

Gender Trouble in the Church: Promoting Associational Autonomy Through Ontological Difference

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Dissertation submitted in fulfilment of the degree:

Master of Laws with Specialisation in Constitutional Law and Philosophy of Law

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University of the Free State

July 2023

Declaration

I, Janko Vorster, affirm that the content of this thesis is entirely my own creation, except in cases where I have duly acknowledged external sources. Furthermore, I confirm that neither the entire thesis nor any portion of it has been previously submitted for the attainment of another academic degree, whether at this institution or any other university.

Acknowledgements

To the following people I extend my sincere gratitude:

To my uncle, Christo Hooman, for steadfast support and unwavering belief. Your guidance has been a lodestar through my academic journey. To my mother, Tessa, a beacon of strength and love. Your enduring faith has lit the path of my success. To my late father, Fanie, whose pride remains an ever-present echo, urging me forward. To my close friend, Nico Dreyer, whose profound conversations on philosophy, politics, ethics and religion have been poured into this dissertation. To the recently retired Mrs Estie Pretorius, whose warm hospitality allowed me to work in the music library. Your kindness made the Odeion a second home. To Professor Iain Benson, whose sharp insights have honed this research, shaping the title it holds now. And to my supervisor, Professor Shaun de Freitas, whose patience, wisdom, and support have been the calm, steady current steering my academic voyage.

Each of you I thank from the depths of my heart. Your support is the unseen foundation of this work, for which I am eternally grateful.

Abstract

This dissertation investigates the complex interplay between a pluralistic, liberal, and democratic state's duty to maintain diversity and protect the identities of individuals and groups with irreconcilable worldviews, focusing on the intersection of transgender identity and religious associations.

The study grapples with the challenges of defining key concepts in the discourse of religious rights and diversity within a liberal democracy, avoiding simplistic definitions. The examination reveals the limitations of the prevailing discourse, which often assumes a secular neutrality that overlooks religion's role in shaping communal identity.

It also explores the nuances of transgender rights, recognizing the importance of gender identity while respecting the traditional perspectives within religious associations. International legal developments highlight the tension between advocating transgender rights and upholding the principles of liberal democracy, revealing potential biases within the Yogyakarta Principles. The study underscores that claims based on transgender identity are ontological rather than empirical scientific facts.

In the context of religious employment exemptions, the doctrinal core approach is critiqued in favour of the organic or permeated ethos approach, which respects the communal perspective and substantive autonomy of religious associations. Hypothetical scenarios further emphasise the doctrinal core approach's inadequacy in addressing issues related to religious exemptions and discrimination involving transgender individuals.

Overall, the dissertation calls for an inclusive and nuanced approach that upholds the ideals of freedom, democracy, and diversity, while emphasising the need to safeguard the rights and identities of both transgender individuals and religious groups within a pluralistic society.

Key words: Secular neutrality; religious associations; religious associational identity; religious rights; religious group rights; communal identity; religious associational autonomy; ontological diversity; human dignity; human dignity conflicts; gender identity; transgender identity; gender ideology; transgender rights; Yogyakarta Principles; doctrinal core approach; organic approach; permeated ethos approach.

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CHAPTER 1

INTRODUCTION

1.1 Background

The concept of freedom of association developed slowly in Western civilisation, notably advancing in medieval times as merchant guilds formed, and of course there was the Roman Catholic Church.¹ Eventually, political group rights developed in Europe: England had its *Petition of Rights* in 1689, whereas France had its 1789 *Declaration of the Rights of Man and the Citizen* (and proceeding variants).² It was with the *Constitution of the United States* in 1787 that we saw the first instance of where a bill of rights was formulated with the express purpose of protecting individual citizens' freedoms against the tyranny of the state or majority suppression.³ As is often noted, the US Constitution does not explicitly provide protection of the right to association, instead doing so indirectly by limiting *the state's interventive competencies* in terms of the rights to free speech and assembly.⁴ The *Constitution of the Republic of South Africa* (hereafter, the *Constitution*), on the other hand, explicitly provides for the freedom of association⁵ and freedom of religion in sec. 15(1).⁶ The effectiveness of these explicit provisions might, as per the argument of this dissertation, turn out to be a function of the judiciary's understanding of the state's limits.

