a division of Seardel Group Trading (Pty) Ltd*¹⁵³¹ the court had to consider whether the dismissal of one of the applicants constituted an automatic unfair dismissal under s 187(1)(f) of the LRA on the basis of discrimination on grounds of religious beliefs. The financial downturn of the company's performance required that it operate on weekends which resulted in Williams (one of the applicants) refusing to work on a Sunday on the grounds that it conflicted with his right to religious freedom. In considering religious discrimination the court, per Steenkamp J, referred to the Labour Appeal Court decision of the

¹⁵³⁰ See *NEHAWU v University of Pretoria* 2006 5 BLLR 437 (LAC) para 55; *Kotze v Rebel Discount Liquor Group (Pty) Ltd* 2000 21 ILJ 129 (LAC) paras 132-3; *Johnson & Johnson (Pty) Ltd v CWIU* 2006 27 ILJ 269 (LAC).

¹⁵³¹ 2012 33 ILJ 972 (LC).

*Department of Correctional Services v POPCRU*¹⁵³² and had regard to the following factors:

- that an ostensibly neutral policy of the employer which applies to all employees can still be discriminatory if it offends an individual employee's religious beliefs;
- the employee must show that the policy interfered with their ability to practice their belief;
- that the principle involved must be a central tenet of the faith;
- that the employer must be aware of the employee's religious convictions;¹⁵³³
- once the above has been established by the employee, the employee would have established a case of *prima facie* unfair discrimination. The employer must show that the rule is an IROJ or that the discrimination was fair;¹⁵³⁴
- in particular, the employer must establish that it has taken reasonable steps to accommodate the employee;
- ultimately the principle of proportionality must be applied, meaning an employer may not insist upon obedience to a workplace rule where that refusal would have little or no consequence to the business.¹⁵³⁵

¹⁵³² Handed down by Murphy AJA, Waglay DJP and Davis JA on 27 September 2011, which decision was taken on appeal and is discussed below.

¹⁵³³ This is an interesting and significant aspect raised by Steenkamp J. Some may argue that it is self-explanatory, however, arguably it should be a requirement in discrimination disputes. Awareness on the part of the employer of the employee's religious beliefs offers more benefits than disadvantages. Awareness can act as a necessary catalyst to for dialogue between employee and employer which, if used to address any potential conflict, can act as a means of effective dispute resolution. In this regard see the discussion in subparagraphs 2.9.2 to 2.9.5 and 3.2.3 and 3.4.3 above, in addition to 5.4.6 below. Furthermore, it also imposes a duty upon the employer to take steps to address the IROJ. Moreover, it enables reasonable and necessary measures to be addressed that seek to accommodate the religious beliefs of the employee. The lack of knowledge on the part of the employer played a significant role in the judgment of Cheadle AJ in *Media24* para 126.

¹⁵³⁴ This requirement is almost prescient of the amendment that would appear in s 11(1)(b) of the EEA, as amended by s 6 of Act 47 of 2013 which in essence provides that if unfair discrimination is alleged on a listed ground, the employer against whom the allegation is made must prove that the discrimination is not unfair.

It has been correctly observed that the requirements laid down in the *SACTWU* case are the most comprehensive requirements to date on "guidance" as to how our courts adjudicate religious discrimination disputes in the workplace.¹⁵³⁶ It is also of interest to note the extent to which the court in *SACTWU* goes in taking a broad non-myopic conspectus of all factors and matters impacting on or influencing the issue of religious discrimination in adjudicating the fairness thereof. The only *caveat* thereto is in respect of reasonable accommodation. It is imperative that this is generously interpreted as articulated by Cheadle AJ in *Media24*, namely that it is mutual accommodation, for the reasons already stated.

The next case is the Supreme Court of Appeal (SCA) decision in *POPCRU* to which reference was made by Steenkamp J in *SACTWU*. *Department of Correctional Services v POPCRU*¹⁵³⁷ came before the SCA as an appeal from the LAC upholding a finding of the Labour Court (LC) that the dismissals of the respondents were automatically unfair in terms of section 187(1)(f) of the LRA. Whilst the LC had made a finding of unfair discrimination on the basis of gender, the LAC added religion and culture as additional grounds of discrimination.¹⁵³⁸ The respondents were employed by the appellant as prison warders and were dismissed for refusing to cut their dreadlocks in accordance with the dress code. They insisted their hairstyles were consistent with their Rastafarian belief.¹⁵³⁹ In addition, cultural reasons were advanced on behalf of some of the respondents.¹⁵⁴⁰ They contended that their dismissals were automatically unfair on grounds of religious discrimination in terms of the LRA.¹⁵⁴¹ In assessing and dismissing the appeal, Maya JA¹⁵⁴² considered their claim in terms of a listed ground, and with reference to the *Harksen* test, stated:

Relevant considerations [in respect of a listed ground of discrimination] include the position of the victim of the discrimination in society, the purpose sought to

¹⁵³⁵ The above requirements appear at para 38.

¹⁵³⁶ See Bernard 2014 *PER* 2886.

¹⁵³⁷ 2013 JOL 30347 (SCA).

¹⁵³⁸ Para 1.

¹⁵³⁹ Para 6.

¹⁵⁴⁰ Para 7.

¹⁵⁴¹ Section 187(1)(f) and para 10.

¹⁵⁴² Nugent, Pillay JJA, Plasket and Mbha AJJA concurred.

be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, whether the discrimination has impaired the human dignity of the victim, and whether less restrictive means are available to achieve the purpose of the discrimination.¹⁵⁴³

Maya JA went on to observe the following:

Without question, a policy that effectively punishes the practice of religion and culture degrades and devalues the followers of that religion and culture in society; it is palpable invasion of their human dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment.¹⁵⁴⁴

Common to the LAC and SCA decisions is that *POPCRU* was decided in terms of section 187(1)(f) of the LRA.¹⁵⁴⁵ The claims of the respondents were also decided on the grounds of unfair discrimination relating to religion and culture. The approach toward the determination of the test of discrimination differs. Whilst the SCA referred to *Harksen* as authority for proving a listed ground of unfair discrimination, the LAC simply looked at the case of the respondents by asking whether there had been differentiation between the employees on one of the prohibited (listed) grounds which imposed a burden or disadvantage. Both the LAC and SCA took due account of the significance to be accorded to religious beliefs and culture. The LAC's determination of unfair discrimination was more expansive inasmuch as it considered whether there had been direct discrimination and having found that indeed there had been, took the enquiry even further, finding that the unfair treatment extended to disparate (indirect) discrimination.¹⁵⁴⁶ Having found this to be the case, the LAC then considered whether the discrimination was justified, fair or justifiable.¹⁵⁴⁷ This the applicant was unable to demonstrate due to the laxity of the enforcement of its dress code, and in particular that hair had to be cut short, as being an IROJ.¹⁵⁴⁸ Effectively the SCA found that the employer's policy had the effect of punishing the exercise of

¹⁵⁴³ Para 21. Footnotes excluded.

¹⁵⁴⁴ Para 22.

¹⁵⁴⁵ Para 23.

¹⁵⁴⁶ Para 28.

¹⁵⁴⁷ Para 30.

¹⁵⁴⁸ Paras 37-42.

freedom to practice a religion or culture which amounted to a degradation of such religion or culture. This, the court found, was an invasion of their human dignity.¹⁵⁴⁹ It is argued that there was no need for the SCA to employ the *Harksen* test as it did. On the other hand, the emphasis placed by the LAC and finally by the SCA on principles of equality and human dignity is welcome since these are both fundamental features which inform the conceptual framework of religious discrimination adjudication.

The *Dlamini* and *POPCRU*¹⁵⁵⁰ cases raise interesting aspects noteworthy of comparison.¹⁵⁵¹ Both cases imposed certain IROJ on the applicant employees. In *Dlamini*, a requirement of being a security guard was to have a shaved or trim beard.¹⁵⁵² The dress code (the code) of the Correctional Services Department in *POPCRU* prohibited males from wearing dreadlocks.¹⁵⁵³ The respondents in *POPCRU* were unable to successfully prove the rationale for discriminating against the applicants. No nexus could be established between the need for males wearing their hair short and the need to maintain discipline and ensure security. The belief of the applicants was related to both culture and religion in *POPCRU*. In *Dlamini* the belief of the applicants was based solely on religion. Essentially, in neither *POPCRU* nor *Dlamini* were the employers able to establish that the IROJ were of such a nature as to outweigh the religious practices of the employees. However, the difference in outcomes of findings by the courts in *Dlamini* and *POPCRU*¹⁵⁵⁴ is attributable to the extent to which the employees chose to practise and observe their respective

¹⁵⁴⁹ Para 22. See also Govindjee "Freedom of religion, belief and opinion" 120.

¹⁵⁵⁰ SCA decision.

¹⁵⁵¹ Also see case note discussion in Govindjee 2007 *Obiter* 360-368. In this insightful article the learned author compares the reasoning adopted by the different courts in the Pillay and Dlamini cases. Whilst correctly pointing out that each case essentially dealt with criteria, the consequences of which impacted upon the applicants by way of indirect discrimination, certain factors are highlighted in an attempt to reconcile the different outcomes of the cases (371). One is that culture (as a more expansive term) was the dominating theme in *Pillay* as opposed to religion in the *Dlamini* case. Another is the fact that in *Pillay*, PEPUA was applied whereas the EEA was applied in *Dlamini* (372).

¹⁵⁵² This was a requirement that applied to all employees, both male and female.

¹⁵⁵³ A similar requirement was not imposed on female employees. On the contrary, female employees could wear their hair long which would then be in apparent breach of the code.

¹⁵⁵⁴ Namely that in *Dlamini* the applicant employee's unfair discrimination claim on the basis of religion was rejected and in *POPCRU* the claim of unfair discrimination on the basis of religious and cultural discrimination was upheld.

religions. In *POPCRU* no question was raised as to the manner in which the employees practised their religion. The applicants in *Dlamini*, however, were shown to selectively practise their religious belief.¹⁵⁵⁵

What must be distilled from the aforesaid comparison? It remains settled law that our courts will not question the sincerity of the religious belief which an employee holds.¹⁵⁵⁶ However, as in *Dlamini*, a court cannot simply ignore or disregard the manner in which an employee exercises or practises his or her religious belief. Looking at the way in which the religion is practised should not be equated with questioning the sincerity of the belief. Looking at the practice of the belief on the part of the individual enables a more holistic assessment of what measures can and should be adopted to address the IROJ.¹⁵⁵⁷ In this regard, Govindjee¹⁵⁵⁸ refers to a judgment of the Labour Court (LC) in *Carlin Hambury v African Trading Corporation*¹⁵⁵⁹ in which an employee who claimed an automatic unfair dismissal on grounds of refusing to work overtime on Saturdays on the basis of being a Seventh Day Adventist. The LC dismissed the claim finding that the IROJ took precedence over the applicant's constitutional rights. In particular the court found that an IROJ was that the applicant be available on Saturdays. There is no indication from the *Carlin* case of the extent to which the applicant selectively practised his religious faith. What *Carlin* does indicate is that if our courts can find that IROJ take preference over an employee's religious freedom, such authority can effectively strengthen an employer's argument that where an employee has been selective as to

¹⁵⁵⁵ Whilst they insisted on wearing beards in accordance with their Nazareth religion, they were less insistent in asserting their religious beliefs when it came to other religious activities. For example, they did not frequently attend church services.

¹⁵⁵⁶ See *Lawrence* para 33; *Christian Education* para 6; *MEC for Education: Kwazulu Natal v Pillay* para 146; *Prince v President of the Law Society of the Cape of Good Hope* para 97; *Dlamini* para 16.

¹⁵⁵⁷ What position would the court have adopted in *Dlamini* had the evidence shown the IROJ only required males to be clean shaven? The finding, it is argued, could have been no different, since on the basis of biological make-up the clean shaven or no-beard rule could only be applicable to male employees.

¹⁵⁵⁸ Govindjee "Freedom of religion, belief and opinion" 121.

¹⁵⁵⁹ Unreported Labour Court case. See Govindjee "Freedom of religion, belief and opinion" 121.

their religious practices,¹⁵⁶⁰ there is no rational or justifiable basis for the religious practice taking precedence over the IROJ.

A more important issue relates to the issue of reasonable accommodation. It is only reasonable and rational to take into account, when considering the issue of mutual accommodation, the extent to which an employee is selective about their religious practices. If the religious practice in question is selective then there should notionally be a greater duty on the employee to find ways in which to accommodate a workable solution to the inherent tension arising from a conflict of rights. Similarly, when looking at what duties are imposed on an employer in terms of taking measures to ensure that the discrimination is fair on the basis of the IROJ, an employee who has a sincerely held religious belief, but is selective as to the manner in which he or she practises such belief, stands to be treated in a manner that may be less accommodating than an employee who is fastidious and notionally less adaptable to changes in terms of the IROJ.