The rights of transgender individuals as weighed against the rights of religious associations have not met directly in the South African legal arena. However, South African courts have decided on cases involving the rights of transgender individuals as sexual minorities.⁷ The courts have also ruled on the rights of religious associations *vis a vis* the individual rights of

¹ Pienaar 1993:147.

² Pienaar 1993:148.

³ Pienaar 1993:148. Also see Brownstein 2013:253-264 for a detailed discussion of the political considerations involved in determining the limits of religious associations' rights in post revolution America.

⁴ Pienaar 1993:148-149, citing Horn 1956, *Groups and the Constitution*; Lenta 2009:832 also notes this.

⁵ *The Constitution*:secs. 18 & 31.

⁶ *The Constitution*:sec. 15(1).

⁷ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4 and *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC).

sexual minorities (mostly homosexual individuals).⁸ But, it is reiterated, the courts have not had the chance to interpret and weigh up the rights of transgender individuals specifically in the religious associational context. This is immediately relevant for several reasons. Most strikingly, this delayed encounter presents an opportunity for scholars to evaluate the judiciary's commitment to the constitutional principles of diversity, equality and human dignity that underlie the Republic. The judiciary has declared its dedication to the furtherance of the rights of sexual minorities.⁹ This is laudable, but it raises the question of whether the current popularity, within liberal democracies, of especially the autonomy of the individual¹⁰ and the overlap of this with the distinction between the mind and body¹¹ might unduly influence judgments where relatively "unpopular" positions, such as those of conservative religious associations, are held to violate the rights of transgender individuals to express their gender identity. Indeed, recent scholarly debates on analogous issues have revealed exactly such tendencies, and this further demonstrates the need for scholarship that critically evaluates associational autonomy in relation to other rights claims.¹²

Focusing on developments relating strictly to transgenderism, the most important document is, of course, the *Constitution* namely section 9 relating to equality, particularly subsections 9(3) and 9(4)¹³ on non-discrimination, as well as section 10 on human dignity and section 16 on freedom of expression.¹⁴ These provisions were foundational to the development of other legislation relating to transgenderism, such as the *Alteration of Sex Description and Sex Status*

⁸ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1, *Ecclesia de Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2014 (726/13) ZASCA 151 and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* 2015 (CCT223/14) ZACC 35.

⁹ *Zibathini v S* (CA & R 99/17) [2019] ZANHC 30 para. 28, "Our Courts will continue with their concerted effort to protect the lesbian, gay, bisexual and transgender (LGBT) rights."

¹⁰ This forms part of Western thought already beginning to gain in momentum towards the end of the Middle Ages. In this regard, Larry Siedentop observes, "The 'deep' foundation for the individual as the organizing social role – a status which broke the chains of family and caste – was laid by lawyers, theologians and philosophers from the twelfth to the fifteenth century. Their picture of reality gave individual conscience and intentions, the moral life of the individual, a foundational role", Larry Siedentop, *Inventing the Individual. The Origins of Western Liberalism*, (The Belknap Press of Harvard University Press: Cambridge, Massachusetts, 2007), 338.

¹¹ This also relates to the current emphasis on emotivism in Western culture. I am well aware that this emphasis on the individual is inextricably related to a number of philosophical schools of thought such as postmodernism, utilitarianism and Kantian moral rationalism.

¹² While Bussey (2018:559) writes on the Canadian situation, his comments are worth noting as South Africa's courts consider Canadian precedent influential: "The law on religious accommodation in Canada has been dramatically altered - to the detriment of religious freedom and diversity."

¹³ *The Constitution*:secs. 9(3-4). "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex... religion, conscience, belief, culture... (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)..."

¹⁴ *The Constitution*:secs. 10 & 16.

Act 49 of 2003, and to the judicial determination of the rights of transgender individuals.¹⁵ With regards to judicial precedent and transgenderism, the cases of *KOS v Minister of Home Affairs*¹⁶ (hereafter *KOS*) and *September v Subramoney*¹⁷ (hereafter *September*) are notable, but the latter more so.