Most examples drawn upon in this study, and in fact much of the case law analysed in this chapter, are indicative of instances where the employer is called upon to react to an allegation or claim of religious discrimination. In defending a claim of discrimination on grounds of religion, the employer is required to prove that it was fair. In most instances the defence is based on the IROJ. To address the situation the employer is often required to refrain from continuing a course of action. One case that comes to mind is the *POPCRU* matter in which the employer was admonished to refrain from a strict adherence thereto in favour of the religious beliefs of the claimant employees; similarly in the *SACTWU* matter. These obligations imposed should in a sense be regarded notionally as negative obligations. The negative sense of the obligation is also understood in the context that all claims of religious discrimination in the workplace which have been analysed are instances in which the employer has been required to "react". For instance, a claim of religious discrimination has been made, and the employer has had to prove the fairness

¹⁵⁶⁰ As was shown to be the case in *Dlamini*.

thereof, and hence this can be described as "reacting" rather than being proactive in taking steps and measures that would actually eliminate religious discrimination in the workplace.

One should distinguish these so-called negative obligations from so-called positive obligations which are imposed on an employer in respect of a claim of religious discrimination. Positive obligation notionally goes much further in addressing the issue of whether an employer has acted fairly in all circumstances. To begin with, the issue of reasonable accommodation charges the employer to take steps to accommodate the religious beliefs of the employee. The employer in *Kievits Kroon*, it must be remembered, was reprimanded by the SCA for failing to take suitable steps to accommodate the employee's request. Moreover, if one is to give more effect to the spirit of the EEC which seeks to eliminate discriminatory practices in the workplace, then imposing duties upon an employer akin to what is imposed on employers under the Code of Code Practice on Sexual Harassment¹⁵⁶¹ is a step in the direction of raising general awareness in the workplace about the sensitivity and importance of religious discrimination.¹⁵⁶² This general awareness translates into a broader education about rights in the workplace with a view to fostering appropriate dialogue between employees and employers in the workplace.

5.5 Conclusion

The analysis of jurisprudence of South African courts in relation to religious discrimination forms a crucial aspect of our notional understanding of this area of equality jurisprudence.

Understanding the approach adopted in relation to the interpretation of the Bill of Rights provides a normative understanding that transcends the mere linguistic

¹⁵⁶¹ See subparagraph 3.4.3 above.

¹⁵⁶² The existence of a Code of Good Practice on Religion is no guarantee or assurance against religious discrimination in the workplace. However, at the very least it creates a mechanism in terms of which parties to a possible dispute and/or co-employees can at an early stage identify any potential conflict of fundamental rights and seek to engage in constructive measures of appropriate dispute resolution.

parameters of the constitutional and legislative framework pertaining to religious discrimination. The interpretation, as we have seen, is with a purpose of seeking to give effect to the underlying values and principles of the Constitution. If interpretation is subject to the supremacy of the Constitution and the rule of law, then the rights and limitations to the exercise thereof must be interpreted subject to the overarching theme of justification which aligns itself with the culture of justification – an imperative component of transformative constitutionalism.

It would be artificial to conceive of religious discrimination in isolation. This means that one must, in considering religious discrimination in the workplace, also take into account the broader dimension of equality jurisprudence. In this respect equality and human dignity are central role-players as evidenced in various decisions handed down by our courts in equality jurisprudence in general as well as in non-workplace-related religious discrimination disputes. The rationale for focusing on this aspect is not only to edify our understanding of the role played by substantive equality and human rights but to also look at the development of the common law as an organic area of our law which in a notional sense contributes significantly to transformative constitutionalism through judgments addressing equality disputes which in turn translate into social justice.

Judgments handed down in non-workplace-related religious discrimination disputes as well as more specifically workplace-related religious discrimination matters have been focused on to establish whether there is a uniform or set test being invoked in the adjudication of such disputes. Sachs J in *Christian Education* advocated a "nuanced context-sensitive" approach in relation to the adjudication of such disputes. The rationale is due to the conflict of the fundamental rights in issue and the most appropriate way in which to balance such rights. As previously mentioned, the right to religious freedom, when pitted against another fundamental freedoms, poses difficult questions. An example is a secular school which does not make allowance for the religious dress code of the individual pupil wishing to celebrate his religious beliefs by dressing in a particular manner (as was the case in *Pillay* – distinguishable somewhat in relation to the fact that the pupil wanted to wear a nose piercing). The

aforesaid problem is compounded in relation to the workplace. This is due to the fact that in this instance we have to do with the added matter of the IROJ (which are fundamentally important to the interests of the employer). In the balance of competing interests and the extent to which the employee's religious freedom can and should be limited, notions of reasonableness and rationality in addition to reasonable accommodation must all be considered.

The apparent move away from the traditional *Harksen* test in the adjudication of unfair discrimination disputes is to be encouraged. This is due to the fact that by confining themselves to the strict formula of *Harksen* there is a likely danger of our courts engaging with a less "nuanced context-sensitive" approach. This latter approach appears to be the most suitable and optimal approach in respect of unfair discrimination dispute adjudication in general and specifically workplace-related religious discrimination due to the following reasons:

1. Each and every dispute is decided upon with reference to the imperatives attendant upon the uniqueness of its own dynamics and that of the employment relationship at hand.
2. Courts are duty bound to assess disputes based on the manner in which they are presented to the court. In other words, they cannot be adjudicated in isolation but must be determined on the basis as they have been pleaded by the parties.
3. Parties are bound to rely on national legislation and cannot rely directly on the Constitution.¹⁵⁶³
4. Definitions ascribed to unfair discrimination ought to be ascertained with reference to the Convention as given effect to by the EEA and LRA.

¹⁵⁶³ Unless of course a litigant is directly challenging the validity of a provision of a statute.

5. Failure on the part of the Convention to provide a means of determining the unfairness of the discrimination entitles the court to take into account *relevant* jurisprudence concerning the right to equality and human dignity.¹⁵⁶⁴
6. Assessment of the extent to which the right to religious freedom should be limited in the workplace must be considered taking into account any IROJ. To properly consider this, due account must be had to factors such as reasonableness, rationality as well as proportionality. Effectively it is a matter of balancing both interests, namely that of the employee as well as of the employer.
7. assessment of reasonable accommodation which extends to the notion of mutual accommodation requiring both employee and employer to seek a workable solution to the problem at hand.

In the spirit of tolerance which is imperative to the pluralistic, multicultural and ethnic diverse South African society it must also be acknowledged that our courts as the final arbiters of disputes within the regulatory framework addressing religious discrimination in the workplace do have an effective role to play. However, their role is limited. But by means of employing transformative constitutionalism and adjudicating religious discrimination disputes in a manner that is consistent with social justice, our judiciary has a vital and instrumental role to fulfil.¹⁵⁶⁵

Any dispute resolution, whether at the CCMA or a more formal forum such as a court of law is conceptually and fundamentally regulatory and restrictive. It forces the parties in question to subject themselves to the dispute resolution process at hand. In this sense social dialogue is encouraged, which is a positive development.

¹⁵⁶⁴ Emphasis added. Conceivably a case which is not employment related may still be relevant to an employment-related dispute where the nexus between the two cases in question is based on unfair discrimination. A case in point is *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) which concerned itself with an application based on s 6(1) of the EEA wherein the applicant alleged unfair discrimination on the basis of race or colour (para 2) and in which Van Niekerk J referred to *Harksen* as authority for establishing unfair discrimination (para 5).

¹⁵⁶⁵ See discussion in subparagraphs 2.8.2 to 2.8.3 and 2.9.1 to 2.9.5 above.

A mutually beneficial situation would be where role-players in our society, such as employee and employer, are able to engage in constructive dialogue, as and when disputes in respect of the exercise of religious freedom arise. In this sense they would be able to take ownership of the issue, and if resolvable through means of their own efforts, their dialogue is likely to have a positive impact upon strengthening and fostering a healthier sense of mutual trust and a mutually respectful employment relationship.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 General background

The diverseness of South Africa as a country comes clearly to the fore in terms of its multiracial, culturally and ethnically diverse population. Whilst the notion of "pluralism" captures the aforesaid description it must also be understood in the context of extending to a diversity of religious beliefs, practices and views.¹⁵⁶⁶ Admittedly, not everyone is necessarily religiously inclined; many people, for various reasons, have an opinion, conscience, belief or view unaffected by any religious element. This is either on account of them being atheistic or agnostic or simply choosing to adopt rather a moral as opposed to a religious stance. Accordingly, the aforesaid plurality is characterised by influences of mainstream and non-mainstream religions as well as non-religious influences, namely secular interests and views.¹⁵⁶⁷

The expression of religious freedoms on the part of individuals when conflicting with other rights of individuals or organisations in society, and particularly the workplace, does give rise to tension. This is due to the very conflict arising from competing interests.¹⁵⁶⁸ On the one hand stands the right of an individual seeking to express religious freedom in a specific manner; on the other hand another person or organisation seeking to limit the expression of such right. For example, an individual employee may seek to wear certain clothing apparel at the workplace as an expression of religious identity. The employer, on the other hand, may contend that the clothing apparel in question cannot be worn at the workplace even if it is in the interest of religious freedom, for instance because of health and safety reasons. When the employee alleges unfair discrimination on the basis of religion, the competing interests must be assessed.¹⁵⁶⁹ The limitation placed on the expression of religious freedom must be judged against any IROJ with regard to the

¹⁵⁶⁶ See paragraph 1.1 above.

¹⁵⁶⁷ See subparagraphs 2.9.3 and 2.9.5 above.

¹⁵⁶⁸ See subparagraph 2.2.4 above.

¹⁵⁶⁹ See subparagraphs 2.3.1 to 2.3.2 and 2.4.4 above.

reasonableness and rationality thereof. In addition, issues of reasonable accommodation on the part of the parties also require analysis. It is in this sense that religious discrimination in the South African workplace requires consideration and analysis.¹⁵⁷⁰

Under the constitutional dispensation in South Africa provision is made for the protection of fundamental rights and freedoms. These are, however, all subject to general limitation, should such limitation be reasonable and necessary in a democratic society, regard being had (aside from the factors listed in section 36 of the Bill of Rights) to freedom, equality and human dignity.

It is against this backdrop that the research question of this thesis requires consideration, namely how effective South African labour law is in our constitutional dispensation in addressing religious unfair discrimination in the workplace.¹⁵⁷¹

The aims of the study¹⁵⁷² were to–

1. critically reflect on the importance of South Africa generally being a secular pluralistic society and the consequence thereof in terms of the imperative of tolerance;
2. define and explain what is meant by religious unfair discrimination;
3. explain why there is a need for religious unfair discrimination to be addressed in order to prevent its manifestation or occurrence in the workplace;
4. examine the manner in which transformative constitutionalism can assist in addressing religious unfair discrimination in the workplace;
5. critically analyse and discuss the legislative and constitutional framework in place regulating religious unfair discrimination in the workplace;

¹⁵⁷⁰ See subparagraphs 3.4.3 and 3.4.5 above.

¹⁵⁷¹ See subparagraph 1.2.1 above.

¹⁵⁷² See subparagraph 1.2.2 above.

6. critically analyse and discuss the tests our courts have developed in adjudicating disputes of religious unfair discrimination and reflect on whether such tests are appropriate;
7. critically analyse and discuss how Canadian law addresses religious discrimination in the workplace with the view to seeing to what extent, if any, we can benefit from Canadian law;
8. critically discuss how effective South African labour law has been in addressing religious unfair discrimination in the workplace;
9. suggest proposals aimed at addressing religious unfair discrimination in the workplace more optimally; and
10. suggest ways on how to further improve accommodation and regulation of religious freedom in the workplace.

In giving effect to the above aims¹⁵⁷³ which in many respects call for an analysis of the relevant aspects as detailed above, it is also important to keep in mind that the overarching purpose of doing so is to not merely to produce an analysis, but through such analysis to consider how to further improve the accommodation and regulation of religious freedom in the South African workplace. The analysis of the effectiveness of South African law in addressing religious discrimination, in the context of our constitutional dispensation, has inescapably led me to consider how to further improve the accommodation and regulation of religious freedom in the workplace.

6.2 Definition of concepts and normative terms

6.2.1 Secularism in South Africa

Examining the importance of South Africa generally being a secular pluralistic society and the consequence thereof in terms of the imperative of tolerance was an aim of this study.¹⁵⁷⁴

¹⁵⁷³ As will be discussed and expanded on in this Chapter.

¹⁵⁷⁴ See subparagraph 1.2.1 above.

Secularism is a term that can be loosely bandied about. In the colloquial sense it is understood to mean something which is non-religious. The diverseness of South African society brings immediately to mind its strongly multicultural racial, ethnic and cultural mix of people. It would be naive to think of the collective mix as being non-religious. However, it would be inaccurate to describe our country as a religious society or community, or as a theocracy.¹⁵⁷⁵

Accordingly, it is important that secularism is contextualised and that we ascribe to the term a meaning with regard to the South African dispensation. Currently, there can be no doubt that the right to religious freedom is protected. The right not to be religious is equally protected, inasmuch as the Constitution recognises the right to have any opinion or belief. What this means is that individuals are at liberty to believe and form views in relation to specific ideas, concerns and issues as they wish, free from interference either by other individuals or the state. The state does not profess to proclaim any religious or non-religious point of view, and in fact plays no role in the opinion or belief an individual holds, whether it be religious or non-religious. To this extent, notionally, it is argued that South Africa is a neutral society in relation to the expression of religious freedom on account of a non-interventionist role on the part of government.¹⁵⁷⁶

The expression of freedom of religion aligns itself with the normative concept of tolerance. The ushering in of the democratic dispensation did not translate into a sudden awareness of "religiousness". At the bare minimum, however, there is awareness of the fact that freedom of religion extends not only to mainstream religious groups but must also include the lesser known religions, the minorities. Hence, the importance and significance of the views articulated in the dissenting judgment in the *City of Tshwane* matter.¹⁵⁷⁷

If we take secularism in the context of tolerance and pluralism, we must make allowance for the expression of individual (majority and minority) religious freedoms

¹⁵⁷⁵ See subparagraphs 2.4.1 and 2.4.3 above.

¹⁵⁷⁶ See subparagraph 2.4.3 above.

¹⁵⁷⁷ See subparagraph 2.9.3 above.

as we must for religious freedoms on the part of associations and organisations. However, these freedoms are not absolute. They are subject to the rule of law in general and in particular to the limitation of rights clause which essentially provides for a means to balance conflicting fundamental interests. The question how an appropriate balance should be struck between conflicting fundamental rights is not an easy matter as evidenced by the examples given in this study and the analysis of South African¹⁵⁷⁸ in addition to Canadian case law.¹⁵⁷⁹

6.2.2 Transformative constitutionalism and religious freedom

Examining the manner in which transformative constitutionalism can assist in addressing religious unfair discrimination in the workplace was an aim of this study.¹⁵⁸⁰ Transformative constitutionalism has been seen as a necessary means of changing our society from its former condition¹⁵⁸¹ to a scenario in which all actions and conduct, whether on the part of private or public persons (juristic entities), and especially organs of state, must be justified. Under the constitutional dispensation, if the rule of law is supreme, then all actions and conduct must be compliant therewith. This ensures that the actions of everybody – without exception – are subject to the tenets of the rule of law. Hence the normative notion of a culture of justification in terms of which the minimum threshold of accountability in terms of the exercise of power is that it must be reasonable, rational and legal.¹⁵⁸²

The construct of transformative constitutionalism is employed not merely as an ideology, but rather as a means by which, through its constant recognition, our courts interpret the Bill of Rights in a way that gives effect to the underlying values and principles thereof. Judgments handed down by our courts, and more specifically the Constitutional Court, give effect to the aforesaid values and principles are emblematic in many ways. They enforce and guarantee observance of the rule of law

¹⁵⁷⁸ See subparagraphs 5.4.5 and 5.4.6 above.

¹⁵⁷⁹ See subparagraphs 4.5.5, 4.6.3 and 4.6.4 above.

¹⁵⁷¹ See subparagraph 1.2.1 above.

¹⁵⁸¹ Described as a "culture of authority" in terms of the draconian legislative regime that was in place to support minority governance and control over a disenfranchised majority population. See discussion in subparagraphs 2.9.1 to 2.9.2 above.

¹⁵⁸² See subparagraphs 2.8.3 as well as 2.9.1 to 2.9.2 above.

in our democracy. However, they also give expression to the progressive realisation of socioeconomic rights. In this way the Bill of Rights continues to remain meaningful and relevant to the lives of everyone who has a right or freedom deserving protection. It is in this sense that social justice, as the by-product of transformative constitutionalism is realised.¹⁵⁸³

The notion of *ubuntu* – the obligation to care for family members and a sense of community responsibility – is recognised as a significant component of our law. It is also an integral feature of transformative constitutionalism by the way in which it demands that one has regard to the notions of advancement of the sense of community and social cohesiveness – which are essential to the success of a democratic order.¹⁵⁸⁴ Such success, however, depends on the willingness of the role-players. However, the context in which we seek to conceive of *ubuntu* is an area of possible ongoing controversy as a result of the Constitutional Court decision in *City of Tshwane*.¹⁵⁸⁵ The assumption that the interests of minority groups may be disregarded merely on account of the fact that they identify with a belief which is not viewed as mainstream or majoritarian is anathema to our culture of diversity and ethos of celebrating our differences.¹⁵⁸⁶

The reality of the employment relationship, however, is characterised by an entrenched systemic chasm between management and workers that is not always conducive to dialogue between the parties.¹⁵⁸⁷ As a result, there is a need for religious discrimination in the workplace to be addressed in terms of the South African legislative and constitutional framework as given effect to by our courts.¹⁵⁸⁸

¹⁵⁸³ See subparagraph 2.9.2 above.

¹⁵⁸⁴ See subparagraph 2.9.3 above.

¹⁵⁸⁵ See subparagraph 2.9.3 above.

¹⁵⁸⁶ See subparagraphs 2.4.1 to 2.4.3 and 2.9.3 above.

¹⁵⁸⁷ See subparagraph 2.9.4 above.

¹⁵⁸⁸ See subparagraph 2.9.4, 3.2 to 3.4 and 5.3 above.

6.2.3 The importance of tolerance in facilitating transformative constitutionalism

There are greater benefits to be gained from tolerance than from intolerance. An obvious limitation on tolerance is that nothing should be tolerated which will result in harm to others.¹⁵⁸⁹ What is harmful must be determined with reference of the facts and circumstances of each case. It is context specific.¹⁵⁹⁰

A conceptual notion of tolerance is essential with regard to the workplace. This is on account of the fact that inherent to the employment relationship is a trust imperative between the parties. This imperative is important to secure a harmonious relationship between the parties. Underscoring this dynamic is a sense of tolerance on the part of each party to the relationship. However difficult this balance may be to establish, it is nevertheless important to maintain. The workplace is, in a sense, a microcosmic version of the macrocosmic society in which we live. As such, tolerance of religious freedom within the workplace is more likely to have a positive effect in terms of profit generation than disputes over the exercise of religious freedom, where time is dedicated to dispute resolution and adjudication procedures rather than to the commercial purpose of the business. Moreover, the ability to tolerate a religious belief different from one's own is the hallmark of inclusivism in a multicultural democracy which, depending on one's perception, can move from toleration to celebration. Tolerance, as opposed to intolerance, is instrumental to the success of transformative constitutionalism.¹⁵⁹¹ On the other hand, whilst we need to stress the need to tolerate, there is also the notional sense of something more than toleration required in the true sense of accommodating diversity and multiculturalism. It is the idea of not mere toleration but celebration.¹⁵⁹² As such, does this render our notion of tolerance elusive?

¹⁵⁸⁹ See subparagraph 2.9.5 above.

¹⁵⁹⁰ See subparagraph 2.9.5 above.

¹⁵⁹¹ See subparagraph 2.9.5 above.

¹⁵⁹² See subparagraph 2.9.5 above.

6.2.4 Describing discrimination in South African law

Defining and explaining what is meant by religious unfair discrimination was an aim of this study.¹⁵⁹³ During the course of my research, I was asked whether use of the word "unfair" in relation to "discrimination" was not pleonastic. This is a very valid question, and especially in relation to the context of South Africa. South Africa's social, political, and legal history is steeped in legacies of unequal treatment of individuals and racial segregation in terms of the apartheid regime. Having personally attended primary school in the seventies, secondary school in the eighties and been exposed to tertiary education in the nineties, these racial divides were all too apparent and realistic. Yet they were part of life. Though morally subject to challenge, they could not be legally challenged under the then system of parliamentary sovereignty. The change to the democratic dispensation of government brought with it hope and expectation. However, a constant reminder of the past that was essentially embedded in one's psyche was the reality that for too many years racial discrimination had reigned supreme in our country. The discrimination did not have to be defined in legal terms to gauge its moral reprehensibility. It was unacceptable because of the extent to which it compromised the fundamental human dignity of human beings. The full effect of this has, in a way, coloured perceptions of many South Africans on being confronted with the notion of discrimination to at once associate it with something which is inherently unfair, hence no need to resort to pleonasm and insert the adjective "unfair".

However, as explained in Chapters 2 and 3, in the jurisprudence law pertaining to unfair labour practices, in addition to fulfilling the legal prerequisites of what constitutes prohibitive acts of discrimination in terms of our legislative and constitutional framework, express provision has been made for a legal normative understanding of the term "unfair discrimination".¹⁵⁹⁴ This arises from the fact that to merely make a distinction between persons does not necessarily impair any person's human dignity or entitlement to equal treatment. However, to distinguish between

¹⁵⁹³ See subparagraph 1.2.1 above.

¹⁵⁹⁴ See subparagraph 2.2.2 above.

persons on the basis of ethnic origin or religious belief and treat them in a different manner and thereby negatively impact upon their human dignity, alternatively to treat persons differently on the basis of attributes or characteristics immutable to them as individuals such as gender or race which also impacts upon their human dignity does *prima facie* constitute unfair discrimination.¹⁵⁹⁵

6.2.5 Relevance of religious observances and symbols in the workplace

The allegation of unfair discrimination on the basis of religion in particular looms large when the employee is requested by the employer to refrain from dressing in a certain manner or displaying a religious symbol, or not to attend religious prayers at a specific time.¹⁵⁹⁶

However, the limitation of the religious rights on the part of the employee by the employer must be determined in the context of whether there is a justifiable basis upon which the employer has sought to limit the right.¹⁵⁹⁷ How fundamental rights which clash with each other are to be balanced in a fair manner so that one right, such as of freedom of religion on the part of an employee in the workplace, can be permitted to be exercised in manner that justifiably restricts the IROJ which an employer may have, is not always a simple assessment. On the other hand, the religious freedom in question on the part of the employee may have to be restricted in favour of the inherent requirements of the job as imposed by the employer. The advancement of one fundamental right by restricting or limiting another fundamental right can only fairly be assessed with due regard to what is rational and reasonable, regard being had to the facts and circumstances of each case. Such tests are in a sense nothing more than exercises in proportionality on account of the fact that the fairness of restricting a fundamental right can only properly be gauged with reference to equality, freedom and human dignity.¹⁵⁹⁸

¹⁵⁹⁵ See subparagraphs 2.5.2, 2.6.2 and 2.7.1 to 2.7.2 above.

¹⁵⁹⁶ See subparagraphs 2.4.3 and 2.4.4 above.

¹⁵⁹⁷ See subparagraphs 2.2.8 and 3.2.3 above.

¹⁵⁹⁸ See subparagraphs 3.2.1 to 3.2.4 above.

From examples drawn upon and case law analysed in this study of religious discrimination in the workplace it is clear that when faced with a claim of religious unfair discrimination, the employer is required to prove the fairness thereof with reference to the IROJ.¹⁵⁹⁹ Alternatively, the employer may also be permitted to show that steps were taken to reasonably accommodate the manifestation of the employee's religious belief in the workplace.¹⁶⁰⁰ The onus placed on an employer in proving fairness of the distinction made on grounds of religion requires the employer to "react" to the claim.¹⁶⁰¹ In this way the employer can be seen to be under a so-called notional negative duty. The importance and value in conceiving instead of so-called positive duties is that instead of being "reactive", the employer is called upon to be "proactive".¹⁶⁰² To begin with, the employer can take or implement measures in the workplace, such as a guideline akin to a Code of Good Practice, that seeks to address religious discrimination and/or issues relating to the expression or manifestation of religious beliefs in the workplace. This could result in facilitating constructive dialogue between parties with a view to obviating the need for formal intervention of our courts. Alternatively, where intervention is required, the positive obligation underscores and gives impetus to the imperative of reasonable accommodation.¹⁶⁰³

6.2.6 Attempting to define "religion"

A useful attribute of a definition is the notional sense of security it creates in terms of a normative understanding thereof as a concept. Religion as a concept eludes definition. Some people regard religion as nothing more than a belief, view or system of faith. For others, it is something more expansive – it colours, fashions and determines their lifestyle, culture and essentially defines who they are as individuals. For the latter, religion is not something which is apparently made manifest on a certain day of the week by merely attending a church service, but is made manifest

¹⁵⁹⁹ See subparagraph 5.4.4 above.

¹⁶⁰⁰ See subparagraph 5.4.5 above.