The *September* case is especially noteworthy because it emphasised aspects of gender expression as essential to human dignity, and because Justice Fortuin cited certain (non-binding) international principles with approval,¹⁸ namely the *Yogyakarta Principles*¹⁹ and the *Yogyakarta Principles + 10*.²⁰ These international law principles may not be strictly binding, but because of section 39(1) of the *Constitution*,²¹ and owing to past instances where South African courts have recognised the influence of non-binding international law, these *Yogyakarta Principles* may be influential in future debates concerning rights related to transgenderism in South Africa.²²

Preliminarily, it would be prudent to mention what the Equality Court held regarding the rights of an incarcerated transgender individual, Ms Jade September, since this provides some insight into what our courts have considered constitutive of a transgender person's human dignity.²³ The incarceration facilities in question refused to allow Ms September to wear female underwear, make-up, jewellery and to wear her hair in feminine styles. Facility officers refused

¹⁵ Interestingly enough, prior to the *Alteration of Sex Description and Sex Status Act* 49 of 2003, the *Births, Marriage and Deaths Registration Act* 81 of 1963 at sec. 7(b) did allow for the legal alteration of a person's sex, but was repealed by the *Births and Deaths Registration Act* 51 of 1992, which did not allow such alteration.

¹⁶ *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC).

¹⁷ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4.

¹⁸ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4:paras. 95-100. It should be noted that Justice Edwin Cameron (at that time a Justice on the SCA, later going on to the Constitutional Court) was also a drafter of the first set of Yogyakarta Principles.

¹⁹ 2007. Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

²⁰ 2017. Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles.

²¹ *The Constitution*:sec. 39(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."

²² Sloth-Nielson LLM Thesis:48. The author cites *Glenister v President of the Republic of South Africa & Others (Helen Suzman Foundation as Amicus Curiae)* 2011 (3) SA 347 (CC) and *S v Makwanyane* 1995 (3) SA 391 (CC) as instances where courts had regard to non-binding international law. These cases are also cited in this regard at para. 125 of *September*.

²³ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4:paras. 95-100;123-126: In this regard, the *September* Court made reference not only to the *Constitution* and *PEPUDA*, but also to the *Yogyakarta Principles* at paras. 95-100, justifying this usage at paras. 123-126.

to acknowledge her as a woman and refused to use September's preferred pronouns. The Court held all that these actions, insofar as they resulted in a refusal to allow Ms September to express her gender identity, thus impairing her human dignity, constituted unfair discrimination in terms of sec. 8 of *PEPUDA*²⁴ and was therefore unlawful and unconstitutional.²⁵ The court ordered various forms of relief, among this: ordering the facilities to allow her to dress according to her preferred gender; ordering all officials (and their subordinates) in the offending facilities to address Ms September according to her preferred gender; and ordering that transgender sensitivity training be introduced as part of new and current employees' training.²⁶ The Court in *September* thus found the expression and recognition of a transgender person's gender identity to be integral to their human dignity.²⁷

Looking ahead, it seems there is potential for the constitutional rights of religious associations and transgender individuals to come into conflict, as we have seen in cases dealing with the rights of homosexual persons and religious associations. However, since the interests of transgender persons pertaining to their gender identity have not been addressed by our courts in a religious associational context, it would be instructive to refer to cases where other sexual minorities' (such as homosexuals) rights have been considered in relation to religious associational rights. The *Strydom* case is especially useful in this respect: it demonstrates the Equality Court's attempt to balance the equality rights of a homosexual individual against the right to religious freedom of a religious association.²⁸ Other cases, such as *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (hereafter, *De Lange*) and *Gaum v Van Rensburg* (hereafter, *Gaum*), also contain notable insights into how the judiciary's attitude towards religious associational autonomy has evolved since *Strydom*, for better (as in *De Lange*) and worse (as in *Gaum*).²⁹

²⁴ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000:sec. 8.

²⁵ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4:par. 164.

²⁶ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4:paras. 164.7-8.

²⁷ *September v Subramoney NO and Others* 2019 (EC10/2016) ZAEQC 4:par. 122, The Court found that: "even though "transgender" is not a listed ground under the *Constitution*, nor the *Equality Act*... In my view, the right of dignity includes the applicant's right to her gender identity."

²⁸ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par:8: "the right of equality must be balanced against the freedom of religion of the church."

²⁹ *Ecclesia de Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2014 (726/13) ZASCA 151; *Gaum and Others v Van Rensburg NO and Others* 2019 (40819/17) ZAGPPHC 52.

The right-principle of equality and its corollary, non-discrimination, are integral to liberal democracy, but when these principles and rights are misunderstood and misapplied as “trumps” over other, equally important principles and rights, the threat of convergence liberalism arises.³⁰ The recent debate in South Africa regarding the *Strydom*-judgment therefore, seems indicative of a larger issue where liberal societies now are having to grapple with the realities that a commitment to principled pluralism and deep diversity presents:³¹ the state must either impose whatever values it “holds” at a given time onto religious associations, or it must accommodate the difference in worldview and morality presented by these associations.³² It seems that the limits of religious associations’ right to maintain their autonomy in various respects is a significant part of this issue, especially relating to their ability to discriminate in employment or membership, and most notably when such discrimination occurs with respect to an individual’s immutable characteristics or engagement in prohibited relationships. This has been treated in the literature as far as homosexuality (as one type of sexual minority) is concerned.

Certain insights and arguments have developed in the case of *Strydom*, for instance: the differentiation between homosexual identity and homosexual conduct;³³ the Court’s acceptance of a church’s pre-established moral stance on homosexuality;³⁴ and importantly, the disagreement about whether continuing to employ someone engaged in a same-sex

³⁰ Esau 2009:429. Also note Lenta 2009:836 at fn. 44: “It may be claimed that the Equality Act itself privileges equality. On Woolman’s reading of the Equality Act, ‘the Act makes equality per se an overridingly important goal’ and ‘a trump’... To the extent that the Equality Act gives equality precedence over associational freedom and religious liberty, this is illegitimate.”

³¹ Van der Vyver 2012:8; Robbers 2010-2011:283; Rivers 2010:339. According to Van der Vyver (2012:8), recent judgments from the European Court of Human Rights (ECHR) concerning religious associational autonomy and employees’ rights have the effect of placing “a special burden on the “right to self-determination” of religious institutions.” And of these same judgments, Robbers (2010-2011:283) notes that, because of the ECHR’s broad jurisdiction, “These decisions, moreover, may well have significant consequences for religious autonomy not only in Germany, but for nation-states throughout Europe.” Rivers remarks on the tendency in recent legal developments to limit the autonomy of religious associations by extending antidiscrimination legislation into their internal affairs.

³² This is essentially the difference between convergence liberalism and divergence liberalism (or *modus vivendi* to use John Gray’s term from *The Two Faces of Liberalism*). Phrased differently this seems a more troubling proposition: Those vested with the power to do so must decide whether to impose their values or the values they understand as overriding onto religious associations, shaping those associations’ self-understanding accordingly.

³³ De Freitas 2012:260.

³⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par:12; Lenta 2009:837 at fn. 46: “There is no indication from the judgment that the existence of a coherent theological basis for the school’s stance on sexual morality was disputed, but a resolution of this dispute, had it arisen, would anyway have taken the court beyond its legitimate role.”

relationship would place an “undue burden” on the church.³⁵ Considering that this is an important case in South Africa involving the balancing of “equality and freedom of religion,” the insights produced therefrom (but not limited thereto) could be applied to similar instances involving other sexual and gender (for the purposes of this study, transgender) minorities, specifically with a view to enabling jurisprudence that affords sufficient weight to the rights of both transgender individuals and religious associations.

Jurisprudence thus developed would recognise the importance of transgender identity and religious identity fulfilled through religious associational life as equally constitutive of human dignity. Accordingly, such jurisprudence would seek accommodation for religious associations and the divergent views of the good life they represent, even where such views of the good life might exclude transgender individuals from participating in such religious associations, as long as serious harm does not occur.³⁶ This kind of jurisprudence, if developed with sufficient consideration to both parties, as was arguably the case in the *De Lange* judgment – where the courts declined to intervene in religious associational matters under the rubric of non-discrimination – would be more in line with equality and pluralism that our liberal democracy relies upon than some contemporary strands of jurisprudence that understand equality as a right to trump most other rights.³⁷

1.2 Research aim and research questions

The overall purpose of this dissertation is to plot out how religious associations should be understood in light of the transgender phenomenon, so that associations may retain their autonomy when threatened by potential state interference under the guise of, amongst others, non-neutral equality rhetoric. Ultimately, then, it will argue for an understanding of relevant rights from a principled liberal perspective, which entails interpretations of equality, diversity

³⁵ Lenta 2009:852-853: “The Equality Court nevertheless underestimates the reasons for thinking that the burden placed on a church by the anti-discrimination legislation may be substantial. To disallow a church from discriminating impairs the ability of the religious community of which it forms a key part to transmit its core beliefs - including the belief that homosexual activity is sinful - by example, and may also impair the ability of a church to maintain the religious *ethos* of its academy, which includes the exemplification of these beliefs in its practices. This threatens religious pluralism and diverse civil associations, which work to express a range of conceptions of the good life and mitigate state power.”