¹⁶⁰¹ See subparagraphs 5.4.5 and 5.4.6 above.

¹⁶⁰² See subparagraphs 3.2.3, 3.4.3 and 5.4.6 above.

¹⁶⁰³ See subparagraph 5.4.5 above.

through their behaviour and conduct toward other people.¹⁶⁰⁴ Different religions have different meanings for different people. It must be understood in the normative sense as being anything from a spiritually held view to a way of life or culture.¹⁶⁰⁵ Giving "religion" a more expansive and generous interpretation is also consistent with the interpretative method our courts are encouraged to employ in relation to our legislative and constitutional framework.¹⁶⁰⁶

6.3 Significance of a legislative and constitutional framework in respect of religious discrimination in South Africa

Critically analysing and discussing the legislative and constitutional framework in place regulating religious unfair discrimination in the workplace was an aim of this study.¹⁶⁰⁷ The regulatory framework is a means by which fundamental rights in the employment relationship are protected in the Constitution. Effect is given to these rights in terms of national legislation which provides the necessary mechanism by which effect is given to rights and obligations as well as to its enforcement.¹⁶⁰⁸

The legislative framework giving effect to the constitutional rights on account of the fact that rights in the Constitution which are not self-executing depend on national legislation is an important recognition of giving effect to the principle of subsidiarity.¹⁶⁰⁹

Criticism has been directed against the aforesaid framework as being overly regulatory. The reality is that the legislative system which we have is a necessary means enabling individuals to assert and enforce their fundamental rights and freedoms. It would be naive to conceive of a constitutional dispensation guaranteeing

¹⁶⁰⁴ See subparagraphs 2.2.1 to 2.2.3 and 2.2.8 above.

¹⁶⁰⁵ See subparagraphs 2.2.2 to 2.2.3 above.

¹⁶⁰⁶ See subparagraphs 3.3.1 to 3.3.2 above.

¹⁶⁰⁷ See subparagraph 1.2.1 above.

¹⁶⁰⁸ See subparagraph 3.4.1 above.

¹⁶⁰⁹ See subparagraph 3.4.1 above.

fundamental rights, but without a regulatory regime which provides the mechanism by which such rights are enforced, monitored and essentially protected.¹⁶¹⁰

Whilst participatory dialogue by all role-players in our democracy is encouraged, we cannot ignore the consequences of the reality caused by the inherent imbalance of power in the employment relationship.¹⁶¹¹ This reality effectively means that issues of religious discrimination in the workplace are not addressed as and when a potential conflict of fundamental rights occurs. Religious discrimination in the South African workplace is dealt with more as an issue after the fact (in other words, after the alleged incident has taken place), rather than being addressed beforehand between the concerned parties. In the absence of constructive dialogue between the parties, the legislative and constitutional framework has in effect become the crucible for addressing religious discrimination in the South African workplace.

6.3.1 The relevance of the supremacy of the Constitution and the rule of law

The supremacy of the Constitution and the rule of law requires that the exercise of public power on the part of individuals, juristic persons or organs of state is lawful. Organs of state and private entities which employ workers must accordingly ensure that their conduct in relation to all their commercial and labour-related activities is lawful.¹⁶¹² This is not to mean that individual employers, for example in the domestic sector, are immune from having to act lawful in relation to the employment of domestic workers. In this regard, the employment relationship is to be governed by the national legislative framework which protects the rights and interests of both parties in the aforesaid relationship by giving effect to the overarching imperative of fair labour practices enshrined in the Constitution. This regulatory framework was considered in Chapter 3. It essentially gives effect to the rule of law by ensuring the enforcement of rights and obligations. Underscoring the effective balancing of conflicting fundamental rights is the role played by adjudication of our courts. An

¹⁶¹⁰ See subparagraphs 3.4.1 to 3.4.2 above.

¹⁶¹¹ See subparagraphs 2.9.4, 3.2.4 and 3.4.3 as well as paragraph 5.4 above.

¹⁶¹² See subparagraphs 2.8.1 to 2.8.3 above.

analysis of South African case law¹⁶¹³ does indicate a strong reliance placed on reasonableness and justifiability with reference to what is rational and proportional in any given circumstances when adjudicating conflicting fundamental rights.¹⁶¹⁴

6.3.2 The importance of substantive equality

A formal approach to the interpretation of equality fails to actually address the essential concern of what fair treatment attempts to address. Treating all people the same would account for little because in certain cases and instances certain individuals have specific needs different from those of other individuals. This calls not for equal treatment but for differential treatment taking into account the specific needs in question. Thus, when equality is conceived of in the sense of substantive equality, it means making due allowance for differentiating between persons for valid reasons.¹⁶¹⁵ The substantive approach to equality has been endorsed by our Constitutional Court as the only way in which equality can properly be interpreted and adjudicated.¹⁶¹⁶

A substantive approach seeks not to administer the same equal treatment to all alike. It seeks to treat individuals on the basis of their needs and circumstances and context in which the merits of their case must be assessed. This is especially helpful in a country like South Africa that does not have a homogenous citizenry. South Africa is a pluralistic society in which different individuals live who have different needs.¹⁶¹⁷

6.3.3 The importance of human dignity

Human dignity has been described as essential on account of the role it plays as a foundational value in our constitutional framework, although some scholars continue to criticise and debate whether the very notion of human dignity *per se* is sufficiently

¹⁶¹³ See subparagraphs 5.3.1 to 5.3.4 above.

¹⁶¹⁴ See subparagraph 3.2.2 to 3.2.4 above.

¹⁶¹⁵ See paragraphs 3.2 and 3.2.1 above.

¹⁶¹⁶ See subparagraph 5.3.4 above.

¹⁶¹⁷ See subparagraph 2.4.3 above.

cogent to warrant the place it is said to occupy in general equality jurisprudence.¹⁶¹⁸ I contend that this school of thought lacks sufficient merit for the simple reason that the inherent worth of a human being is an ingredient which is fundamentally meaningful to what it is that constitutes a human being capable of reasoning and making moral choices.¹⁶¹⁹

6.3.4 The general limitation of rights

Whether or not a specific right is to be limited requires consideration of what is reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity, taking into account the five material factors listed in the Constitution.¹⁶²⁰ It has been expressly noted by our Constitutional Court that notions of what is reasonable and justifiable must necessarily take account of what is rational and proportional in the circumstances of any case.¹⁶²¹ By implication, this requires a balancing of rights exercise.¹⁶²²

Establishing whether a fundamental right, such as freedom of religion (on the part of the employee) should be limited may, with reference to the requirements of section 36, appear to require a mere formal analysis. However, divergent conflicting interests flow from a potential limitation, such as the nature of the right to be limited, the extent, if at all, to which it should be limited, the purpose to be served by its limitation and the interest advanced by the limitation. Whether the limitation should be permitted is a matter for interpretation relating to the content and scope of the relevant right and any conflicting interests.¹⁶²³

6.3.5 Interpreting the text of the Constitution

The aim of interpretation is to gather as much information from what the text permits. The purpose is not merely to understand the linguistic and textual meaning

¹⁶¹⁸ See subparagraph 2.7.2 above.

¹⁶¹⁹ See subparagraphs 2.7.1 to 2.7.2 above.

¹⁶²⁰ See subparagraph 3.2.3 above.

¹⁶²¹ See subparagraphs 3.2.3 to 3.2.4 above.

¹⁶²² See subparagraphs 3.2.3 to 3.2.4 above.

¹⁶²³ See subparagraph 5.3.4 above.

of the words but to interpret them in a manner that is conducive to the overall purpose sought to be achieved by the Constitution as a whole.¹⁶²⁴

Interpreting according to the values of the Constitution gives effect to the will of the people of South Africa whose diverse interests are represented, articulated and captured by the fundamental provisions. This is the constitutional mandate which calls for a value judgment that seeks to advance in the most optimal manner the values underlying a constitutional democracy. The interpretation must be conducive to these values inasmuch as they must not only support the democratic ideal, but must seek also to advance the interests of everyone in the democratic dispensation in a way that gives effect to social justice.¹⁶²⁵

When viewing the judgment of a case in its entirety as well as the reasons given in support for the finding, it becomes clear when a court has attempted to give expression to the values infusing the Constitution; in particular values resonating with freedom, equality and human dignity. Most significantly, by giving effect to such values, these decisions do give effect to transformative justice and contribute to the achievement of social justice.¹⁶²⁶

6.3.6 Interpreting legislative provisions

Words and expressions used in statutes must be interpreted according to their ordinary meaning.¹⁶²⁷ However, it has also been recognised that such legislation must be interpreted through a "generous" and "purposive" lens in alignment with the way in which the Constitution is interpreted.¹⁶²⁸

Interpretation of labour legislation must not only give effect to the purpose of the legislative provision but must also advance social justice and labour peace.¹⁶²⁹ This is particularly important in informing the essence of transformative justice and

¹⁶²⁴ See subparagraphs 3.3.2 to 3.3.3 above.

¹⁶²⁵ See subparagraphs 2.9.2 and 2.9.3 above.

¹⁶²⁶ See subparagraphs 2.9.2 and 2.9.3 above.

¹⁶²⁷ See subparagraphs 3.3.1 and 3.4.1 above.

¹⁶²⁸ See subparagraph 3.3.3 above.

¹⁶²⁹ See subparagraphs 3.4.1 and 3.4.2 above.

particularly addressing religious discrimination in the South African workplace in a manner conducive to maintaining the employment relationship, celebrating diversity throughout our society and the workplace.¹⁶³⁰

If substance and meaning is given to the terms "generous" and "purposive" interpretation, this means an interpretation which is most liberal having regard to all the facts and circumstances. If this is the case, then this interpretation must make allowance even for minority views, as marginalised as such views may be. This was the concern articulated by the dissenting judgment in the *City of Tshwane* case.¹⁶³¹ The cogency of such an argument is reflected in the principle running through our equality jurisprudence of giving effect to substantive equality; namely, that in a democratic dispensation even the most marginalised and minority of interests warrant protection¹⁶³² since they too constitute the fabric of our diverse society.

Such "generous" and "purposive" interpretation gives impetus to a "nuanced context-sensitive" test applied by our courts when adjudicating religious discrimination disputes.¹⁶³³ When employing a "generous" and "purposive" approach, the so-called negative and positive obligations imposed upon an employer in respect of taking appropriate measures when addressing issues of expression of religious beliefs in the workplace must also be taken into account.¹⁶³⁴

6.3.7 The notion of reasonable accommodation

Although the notion of reasonable accommodation referred to in the EEA is employed with reference to persons from a designated group, this notion has come to be used in general in equality jurisprudence and in particular in religious discrimination disputes to adopt measures to make appropriate and suitable allowance for the

¹⁶³⁰ See subparagraphs 2.4.3 to 2.4.4 and 2.9.3 to 2.9.4 above.

¹⁶³¹ See subparagraph 2.9.3 above.

¹⁶³² Subject to the "no harm" *caveat* as discussed in subparagraphs 2.7.2 and 5.4.2 above.

¹⁶³³ See subparagraph 5.4.6 above.

¹⁶³⁴ See subparagraph 5.4.6 above.

individual's particular make-up. The duty to reasonably accommodate forms an essential ingredient of the enquiry into the justification of the limitation.¹⁶³⁵

Essentially in addressing measures taken by the employer, one is required to contextualise such steps with reference to what is rational and reasonable in the workplace. In our constitutional dispensation diversification and tolerance is a peremptory requirement.

There can be little doubt that reasonable accommodation has played and will continue to play a significant role in the determination of religious discrimination disputes in the workplace. The impetus that reasonable accommodation gives to equality jurisprudence is noteworthy, not least on account of the fact that it is a means of assessing what measures have been taken to embrace an individual who is different.¹⁶³⁶

Reasonable accommodation, as defined currently in terms of the EEA, is restrictively defined and more closely aligned to address instances of accommodating disabled persons.¹⁶³⁷ On the other hand the notion of reasonable accommodation employed by PEPUDA has a broader, less restrictive meaning.¹⁶³⁸ Although PEPUDA is applicable to non-workplace discrimination disputes, until such time as the definition of reasonable accommodation in the EEA has been amended so that instances of religious workplace discrimination can also fall within its ambit, our courts will have no option but to follow the guidelines offered by PEPUDA.

¹⁶³⁵ See subparagraphs 3.4.2 and 5.4.5 above.

¹⁶³⁶ See subparagraph 5.4.5 above.

¹⁶³⁷ See subparagraph 3.4.4.1 above.

¹⁶³⁸ See subparagraph 3.4.4.2 above.