³⁶ Determination of what exactly constitutes serious harm in such instances will require a more extensive discussion.

³⁷ Although the *De Lange* judgment is endorsed here, it should be mentioned that it still applied the doctrinal core approach, which, as will be discussed later on in this dissertation, displays several insufficiencies where nuance is introduced into religious associational autonomy issues. Nevertheless, for a summary discussion of the *De Lange* judgment, see De Freitas 2016:1-22.

and dignity that lead to a situation where people in their respective communities are allowed to continue holding distinct moral opinions, even when this is offensive, unpalatable or even incomprehensible to people with differing views. This brings me to my main research question: How can the rights of religious associations be afforded protection against potential rights challenges brought on the basis of transgenderism? This in turn links up with important questions such as: How should law's limits be understood in relation to the protection of religious associational rights? How does the protection of religious associations in the context of the expression of gender identity relate to a deeper sense of diversity and tolerance? How should the right to equality and human dignity be understood against the background of the central views held by a religious association?

1.3 Limitations and assumptions

Unlike some other works of legal scholarship dealing with the transgender phenomenon, this dissertation will not dedicate an entire section or sections to discussing the terminology of various transgender identities, opting instead to refer to context-specific definitions (thus when discussing a piece of legislation or a case, the definitions of transgender within these contexts will be assumed). This is both a practical and a theoretical limitation, necessitated by the fact that much of the terminology around trans-concepts is not strictly historically or medically derived but rather largely constructed in the discourse of post-modern theoretical approaches to the concepts of gender and sex.

One cannot employ various ideologically and/or theoretically saturated concepts without assenting to the truth of "lenses" (theoretical approaches) used in their formulation, which in turn implies one's rejection of conflicting approaches. This dissertation assumes a meta-theoretical framework which sees these approaches, each aimed at a different vision of society, along a continuum, ranging from the traditionalist to the classical liberal to the radical postmodernist. Recognising these approaches or lenses within this meta-framework, it becomes obvious that different notions of not only gender, sex and religion, but also of equality and diversity, are in competition.

Within this meta-theoretical framework, this dissertation is further limited in the sense that its arguments broadly follow a combination of theoretical approaches in favour of a *modus vivendi* type of pluralism. The motivation for choosing this approach is detailed in chapter 2. This

approach itself entails certain specific definitions of equality and diversity (which are treated in the course of this work), but, unlike radical postmodernist, utilitarian or Kantian rationalist schools of thought (each with their substantive focus on the autonomy of the individual), it leaves open to liberal democratic mechanisms certain moral determinations relating to sex and gender. Within this dissertation, this may be referred to loosely as divergence liberalism or the pluralist liberal approach.

1.4 Value of study

Considering the issues at hand and with due cognisance of the limits noted above, this study proposes to contribute to the discourse on religious rights and the progression of diversity by illuminating potential challenges occurring at the intersection of the transgender phenomenon and religious associational autonomy. As part of this contribution, this work critically reviews recent domestic and international developments relating to transgender persons' rights. This is done with the stated intent of identifying instances where rights-developments have occurred without due consideration of how this might encroach on other rights, namely religious associational rights.

1.5 Overview of proceedings chapters

This dissertation's two major subjects are the religious association and the transgender individual, and chapter 2 centres on the former. This chapter is intended to provide a nuanced understanding of the religious association's nature as well as role in a pluralistic state and to clarify several misassumptions that permeate and mislead the human rights discourse where religious associational autonomy is concerned. First, several presumptions regarding secularism and its relation to state neutrality will be rebutted, and the limits of the liberal state's regulatory competencies in relation to associational life and meaning making are discussed. Second, the issues arising from an overly individualistic approach to religious liberty will be addressed. It will be shown how such an approach tends to reduce the religious association to a mere collection of private interests, which in turn undermines the foundations of religious associational autonomy and relegates religious beliefs to the private sphere. Lastly, the issue of merging norms will be treated. It will be shown how several misassumptions discussed throughout the chapter, namely those relating to secularity, individualism and convergence, tend to lead toward normative merging. Normative merging manifests where the scope of reasonable disagreement is continually reduced by a state that does not understand its limits.