6.4 Comparative jurisprudence

To critically analyse and discuss how Canadian law addresses religious discrimination in the workplace with the view to seeing to what extent, if any, we can benefit from Canadian law was an aim of this study.¹⁶³⁹

6.4.1 *Relevance of Canada*

Canada has been singled out as a nation for its liberal democratic status based on an egalitarian culture. It has been the focus of many South African Constitutional Court decisions. A notional link is shared between Canada and South Africa with reference to the fact that both countries regard their constitutions as supreme. In addition, both countries are highly plural in terms of their racial, social, cultural and ethnic make-up.¹⁶⁴⁰

Common to both countries is the idea of transformative constitutionalism. Canada has a conceptual notion of the "living tree" which its constitutional jurisprudence justice fosters.¹⁶⁴¹

6.4.2 *Canadian secularism*

The nature of the God referred to in the Preamble of the Canadian Charter has been the subject matter of extensive debate. This is on account of Canada's apparent secular make-up. Human rights legislation, in addition to Canadian case law, makes it evident that Canada can be notionally regarded as we do South Africa, in terms of which the state does not interfere with the fundamental freedom which an individual or an association has to exercise their right of religious freedom.¹⁶⁴²

6.4.3 *The Canadian Charter*

The Canadian Charter effectively regulates interactions between the state and the individual. For over 25 years the Canadian Charter has served as emblematic of the

¹⁶³⁹ See subparagraph 1.2.1 above.

¹⁶⁴⁰ See subparagraph 4.2.3 above.

¹⁶⁴¹ See subparagraphs 4.2.1 and 4.2.2 above.

¹⁶⁴² See subparagraph 4.2.5 above.

values and principles of rights and freedoms upon which the liberal democratic state of Canada is based.¹⁶⁴³

Interpretation of the equality rights in the Canadian Charter have contributed to equality being conceived of as substantive equality. Interpretation has also found human dignity to be axiomatic to equality and specifically the right to religious freedom guaranteed under the Canadian Charter.¹⁶⁴⁴

6.4.4 The human rights framework

The Canadian human rights framework's main purpose and effect is to provide remedies for employees in the private sector, taking into account that the Canadian Charter only has vertical application. The human rights legislation (also known as codes) is regulated at provincial level and is given quasi-constitutional status on account of the substance which it seeks to address, namely the affirmation of equality through ensuring antidiscrimination measures are in place. This entire framework of human rights legislation must be consistent with the tenets of the Canadian Charter which is paramount over all other law including provincial legislation. Put differently, the human rights legislation must ensure that it gives life and impetus to the spirit of the Canadian Charter.¹⁶⁴⁵

Specific relevant legislation in this regard is the Canadian Human Rights Act (the CHRA) which applies on a federal level to all areas of business or the workforce in relation to the provision of goods and services; however, in certain sectors, such as the banking sector, railways, airlines and telecommunications, its area of coverage is limited.

The workforce not covered by either the CHRA or the Canadian Charter has to rely on provincial human rights antidiscrimination legislation.¹⁶⁴⁶ In this regard, Ontario was considered and in particular the Human Rights Code of Ontario (the

¹⁶⁴³ See subparagraph 4.3.1 above.

¹⁶⁴⁴ See subparagraph 4.3.1 above.

¹⁶⁴⁵ See paragraph 4.3 above.

¹⁶⁴⁶ See subparagraph 4.4.1 above.

OHRCode).¹⁶⁴⁷ The human rights legislation which has been enacted at a provincial level is colloquially referred to as human rights codes. The enactment of these codes in the various provinces has a common denominator, namely to address and illuminate unfair discrimination in the private sector and in particular the workplace.¹⁶⁴⁸

6.4.5 A merger of direct and indirect discrimination in Canada

Differentiating between whether discrimination is direct or "adverse effect" discrimination is important because it has implications for the different defences in Canada. Until 1999, if direct discrimination was established, the respondent could justify the discrimination on the basis that the standard was set for a BFOR. The standard would qualify as a BFOR if the respondent could prove, honestly and in good faith, the reasonableness of the standard, and that it did not impose an unreasonable burden on those to whom it applied. If the respondent could not establish the aforesaid, the standard would be struck down as discriminatory.¹⁶⁴⁹

The distinction between direct and adverse impact (indirect) discrimination has been viewed as a barrier to systemic inequality, meaning that the Canadian courts are more concerned with giving effect to substantive equality than drawing notional formal distinctions between direct and indirect discrimination. For this reason, all limitations imposed by an employer on the exercise of a religious right in the workplace will be considered in a broad context taking due account of reasonableness and rationality. This is especially so in relation to looking at the BFOR. Moreover, the reasonable accommodation test has been interpreted broadly in that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.¹⁶⁵⁰

¹⁶⁴⁷ See subparagraph 4.5.2.2 above.

¹⁶⁴⁸ See subparagraphs 4.5.2.2 and 4.5.2.3 above.

¹⁶⁴⁹ See subparagraph 4.5.3.2 above.

¹⁶⁵⁰ See subparagraph 4.5.3.3 above.

6.4.6 Canadian Supreme Court jurisprudence

Supreme Court of Canada cases indicate an affirmation of Canadian secularism in addition to a confirmation of the accommodation of religious beliefs in a pluralistic society.¹⁶⁵¹ There is also evidence of a strong association between a society committed to the attainment of equality by means of a fundamental premise based on tolerance of diversity and the imperative of human dignity as an inexorable part of an individual's self-identity, determination and fulfilment as a human being in a modern society.¹⁶⁵²

From the aforesaid analysis of Canadian jurisprudence this study is able to benefit in the following manner:

- What matters is not so much the distinction between direct and indirect discrimination but the manner in which effect is given to the principle of substantive equality. This is particularly relevant for religious discrimination in the workplace on account of the fact that most, if not all, instances of religious discrimination tend to manifest themselves as indirect rather than direct forms of unfair discrimination.
- A "generous" rather than "restrictive" interpretation of reasonable accommodation has also been formulated in Canadian jurisprudence. It is an interpretation which seeks to ask what measures, short of hardship, did the employer take to accommodate the employee. In addition, it also extends the enquiry by including the employee into the analysis and thereby notionally viewing the analysis in terms of mutual accommodation on the part of both parties.

¹⁶⁵¹ See subparagraphs 4.6.1 to 4.6.3 above.

¹⁶⁵² See subparagraphs 4.6.1 to 4.6.3 above.

- The overall impact which the discrimination has on the dignity of the claimant is a crucial ingredient in the analysis of the overall enquiry into fairness on account of human dignity being an inexorable part of equality.

6.5 South African court jurisprudence

Critically analysing and discussing the tests our courts have developed in adjudicating disputes of religious unfair discrimination and reflect on whether such tests are appropriate was an aim of this study.¹⁶⁵³

6.5.1 A "nuanced context-sensitive" approach to adjudication

As previously discussed, the rights in the Bill of Rights are not absolute. They are subject to the general limitation of rights clause. Similarly, rights enforced in terms of national legislation suffer to be limited in terms of the defences afforded employers under the specific statutory provisions. The real challenge is in the ability to adjudicate conflicting fundamental rights and interpreting such conflict in a manner that gives effect to the underlying values and principles of the Bill of Rights.¹⁶⁵⁴ More significantly, cases are adjudicated in a "nuanced context-specific" manner, meaning special regard is had not only to their factual matrix but to the unique dynamics at play and specifically the underlying inherent tension between the competing rights.¹⁶⁵⁵

Courts must interpret competing interests in religious discrimination disputes in the workplace in a manner that gives effect to and most appropriately articulates the values of the Constitution; not merely to give notional effect thereto but to achieve a purpose, namely to transform our society from its former state of intolerance to a state in which we may celebrate and accommodate diversity.¹⁶⁵⁶

¹⁶⁵³ See subparagraph 1.2.1 above.

¹⁶⁵⁴ See subparagraphs 5.3.4 and 5.4.2 above.

¹⁶⁵⁵ See subparagraph 5.4.6 above.

¹⁶⁵⁶ See subparagraphs 5.4.1 and 5.4.6 above.

6.5.2 Discrimination and impetus to reasonable accommodation

The study has shown how our courts have used the reasonable accommodation test in various cases. It has also been extended, most notably, for the first time in *Media24* as a notion of mutual accommodation.¹⁶⁵⁷

For its development and appropriate application the reasonable accommodation test depends essentially on the "nuanced context-sensitive" approach adopted by our courts when adjudicating workplace-related religious unfair discrimination disputes. Notionally, reasonable accommodation must be more than merely asking what steps have been taken by the employer to "put up with" or accommodate the particular religious beliefs of the employee as exercised in the workplace. To give optimal effect to the overarching imperative of substantive equality, we must require that the notion is conceived of in terms of mutual reasonable accommodation. In other words, what steps have both parties in the employment relationship taken to address the issue of conflicting fundamental rights. This is also a means of giving effect to encouraging dialogue between employee and employer. Engagement in responsible and constructive dialogue can have positive effects, not least of which is enabling the parties to resolve the problem themselves without having to resort to external dispute resolution mechanisms.¹⁶⁵⁸

The following aims of this study are discussed below:

- how effective South African labour law has been in addressing religious unfair discrimination in the workplace;
- suggesting proposals aimed at addressing religious unfair discrimination in the workplace more optimally, and
- how to further improve accommodation and regulation of religious freedom in the South African workplace.

¹⁶⁵⁷ See subparagraph 5.4.6 above.

¹⁶⁵⁸ See subparagraphs 5.4.2 and 5.4.6 above.

6.6 Main findings

This study examined to focus on the role played by South African labour law in our constitutional dispensation in addressing religion-related unfair discrimination in the workplace. In accordance with this study, the legislative and constitutional framework that seeks to address and regulate religion-based unfair discrimination in the workplace was considered. Regard had to be had to the imperative of transformative constitutionalism and its relevance to religious discrimination in the context of this study. The South African jurisprudence of general equality discrimination has developed principles which our courts apply in dealing with unfair discrimination matters. Consequently, account had to be taken not only of religion-related unfair discrimination disputes in the workplace but also of other instances of unfair discrimination not necessarily based on religion. Even when focusing upon religion-related unfair discrimination, account was taken of disputes that were not workplace-related. This study took into account the Canadian regulation of religious unfair discrimination in the workplace. The main findings based on this study are set out below.

6.6.1 South Africa as a secular pluralistic society and the need for tolerance

The description of South Africa as a "rainbow nation" captures the make-up of its diversified population. There is a rich make-up of divergent races, cultures, views, ideologies and opinions.¹⁶⁵⁹ This is in relation to matters that are as much non-religious as they are religious. Normatively, the word "secular" is understood to mean "non-religious". Whilst some jurisdictions like the US are well known for their "establishment clause" in terms of which there is a constitutional recognition of no interference by government in the realm of religion,¹⁶⁶⁰ South Africa is not less secular due to the lack of such a provision in the Bill of Rights.¹⁶⁶¹ It is important that South Africa must be seen in the context of there being no official or formal policy in

¹⁶⁵⁹ See subparagraphs 2.4.1 to 2.4.3 above.

¹⁶⁶⁰ See subparagraphs 2.4.1 to 2.4.3 above.

¹⁶⁶¹ See subparagraphs 2.4.1 to 2.4.3 above.

terms of which religion is enforced upon the citizens or members of the country.¹⁶⁶² Religious rights and freedoms, as with all other fundamental rights, are subject to the general limitation of rights clause in the Bill of Rights.¹⁶⁶³

An essential underpinning dynamic to a healthy harmony between secular (non-religious) interests and the expression of freedom of religion is a sense of tolerance.¹⁶⁶⁴ A potential clash of these fundamental rights and interests creates inherent tensions in society and communities that will result in disputes, conflicts and hostility unless some means of tolerance is sought.¹⁶⁶⁵ The ability to tolerate has far-reaching benefits. The only limitation to be imposed on tolerance is that conceptually nothing should be tolerated that is harmful to another.¹⁶⁶⁶ Tolerance must be embraced because it is constructive and uniting. It gives meaning to our sense of humanity, community, society. More significantly, it is indicative of a commitment to change.¹⁶⁶⁷ For South Africa, this commitment to change is expressed in the notion of transformative constitutionalism.¹⁶⁶⁸ The success of our democratic dispensation and the realisation of social justice depends crucially on transformative constitutionalism.¹⁶⁶⁹

However, whilst tolerance has been noted as important for purposes of recognising differences and, more importantly, effectively facilitating cooperation, it has been noted whether tolerance *per se* is sufficient if we are truly to encourage accommodating diversity and multiculturalism. As previously mentioned,¹⁶⁷⁰ our differences, whatever they may be, should rather be conceived of in the sense of being celebratory rather than subject to tolerance. This concept is expressive of a more authentic sense of a commitment to a democratic order in which diverse interests are included, than merely tolerated or "put up with". The latter term tends

¹⁶⁶² See subparagraph 2.4.3 above.

¹⁶⁶³ See subparagraphs 2.4.2 and 2.4.4 above.

¹⁶⁶⁴ See subparagraph 2.9.5 above.

¹⁶⁶⁵ See subparagraph 2.9.5 above.

¹⁶⁶⁶ See subparagraph 2.9.5 above.

¹⁶⁶⁷ See subparagraph 2.9.2 above.

¹⁶⁶⁸ See subparagraphs 2.9.2 to 2.9.3 above.

¹⁶⁶⁹ See subparagraphs 2.9.2 to 2.9.4 above.

¹⁶⁷⁰ See subparagraph 2.9.5 above.

to render the underlying ethos of or commitment to change and transformation illusory. Moreover, there is a strong conceptual parallel between accommodation of differences and the need for reasonable and mutual accommodation in the workplace of the very differences between employee and employer that would otherwise render the ongoing working relationship impractical if not impossible for either party.

In accordance with the sentiment expressed above, there is more cogency, it is argued, in the dissenting judgment of the *City of Tshwane*.¹⁶⁷¹ The dissenting judgment effectively endorses the principle that all differences in our constitutional dispensation must be celebrated in giving effect to transformative constitutionalism and *ubuntu*; moreover, that the latter notion should not exclude minority views which may identify with views from the past. These views too, make up the collective of who we are as a multicultural society.

6.6.2 The definition and explanation of what is meant by religious unfair discrimination

This study has established that there is no universal definition of religion.¹⁶⁷² Notwithstanding, our courts have attempted to gather an understanding of the term in terms of its linguistic and textual meaning as it appears in the Bill of Rights in addition to how it is expressed in international and foreign law, namely in Canada¹⁶⁷³ and in international standards such as the UDHR, the ECHR and ILO Convention 111. The collective notional understanding of the term is that it is most commonly expressed in texts alongside notions of "conscience", "belief", "opinion", or even "creed".¹⁶⁷⁴ Religion is given expression to as one of the basic fundamental human rights expressed as spiritual values and ideals or even as a philosophy.¹⁶⁷⁵ Religion is better understood in the broadest conceptual term as referring to something which is a subjectively held "belief" yet capable of manifesting itself by way of a "culture" or "way of life". It must even be understood in terms of "any religious belief" or "lack of

¹⁶⁷¹ See subparagraph 2.9.3 above.

¹⁶⁷² See subparagraph 2.2.8 above.

¹⁶⁷³ See subparagraph 2.2.6 above.

¹⁶⁷⁴ See subparagraph 2.2.4 above.

¹⁶⁷⁵ See subparagraph 2.2.8 above.

"belief".¹⁶⁷⁶ Understanding religion in terms of a broader meaning than a restrictive "strictly religiously" charged sense of the term permits of a more comprehensive understanding of religious freedom as a constitutional guarantee.¹⁶⁷⁷

Unfair discrimination as a legal normative concept has evolved to find expression in the South African Bill of Rights and relevant legislation.¹⁶⁷⁸ As a legal normative concept, unfair discrimination is understood to mean being something more than mere differentiation or being treated differently to others. It is necessary to show that one is treated differently on a ground that is arbitrary or capricious, the effect of which is hurtful.¹⁶⁷⁹ To treat another person differently for reasons related to religion constitutes unfair discrimination. This is on account of the fact that it violates the victim's right to equality and human dignity.¹⁶⁸⁰ Equality as aforesaid must be understood to mean substantive, as opposed to formal, equality.¹⁶⁸¹ Whilst there has been some debate as to whether human dignity as a concept has any real relevance,¹⁶⁸² it would appear that human dignity is generally regarded by most scholars and particularly by the courts in the adjudication of unfair discrimination disputes as playing an important role in the analysis of substantive equality.¹⁶⁸³

In giving effect to the notion of substantive equality it is important that this is conceived of in a "generous" and "purposive" approach which accords with our jurisprudence of statutory and constitutional interpretation. As such, when considering the (un)fairness of an employer's defence to a claim of religious discrimination in the workplace it should not be conceived of through the narrow confines of the strict wording currently provided by the EEA, LRA or even PEPUDA. Sufficient room should be made for an overall conspectus to be had of the so-called negative and positive duty that was on the respondent employer confronted by an

¹⁶⁷⁶ See subparagraphs 2.2.1 to 2.2.2 above.

¹⁶⁷⁷ See subparagraph 2.2.8 above.

¹⁶⁷⁸ See subparagraphs 2.5.1 to 2.5.3 above.

¹⁶⁷⁹ See subparagraphs 2.5.2 and 2.7.2 above.

¹⁶⁸⁰ See subparagraphs 2.7.1 to 2.7.2 above.

¹⁶⁸¹ See subparagraphs 2.6.1 to 2.6.2 above.

¹⁶⁸² See subparagraph 2.7.2 above.

¹⁶⁸³ See subparagraphs 2.6.2 and 2.7.2 above.

instance of expression of religious freedom in the workplace. An analysis of a negative duty may very well lead the court to find that on account of the fact that the employer had no knowledge or was unaware of the employee's religious belief, there was no obligation on the employer to take any steps in the circumstances.

6.6.3 The need for religious unfair discrimination to be addressed in the workplace

This study describes the workplace notionally as a microcosmic image in terms of our macrocosmic society. In this sense, it can only be expected that the multicultural diversity that characterises our society will also be visible in the workplace.¹⁶⁸⁴ The inherent imbalance of power in the employment relationship often places the employee in a vulnerable position.¹⁶⁸⁵ Both parties in the employment relationship enjoy the same fundamental rights, namely equality; human dignity; religious freedom; freedom of expression; freedom of association and fair labour practices. In addition, an employer is afforded the right to freedom of trade.¹⁶⁸⁶

All of the aforesaid fundamental rights are subject to the general limitation clause in the Bill of Rights. It is when the expression of the right to religious freedom in the workplace on the part of an employee is limited in a certain way by the employer that potential for conflict arises, or alternatively, where an employer as a religious association seeks to exclude an applicant for employment. Manifestations of conflicts of rights and interest are varied. They can be based on direct discrimination in the form of a dismissal of an employee by an employer on grounds of religion relating to prejudice against the particular religion. An employer could dismiss an employee on the ground that the way in which the employee manifests his religious belief is contrary to the IROJ. It can also be found in instances where an employer refuses to employ a job applicant on the basis that the IROJ requires the applicant to be of a particular religious faith. An employer could impose what appears to be a neutral standard or policy in the workplace but which adversely affects only employees of a

¹⁶⁸⁴ See subparagraphs 2.3.1 and 2.4.4 above.

¹⁶⁸⁵ See subparagraph 2.9.4 above.

¹⁶⁸⁶ See subparagraph 2.9.4 above.

particular religious faith and in this manner there is unfair indirect discrimination which takes place.¹⁶⁸⁷

A complexity unique to the employment relationship is the need to maintain the trust imperative whilst also addressing situations of how to find the optimal balance when fundamental rights of parties to the relationship compete. Put differently, when the exercise of the right to religious freedom on the part of any party to the employment relationship is limited in any way, how is the optimal balance of such competing rights to be addressed?¹⁶⁸⁸ In many instances, however, the analysis ironically is *ex post facto*, in that after an employee has been dismissed by an employer for reasons relating to religion, our courts are called upon to adjudicate the dispute. By this time the trust relationship has long since become irretrievably broken down.

This study does indicate what factors a court is likely to take into account when considering whether any limitation on the expression of religious freedom in the workplace was justified. The reference to the constitutional and legislative framework and the South African case law on religious discrimination makes it clear that any limitation will be adjudicated with reference to addressing the issue of substantive equality which will necessarily have regard to the impact of the religious unfair discrimination on the human dignity of the victim.¹⁶⁸⁹ The adjudication takes due account of the IROJ¹⁶⁹⁰ in addition to the issue of reasonable accommodation.¹⁶⁹¹ These issues are considered in the context of what is rational, reasonable and proportionate in the circumstances of each case.¹⁶⁹²

It would benefit both parties to the employment relationship, as role-players in our "participatory democracy", to take up the challenge of addressing the issue of unfair discrimination on the basis of religion¹⁶⁹³ by having regard to the above factors in

¹⁶⁸⁷ See subparagraph 3.2.4 above. Also see subparagraphs 2.9.2 and 5.4.2 above.

¹⁶⁸⁸ See subparagraphs 3.2.2 to 3.3.3 above.

¹⁶⁸⁹ See subparagraphs 2.4.4 and 2.5.2 above.

¹⁶⁹⁰ See subparagraph 5.4.4 above.

¹⁶⁹¹ See subparagraph 5.4.5 above.

¹⁶⁹² See subparagraphs 3.2.2 to 3.2.3 and 5.4.6 above.

¹⁶⁹³ See subparagraph 2.9.4 above.

seeking constructive ways and measures to deal with issues of religious freedom in the workplace and any restrictions or limitations that may be sought to be placed thereon. However, the disparity in the bargaining power and the inherent imbalance in the employment relationship are significant factors that impede constructive dialogue. The result is that religious discrimination in the workplace is currently addressed more in the form of the legislative and constitutional framework as an occurrence after an incident has taken place. All reported cases analysed in this study are evidence of this fact. Admittedly, this study has not purported to engage on empirical research of any instances where religious discrimination in the workplace have been constructively addressed by the parties through constructive dialogue and thereby avoided formal adjudication. On the other hand, in the course of the literature reviewed in this study, there has been no evidence of any particular instance in the South African workplace where religious discrimination is currently being addressed by way of dialogue between employee and employer.

Consequently, it is my finding that the current legislative and constitutional framework plays a significant role in regulating and addressing religious discrimination in the workplace.

6.6.4 The relevance of the legislative and constitutional framework in place regulating religious unfair discrimination in the workplace

The importance accorded to equality is evidenced by the fact that there is a constitutional and legislative framework addressing ways in which to avoid unfair discrimination and establish a more egalitarian society.¹⁶⁹⁴ The reality is that, as evidenced by our case law, claims of religious discrimination in the workplace arise from the context of facts where the employer's IROJ appear to restrict the employee's right to expression of religious freedom, alternatively where the employer has failed to accommodate the employee's religious beliefs.

There are inherent limitations to the current manner in which the legislative framework is regulated. This limitation arises from the manner in which the EEA and

¹⁶⁹⁴ See paragraph 3.4 above.

LRA seek to address the issue of determining whether a distinction on the basis of religion in the workplace can be determined to be fair or unfair. It is essentially whether or not the restriction or limitation on the religious freedom in the workplace can be justified with reference to the IROJ. Some may argue that the new amendments to the EEA in terms of section 11(2) which provide for unfair discrimination on an arbitrary ground do in fact broaden the scope of analysis into the overall determination of fairness. However, it should be borne in mind that from a practical point of view it is unlikely a claimant would pursue a religious freedom dispute on the ground of it being "arbitrary" for the simple reason that it already qualifies as a listed ground under section 6(1). More importantly, there is no reason why a claimant would seek to attract the additional proof required to be discharged under section 11(2) of the EEA.

Proving fairness of a distinction in the basis of religion with reference to reasonable accommodation is a recognised basis of defence by our courts. Unfortunately, the statutory provision of reasonable accommodation in terms of religious discrimination in particular is not given expression to in either the EEA or the LRA. For this we turn to PEPUA which, although applicable to non-workplace discrimination disputes, has to be acknowledged, in terms of the requirements set out in section 14 of determining (un)fairness, as being considerably more far-reaching. In terms of the factors listed under section 14 PEPUA offers greater guidance on what should be regarded as fair.

The finding of this study is that whilst the legislative and constitutional framework does go far in addressing religious discrimination in the workplace, the restrictive wording of the EEA and LRA in determining fairness is too narrow and in its current form there is a need for appropriate amendments to both the EEA and LRA. In this sense, the current legislative regulatory provisions for religious unfair discrimination are not sufficiently effective in optimally addressing the overall determination of establishing the fairness of discrimination. In other words, amendments are needed which effectively permit a court, tribunal or forum to take into account a number of factors other than the mere IROJ in determining fairness. In addition, this study has

found that in no instance have any of the guidelines provided by SACCRF been taken into account by any court or CCMA award.

A parallel can be drawn between the constitutional guarantee to equality and the entitlement that the employee and employer both have to fair labour practices. In addition, the Constitution must be one which seeks to achieve equality through means of substantive as opposed to formal equality.¹⁶⁹⁵ Whether the limitation should be permitted is a matter for interpretation relating to the content and scope of the relevant right and any conflicting interests. It can only be determined with reference to the facts of a particular case. Limiting rights in accordance with what is considered to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom calls for an analysis of fundamentally conflicting rights and essentially how to balance such rights taking into account a variety of factors. The conceptual balance involved in the determination of how to give more effect to one right by curtailing the full exercise of another right calls for an exercise in proportionality or a balance of interests that must be determined subject to a standard of reasonableness. In other words, which right outweighs another competing right?