Chapter 3 focuses on the second major subject of this dissertation: the transgender person. Its main purposes are to describe and, where there are developments relevant to religious associational autonomy, critically comment on the legal framework around transgender persons. First, constitutional provisions integral to the nascent jurisprudence on transgender persons' rights will be discussed. It will be demonstrated how the concept of human dignity has played a foundational role in securing judicial pronouncements on gender identity rights, including the rights to choose, express and require others to acknowledge one's preferred gender identity. Second, domestic legislative developments specifically related to transgender identity will be addressed. Of particular note are the *Alteration Act*, the *Equality Act* and the *Hate Speech Bill*, all of which present difficulties when applied without nuance to a transgender person within the religious associational context. Lastly, insights from international human rights law and foreign law will be considered. The Yogyakarta Principles and the YP + 10, a nonbinding cluster of international instruments governing the application of international human rights law to groups and individuals such as transgender persons, will also be critically evaluated.

Chapter 4 delves into the inadequacy of the doctrinal core approach in handling religious exemptions and discrimination issues. It presents hypothetical scenarios involving transgender individuals working for a church and examines whether the court would accept the church's claim that transgender conduct is prohibited based on doctrine. Even if the court accepts the claim, the chapter argues that the reasoning from the *Strydom*-case would likely be followed, which found that certain positions within the church are not connected enough to the doctrinal core to warrant an exemption from non-discrimination laws. The chapter highlights overlooked aspects of the doctrinal approach, including the definition of "undue burden." It explores hypothetical scenarios involving transgender janitors or secretaries and the potential difficulties they pose, such as addressing preferred gender identity and bathroom usage. The chapter concludes that the doctrinal core approach is insufficient in addressing the burdens faced by religious associations and the denial of transgender individuals' human dignity, highlighting the complexities of these issues.

CHAPTER 2

THE RIGHT TO FREEDOM OF RELIGION AND THE PROTECTION OF RELIGIOUS ASSOCIATIONS

In order to understand the importance of protecting religious associational autonomy generally, and specifically with regards to newer social issues such as transgenderism, one ought first take a step back and appropriately frame the situation. This may go some way in explaining why the overarching argument developed throughout this dissertation is *not*: “The religious association vs the transgender individual.” Rather, what is sought is the recognition of the vital role religious associations play in constituting truly pluralistic democratic societies, and an acknowledgement of the need to protect the autonomy of these associations in enabling and furthering their unique conceptions of the good life (which conceptions themselves inform, at least in part, an understanding of the common good). In this regard, the overarching argument in this study concerns itself with the protection that should be provided to a religious association when matters related to transgenderism play off within a religious association and where the members of such an association bind themselves to specific doctrinal teachings and where these teachings do not allow for the inclusion of transgenderism. Several key interrelated themes will be developed in this regard, namely: the communal nature of religious belief and religious rights; the falsity of secular neutrality; the principles of subsidiarity and solidarity; the limits of principled law; deep diversity as opposed to superficial approaches and practices pertaining to diversity; deep diversity as opposed to deep equality; and similarly, divergence liberalism (often termed *modus vivendi*) as opposed to convergence liberalism. This chapter also clarifies what religious associations are and what legitimates them, what role they fulfil in constituting a diverse society, and how law’s limits should be understood in relation to them.

2.1 Background

An issue that often seems to crop up in the discourse involving religious associational autonomy, and this is especially the instance when certain individual equality claims are addressed, is the portrayal of an antagonistic relationship between religious associations and individuals, and at the larger scale, between religious associations and a “neutral” state and

public sphere.³⁸ Misleading the discourse and rendering it antagonistic are the following claims – or more often, implicit assumptions.³⁹ First is the assumption that whatever is “secular” is, by definition, free from any motivated foundational belief or conviction. Second, the assumption that the state and public sphere are therefore “neutral” in that they are “secular” (*i.e.*, exclusive of religious beliefs and opinions).⁴⁰ Third, that religious rights are best understood in an individualistic sense, thus the proper place for the exercise of religious rights is the private sphere, not the “neutral” public sphere.⁴¹ Fourth, that there exists a sort of public, state pseudo-morality that is totally free of religiously-informed morals, and that this can be enforced against the religious associations that create and perpetuate religiously-informed morals.⁴² Finally, there is the implicit claim arising from these assumptions that the modern democratic ideals of equality and diversity should be understood in terms of an exclusive state pseudo-morality, to exclude equality of public belief,⁴³ to exclude a meaningful plurality of ways of life and related insights, and so finally to exclude a diversity of moral opinion in the public sphere.