This framework creates the normative regulatory basis upon which rights and obligations are not only determined, but also interpreted by our courts. Both the constitutional and legislative regime impose duties upon our courts to interpret the text giving expression to religious freedoms and their limitations, in a particular context.¹⁶⁹⁶ As such, it is imperative that this legislative framework is amended, as previously stated, in a manner that permits our courts when adjudicating upon a dispute to have regard to as many factors as possible. In this way it facilitates and gives impetus to the "nuanced context-sensitive approach" required in the adjudication of religious discrimination disputes.

¹⁶⁹⁵ See subparagraph 3.2.1 above.

¹⁶⁹⁶ See subparagraphs 3.2.2, 3.2.3 and 3.3.1 above.

6.6.5 Tests our courts have developed in adjudicating disputes relating to religious unfair discrimination

Striking a proper balance between fundamental human rights that are in conflict is not an easy exercise. The inherent tension arising from competing rights calls for a value-laden decision to be made with regard to what right deserves greater protection in declaring that the other competing right is less deserving.

Cases of blatant unfair discrimination on the ground of religion in the workplace are *prima facie* less challenging simply because conceptually, factually and legally we have come to recognise the right to equality and the wrong when one individual treats another individual differently in a way that is hurtful simply because the victim holds or expresses a particular religious view.

What is more difficult to assess are cases and instances where, for example, an employer has imposed a standard or work policy which is apparently neutral in that it applies to all the employees in the workplace. However, the effect thereof has a negative impact upon employees of a certain religion.

Accordingly, our courts have recognised the need to address equality in the substantive as opposed to the formal sense of the term.¹⁶⁹⁷ An important aspect thereof is the notional extent to which the human dignity of the victim has been adversely affected by the unfair discrimination.¹⁶⁹⁸ Since unfair discrimination is not presumed in cases of indirect discrimination, the applicant would be required to prove that the measure or standard which the employer adopted has a disproportionate effect which is unfair.¹⁶⁹⁹

Essentially, when assessing a case of religious discrimination on either a listed or unlisted ground, and determining whether the discrimination is fair or the standard is disproportionate respectively, our courts have adopted what is referred to as a

¹⁶⁹⁷ See subparagraphs 3.2.1, 3.2.2 and 3.3.3 above.

¹⁶⁹⁸ See subparagraphs 2.7.1 to 2.7.2 above.

¹⁶⁹⁹ See subparagraph 3.2.4 above.

"nuanced context sensitive" approach.¹⁷⁰⁰ Depending on the type of religious discrimination dispute in question, the court has regard to different factors. In instances where an employee's freedom of religion is limited due to the IROJ, the legitimacy of such requirement is considered with reference to the rationality and reasonableness of the IROJ. In addition, what our courts also employ is the test of reasonable accommodation to enquire the extent to which the employer has taken steps to seek ways in which despite the IROJ, the employee can somehow still be retained in the workplace in some other capacity. In instances of indirect discrimination, and in determining the disproportionate nature of the standard or measure, the courts also have regard to the IROJ and the notion of reasonable accommodation.¹⁷⁰¹ Whilst opinions vary as to the extent to which proportionality impacts upon the application and assessment of the above tests, it is argued that there is a basis for proportionality to play a role in the adjudication of disputes for the simple reason that a consideration of competing rights demands that one takes into account notional concepts of the extent to which a fundamental right should be limited and thus outweighed by advancing the interests of a competing right. The notion of a reasonable accommodation test applied by the Canadian courts has been developed in the context of extending it to mutual accommodation, in that it requires both parties to the employment relationship to seek measures to address the problem of conflicting rights.¹⁷⁰² It is argued that there is room in our law for the notion of reasonable accommodation to be extended and developed as it has in the Canadian context.¹⁷⁰³ In addition, since the Canadian courts consider whether the reasonable accommodation works any undue hardship on the employer, it is argued that such considerations would only be fair to take into account in the South African workplace setting. On the other hand, the mere question of what constitutes reasonable accommodation, some may argue, begs the question whether there is any undue hardship to the employer.

¹⁷⁰⁰ See subparagraph 5.4.6 above.

¹⁷⁰¹ See subparagraphs 5.4.4 and 5.4.5 above.

¹⁷⁰² See subparagraphs 4.5.3.2 to 4.5.3.3 above.

¹⁷⁰³ See subparagraphs 4.5.3.2 to 4.5.3.3 and 5.4.6 above.

With reference to the mutual accommodation test, the rationale for this in South African religion-related workplace unfair discrimination disputes is as follows. Notionally, both parties to the employment relationship are entitled to fair labour practices in terms of section 23(1) of the Constitution. This has imposed duties on both parties in respect of operational requirement disputes. As a result, by requiring both parties in the employment relationship to seek measures to "accommodate" the conflicting rights and interests gives greater effect to our conceptual notion of a participatory democracy which underscores the notion of transformative constitutionalism.

There was a concern expressed at the outset of this study that the authority asserted by the *Harksen* case would continue to influence future unfair discrimination cases regarding the test to be applied in determining whether discrimination in the legal normative sense of it being unfair discrimination, and thus unlawful, has taken place. To date, the test as articulated in *Harksen* has not been set aside by the Constitutional Court; however, this study has not revealed any pattern on the part of our courts that would suggest a slavish adherence to the *Harksen* test. It is argued that, whilst the determination of whether or not unfair discrimination has taken place is established in terms of the *Harksen* formula or by what Du Toit¹⁷⁰⁴ recommends, is ultimately a formalistic principled argument. What matters more is that when our courts adjudicate religious discrimination dispute matters, proper effect is given to the conceptual notion of substantive equality in a manner that gives impetus to transformative constitutionalism.¹⁷⁰⁵ To the extent that this study has found that our courts approach and adjudicate religious discrimination in general and in particular in the workplace in a "nuanced context-sensitive" approach, it is argued that effect is given to the underlying ethos of transformative constitutionalism.

¹⁷⁰⁴ See subparagraph 3.4.3 above.

¹⁷⁰⁵ See subparagraphs 2.9.2 to 2.9.4 above.

6.6.6 The effectiveness of South African labour law in addressing religious unfair discrimination in the workplace

John Locke's statement "Where-ever law ends, tyranny begins" explains the essential need for the rule of law.¹⁷⁰⁶ Express recognition is given to the fact that the democratic state of South Africa is founded on the supremacy of the Constitution and the rule of law. Consequently, the rule of law has come to notionally inform the exercise of all power and conduct in our country. Both private and public law disciplines are subject to the rule of law.¹⁷⁰⁷ Conceptually, the rule of law also informs our understanding of religious freedom and the limitations thereto in South African labour law. The rule of law extends to ensuring that fundamental rights such as religious freedom and labour practices are interpreted by our judiciary in a manner that is not only rational but also value-laden to the extent that it calls on value-laden decisions to be made in relation to competing fundamental rights.¹⁷⁰⁸

Fundamental rights such as equality, religious freedom and protection from unfair labour practices are entrenched in terms of our Bill of Rights. These are given effect to by the national legislative framework.¹⁷⁰⁹ The normative restrictions which may be perceived by this framework¹⁷¹⁰ must be contrasted with the conceptual organic impetus given to the phenomenon of religious unfair discrimination in the workplace by means of the manner in which these legislative provisions are interpreted by our courts.¹⁷¹¹ Moreover, the legislation is interpreted subject to the values and principles underlying the Bill of Rights¹⁷¹² in addition to values and principles to be garnered from international and foreign law.¹⁷¹³

Consequently it must be understood that unfair discrimination in the workplace on the basis of religion is currently being addressed by the relevant constitutional and

¹⁷⁰⁶ See subparagraph 2.8.1 above.

¹⁷⁰⁷ See subparagraphs 2.8.1 to 2.8.3 above.

¹⁷⁰⁸ See subparagraphs 2.8.1 to 2.8.3 above.

¹⁷⁰⁹ See paragraph 3.4 above.

¹⁷¹⁰ See subparagraph 3.4.1 above.

¹⁷¹¹ See subparagraphs 3.4.1 and 3.4.2 above.

¹⁷¹² See subparagraphs 3.4.1 and 3.4.2 above.

¹⁷¹³ See subparagraphs 3.4.1 to 3.4.5 above.

legislative framework. Essentially, the enforcement of this framework is guaranteed by our courts in terms of the dispute resolution procedures which are given to victims alleging unfair discrimination on the basis of religion. It must be expressly acknowledged, however, that there is a limit to the extent to which this system optimally addresses religion-related unfair discrimination. South African labour law, as constituted by the normative provisions of the Constitution and regulatory statutory framework, addresses religious unfair discrimination in the notional sense of *ex post facto*. The preambles of the statutory framework seek to eliminate the scourge of unfair discrimination in the workplace. The reality, as evidenced from cases that are reported, is that our courts when adjudicating disputes effectively act re-actively, in the context of making a finding in relation to an existing or historical account of conflicting claims. For this reason, it is important that parties in the workplace engage in constructive dialogue to seek measures and take steps which address conflicts arising from manifestations of freedom of religion and any limitation sought to be imposed thereon.¹⁷¹⁴ Role-players in the workplace are in an optimal position to address systemic manifestations of religious discrimination. The reality, however, is that the inherent imbalance of power in the workplace is not conducive to such dialogue resulting in the fact that our courts become the final arbiters of unresolved disputes.¹⁷¹⁵

South African law is currently effective in the way in which it addresses religious discrimination in the workplace. However, for reasons already mentioned, the effectiveness of this system is not without its criticisms.

The main criticisms are as follows:

1. The wording of the current legislative provisions of the EEA and LRA needs to be amended to allow for more factors to be taken into account when considering whether a distinction made on the basis of religion was fair.

¹⁷¹⁴ See subparagraph 2.9.4 above.

¹⁷¹⁵ See subparagraphs 2.9.4 and 5.3.4 above.

2. Not all instances of religious discrimination require an employer to act or take measures. How an employer acts and what measures should and could have been taken should also be considered against the backdrop of knowledge or awareness on the part of the employer. Currently, our law does not make express allowance for so-called negative and positive duties imposed on an employer.
3. Until positive duties are imposed on employers in terms of a Code of Good Practice regulating religion in the workplace, the mere wording of the preamble to our current EEA which seeks to eliminate discrimination in the workplace appears to be insufficient in achieving such purpose.
4. The *City of Tshwane* case, until set aside, is authority for the view that on the one hand our democracy makes allowance for the inclusivity of diversity for necessary transformation to take place through acknowledging the role to be played by *ubuntu*. However, the judgment has effectively placed a particular endorsement of a certain worldview of *ubuntu*. This forces everyone to adopt a mainstream majoritarian view of *ubuntu* at the risk of being marginalised in the event of failing to do so. It is in a sense, anathema to the very essence of our culture of inclusivity of *all* views and cultures.
5. Whilst our courts have articulated the notion of reasonable accommodation being extended to include mutual accommodation, this latter notion should not be left to be invoked on a casuistic basis by our courts, but should be made more prevalent in terms of being given expression to either by express wording in amended legislation or appropriate guidelines such as a Code of Good Practice on religious discrimination.

6.7 Recommendations

In light of the aforesaid, the following are proposed as ways in which religious discrimination in the South African workplace should be addressed.

6.7.1 The approach to defining the term "religion"

The term "religion" requires definition in relation to the subjectively held view of the believer. Whilst we are inclined to immediately think of religion in the spiritual normative sense of the word with reference to a deity, it is imperative that a generous interpretation and approach of the term is adopted.¹⁷¹⁶ If the right to equality is to be protected in our constitutional dispensation, then it is important that full account is taken of the fact that all human beings have the right to equal human dignity.¹⁷¹⁷ As such, the subjectively held spiritual view or opinion of all human beings is something that must be respected, even if objectively viewed it may be considered bizarre, a-religious or merely a way of life.¹⁷¹⁸ The way in which South African as well as foreign courts have interpreted the term¹⁷¹⁹ is a conceptual affirmation of the aforesaid and a continuation of this view in relation to the term bodes well for the ultimate protection of the fundamental right to freedom of religion.

It is recommended, however, that in religious unfair discrimination workplace disputes the distinction between the sincerity of the belief held by the claimant and the manner in which the claimant exercises her religious beliefs is a valid distinction. As was evidenced in the *Media24* and *Dlamini* cases, the employees were selective as to the manner in which they chose to exercise their religious beliefs. *Media24* is actually further distinguishable from *Dlamini* on the basis that the employer had no knowledge of the employee's religious beliefs. However, both cases provide valid authority for arguing that consequences may arise for an employee who is selective about the manner in which he or she practises his or her religious belief, in the sense

¹⁷¹⁶ See paragraph 2.2.8 above.

¹⁷¹⁷ See subparagraphs 2.6.2 and 2.7.1 to 2.7.2 above.

¹⁷¹⁸ See subparagraph 2.2.8 above.

¹⁷¹⁹ See subparagraphs 2.2.4 to 2.2.8 above.

that for no apparent reason church services are not attended, but other beliefs in accordance with the religion are observed, such as a particular dress style. In such cases, it is less compelling why an employer should adjust an IROJ to meet a religious belief on the part of an employee who seeks to exercise such right in the workplace for reasons simply to frustrate the employer. Some may argue that this makes allowance for encroachment into the realm of testing the "sincerity and genuineness of the belief". This is not so on account of the fact that the adjudicating court does not question the sincerity of the belief. The employee retains full rights in this regard. It is simply the manner in which employee has chosen to manifest the belief that is questioned. In this sense, the question addresses the principle of rationality, reasonableness and justifiability and is therefore relevant and necessary.

6.7.2 Addressing conflicting interests in the workplace

The intersection of secular and religious rights and interests in the workplace calls for an assessment of an inherent tension arising from trying to balance fundamental rights. The expression of religious freedom in the workplace in the form of the way in which an employee dresses, or is unable to work on certain scheduled days due to religious observances¹⁷²⁰ must be assessed with reference to the competing interest of the employer in relation to the IROJ.¹⁷²¹ If effect is to be given to the normative concept of transformative constitutionalism, then due account must be taken of the imperative for such conflict to be addressed by the role-players themselves before resorting to the courts as final arbiters. This gives effect to the notion of *ubuntu* which underscores transformative constitutionalism.¹⁷²² In the absence of parties themselves being able to resolve a conflict of fundamental rights in the workplace, our courts must interpret such conflict in a manner that is conducive to the underlying normative concept of transformative constitutionalism in that the decision which is made addresses the imperative of social justice in the workplace.¹⁷²³

¹⁷²⁰ See subparagraph 2.4.4 above.

¹⁷²¹ See subparagraph 5.4.4 above.

¹⁷²² See subparagraphs 2.9.2 to 2.9.4 above.

¹⁷²³ See subparagraphs 2.9.2 to 2.9.4 above.

It is recommended that the most appropriate way of addressing conflict in the workplace is first and foremost through dialogue between the parties themselves, as such carrying out the so-called positive obligations which have been referred to. This would impose on an employer a duty to take whatever steps are necessary to raise awareness through education about the consequences of possible conflicts arising due to a conflict in the workplace between religious and secular rights. Procedures in terms of grievances and appropriate dispute resolution would also be dealt with by the employer.

It is recommended that the optimal way in which this can be addressed is by our legislature having recourse to some of the following options in respect of amending the EEA and LRA, where necessary, to make allowance for the following:

1. Fairness (in the adjudication of workplace-related discrimination disputes) to be assessed in accordance with the current wording provided for under section 14 of PEPUDA (hereafter referred to as the determination of fairness clause);
2. Specific provision being made for operational requirements also to be a basis upon which an employer is entitled to discriminate on the basis of religion;
3. Specific provision being made in the determination of fairness clause for the term "reasonable accommodation" to mean "mutual accommodation". It is recommended that the term "reasonable accommodation" as defined in the definition section of section 1 of the EEA be amended by the legislature and substituted by "mutual accommodation"; furthermore that "mutual accommodation" be defined to mean "any modification or adjustment to a job or the working environment that would not constitute an undue hardship in addition to any steps or efforts taken on the part of the employee that are reasonable in order to comply such aforesaid modification, adjustment to the job or working environment".

4. *In addition*, that the EEA be amended to provide for a list of factors akin to the provisions of section 14(3)(a)(i) of PEPUDA. The effect is that when interpreting whether a respondent has proved discrimination to be fair *and* when interpreting mutual accommodation, a court, tribunal or forum is obliged to have regard, in the overall determination of substantial fairness, to a wider range of factors which may include, for example, but not be limited to, the following: anything that would constitute undue hardship to the employer (such as any factor that could impact adversely on the operational requirements of the business); the nature and extent of the discrimination; whether the discrimination is systemic in nature; whether the discrimination has a legitimate purpose; and knowledge on the part of the employer of the religious belief of the employee.
5. The incorporation of a Code of Good Practice Relating to Religious Discrimination akin to the Code of Good Practice on Sexual Harassment which seeks to impose duties on the employer to take steps to eliminate and address religious discrimination in the workplace. The aim of such a code would be manifold. It would raise awareness of religious unfair discrimination in the workplace. It would also serve as a means of mapping out rights and obligations of parties in the employment relationship and, more importantly, what best practices should prevail in the event of a conflict between the expression of a religious freedom and an IROJ. Whilst it may not serve as a panacea to a conflict of the aforesaid rights in the workplace it can well serve as a guide between the parties as to how to resolve such a conflict. It may also serve as a guide to courts, tribunals and fora in instances where conflicts are incapable of resolution in the workplace;
6. It is proposed that a Code of Good Practice Relating to Religious Discrimination should at the very least contain the following framework:¹⁷²⁴

¹⁷²⁴ Which draws heavily on the Content Schedule of the Code of Good Practice on the Employment of People with Disabilities.

1 Foreword

Setting out the underlying purposes of the Code which must be in accordance with the overarching goals of the EEA.

2 Aims

- 2.1* Establishing that religious freedom is as much a constitutional guarantee as is the right to freedom of trade, occupation and profession; and that the Code serves as a guide for employees and employers in the workplace in seeking to optimally balance the aforesaid constitutionally enshrined freedoms in a manner that maintains the harmony of the employment relationship.
- 2.2* That the Code serves to assist parties in the employment relationship to understand their respective rights and obligations and, in instances of a conflict of such fundamental rights, how to optimally reconcile differences and achieve a win-win situation through a process of mutual accommodation.
- 2.3* That the Code is intended to create awareness of the importance of religious rights and freedoms on the one hand and the fact that the expression of such rights may, depending on the IROJ, be required to be limited. Each and every case would have to be determined on its own merits.

3 Status of the code

The Code does not purport to be a summary of the law and does not create additional rights or obligations. Failure to apply the Code does not render any person liable in whatsoever way or manner. When courts, tribunals or fora apply the EEA, they are encouraged to consider the Code.

4 Definition of religious discrimination

It is proposed that a guideline be established in terms of wording highlighting the general features of differentiation which impact adversely upon an individual on grounds of such person's religious belief, opinion, idea or expression or any manifestation thereof. Due to the difficulty associated with clothing the term "religion" with a finite definition, it is recommended that no definitive terminology be attributed to such term.

5 Mutual accommodation of religious freedoms in the workplace

In this section the Code should contain guidelines, as referred to in proposed amendments to the EEA dealing with, but not limited to, matters such as the following:

- 5.1* The aim and purpose of accommodation;
- 5.2* Whether the employer has adopted the most cost-effective means of removing limitations which would otherwise restrict the exercise of religious freedom on the part of the employee;
- 5.3* The precise nature of the working environment;
- 5.4* Awareness on the part of both parties in the employment relationship prior to commencement of the actual relationship as to the nature of the job and any impact or potential impact the IROJ would have on the expression of religious freedom;
- 5.5* Whether mutual accommodation places undue hardship on any particular party;
- 5.6* The length or duration that the mutual accommodation or mere reasonable accommodation is required; and
- 5.7* Any other factor relevant to the issue of mutual accommodation.

6 Recruitment and selection

- 6.1* The extent to which the IROJ was well known to the job applicant

6.2 Awareness on the part of both parties in the employment relationship of the respective rights of the other party to the relationship

6.3 Whether the nature of the job or advertisement was such as to have the effect of indirect discrimination on the basis of religion

7 *Retaining persons of a particular religion*

Once an employer is aware of an expression of religious freedom that may be in conflict with an IROJ or even an operational requirement, the extent to which an employer consults with the employee concerned in seeking ways to reasonably accommodate the employee.

8 *Termination of employment*

Whether the employer may terminate the employment and the circumstances surrounding termination where the employer is unable to retain the employee.

9 *Worker's compensation*

10 *Employee benefits*

11 *Education and awareness*

Steps that have been taken by both parties to create awareness of rights and obligations in the workplace arising from religious freedoms, IROJ and the potential conflict thereof and how to optimally balance such a conflict in a manner conducive to appropriate dispute resolution without external intervention.

7. Imposing specific obligations on employers in terms of the current section 60 of the EEA by ensuring that employers take appropriate steps and measures in accordance with the aforesaid Code of Good Practice Relating to Religious Discrimination, and

8. Including in the aforesaid Code of Good Practice Relating to Religious Discrimination, the SACRRF guidelines inasmuch as these are applicable to religious institutions seeking to organise themselves in accordance with their religious faith.

Religion continues to play a relevant role in our secular society. In seeking to ultimately prevent and optimally address conflicts that may result in the workplace on account of the expression of religious freedom, it would be in the interests of business, as represented by all interested religions¹⁷²⁵ and public interest groups¹⁷²⁶ to lobby the Minister of Labour to table a Bill for consideration by the National Assembly to have included in the EEA a Code of Good Practice Relating to Religious Discrimination.

6.7.3 The tests to be used in protecting fundamental rights in the workplace

The overarching imperative when addressing claims of alleged unfair discrimination is addressing the issue of substantive equality.¹⁷²⁷ Formal distinctions between direct and indirect discrimination should not be permitted to blur the assessment of how to optimally address substantive equality. Canadian jurisprudence has pointed to the fact that the distinction between direct and adverse impact (indirect) unfair discrimination made in human rights legislation can obscure and misplace the emphasis needed to focus on the overall question of substantive equality.¹⁷²⁸ Formal distinctions between direct and indirect discrimination do not necessarily address the main issue of systemic unfair discrimination. Consequently, it is argued that the reasonable accommodation test must be expanded in terms of its application in South African labour law. It must, when assessing competing fundamental claims, be

¹⁷²⁵ Including but not limited to mainstream and non-mainstream religions, for example the Rastafari religion which has featured in the recent decision of *Prince v Minister of Justice and Constitutional Development* [2017] ZAWHC 30 paras 11-13.

¹⁷²⁶ Like, for example, Freedom of Religion South Africa (FOR SA), trade unions and political parties.

¹⁷²⁷ See subparagraphs 3.2.1 to 3.2.4 above.

¹⁷²⁸ See subparagraphs 4.5.3.3 and 4.5.3.4 above.

used to refer to what steps have been taken by both parties in the workplace to address the situation.¹⁷²⁹

It is recommended that our courts continue to apply the "nuanced context-sensitive" approach when adjudicating religious unfair discrimination workplace-related disputes. However, it is submitted that the South African labour law would greatly benefit if our legislative system which effectively regulates such disputes adopts the recommendations as set out in this study. By so doing, it is contended this will give impetus to the current approach being adopted by our courts in the determination of such disputes.

6.8 Conclusion

The diversity of South African society reflects both secular and religious interests. Our constitutional dispensation protects all the fundamental rights as set out in the Bill of Rights subject to a clause of general limitation. At times individual employees may hold a particular religious belief that does not coincide with the IROJ. On the other hand, an employer as an organisation can also hold a particular religious view in terms of which it decides to employ only workers of the same religion. This gives rise to allegations by applicant employees of alleged unfair discrimination on grounds of religion. These aforesaid competing rights and interests, if they cannot be resolved between the parties to the employment relationship, must be adjudicated.

Central to the determination of the aforesaid competing rights is the requirement of giving effect to the imperative of substantive equality.¹⁷³⁰ Imperative to this assessment are the notional accounts of rationality and reasonableness pertaining to issues of human dignity.¹⁷³¹ Any limitation on the expression of the right to religious freedom must necessarily take into account the IROJ and issues of mutual reasonable accommodation.¹⁷³² An optimal "nuanced context-sensitive" approach is

¹⁷²⁹ See subparagraph 5.4.6 above.

¹⁷³⁰ See subparagraph 3.2.1 above.

¹⁷³¹ See subparagraphs 2.7.1 to 2.7.2 and 3.2.2 to 3.2.4 above.

¹⁷³² See subparagraphs 3.2.3 and 5.4.5 above.

called for in the adjudication of such competing rights¹⁷³³ with as generous and broad an interpretation of the defences so as to adjudicate the dispute in the most optimal manner in the determination of what constitutes fairness.

Let me conclude this study with a reference by Bingham to rights and their determination:

The rule of law requires that fundamental rights, such as that of freedom of belief and practice, should be protected, but it does not require that they should be absolute. The rights of the individual must be set against the rights of others, and that calls for drawing of lines.¹⁷³⁴

¹⁷³³ See subparagraph 5.4.5 above.

¹⁷³⁴ Bingham *The Rule of Law* 78.

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