All these claims ought to be stated explicitly and evaluated critically before there can be any hope of understanding the importance of religious associational autonomy and the need to protect it from undue state interference.⁴⁴ As alluded to earlier, this is because the arguments

³⁸ For an example of this, see the exchanges regarding religious associational autonomy in: Lenta 2009; Woolman 2009; Bilchitz 2011; De Freitas 2012; Bilchitz 2012; Lenta 2012; Woolman 2012; Lenta 2013.

³⁹ I note these issues here only briefly; I will delve into them in more detail below.

⁴⁰ Iain T. Benson has written extensively on this topic, see, *inter alia*: Benson 1999 “Notes Towards a (Re) definition of the Secular”; Benson 2004 “Considering Secularism”; Benson 2013 “Seeing through the Secular Illusion”; Benson & Bussey 2017 “Religion, Liberty and the Jurisdictional Limits of Law.”

⁴¹ Benson 2008(a):296, “(T)he failure to take seriously religions and cultural communities with comprehensive understandings of the good, results in a body of jurisprudence — in South Africa and Canada — that privileges individual religious autonomy over the communal dimension of rights to religious freedom and practice.” Aroney 2014:181, “(T)here is a general consensus among specialist scholars in the field that the right must necessarily have individual, *associational and communal dimensions*.” (emphasis added)

⁴² It should at the very least seem undemocratic that the moral rules of some communities could be coercively altered by groups (or worse, individuals) whose mores dominate a political landscape in which those communities are not even allowed to participate. This current state of affairs echoes Gray (2000:105): “In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear.” Campos (1994:1824) writes critically of this type of convergent liberal thinking: “This overlapping consensus is itself the social instantiation of liberalism as a kind of *fundamental moral view*... (it) is neither sceptical nor pragmatic; it is instead an example of what can be called *secular fundamentalism*.”

⁴³ Benson 2010:20-21. “In various ways terms tend to assume that all “faith” is religious, and that religion is or should be *private*. In addition, the terminology tends to be both bifurcative, driving a wedge between religions and the public sphere, and inaccurate by *failing to view agnosticism and atheism as belief systems*.” (emphasis added)

⁴⁴ Benson 2013(b):71, “(I)n order for law and religion to become properly understood in relation to concepts such as “civil religion,” “the role of the state” or “political theology”, we require lexical recrafting so we can understand what is being said and what other principles are simply being ignored.”

levied against religious associational autonomy that seem convincing, often contain distorted understandings of, among other things, the proper competencies of the state and the value of religious associational life. Thus, an argument against religious associational autonomy could be set innocuously in the following terms: in a society founded on the liberal values of freedom, equality and non-discrimination, the state should not allow religious associations to discriminate unfairly in their employment practices against transgender individuals.⁴⁵ The rationale for such an argument would be that: “Allowing a private religious domain to continue in a manner at odds with the political morality of the state will ultimately undermine the vision of a new order enshrined in the Constitution.”⁴⁶ Such a claim leaves open the seemingly obvious questions of *what exactly* such an overriding pseudo-morality would entail and *by whose* discretion its contents would be determined. Furthermore, it contains many of those erroneous assumptions mentioned previously. It is indicative of the flawed conceptualisations that misguide and antagonise the discourse in this area, and it validates Benson’s observation that:

Where legal and general education has failed is in relation to teaching about appropriate social ordering (including the limits of religion and the law) and civic virtues we need even more strongly in order to deepen our theory and practical understanding of the crucial importance of associational diversity and its justifications.⁴⁷

The consequences of such failure are the myriad flawed claims and assumptions that must be explicated in order to properly understand the importance of religious associational autonomy and the reasons for limiting the state’s interference therein. This is particularly important, given that many (if not most) of the recent claims for state interference in religious associational autonomy come in the form of equality and non-discrimination rhetoric, which often rely on the very claims and assumptions that mislead the discourse.⁴⁸

⁴⁵ Arguments in this line, though relating to homosexual individuals instead of transgender individuals, have been made by South African constitutional scholars. see: Bilchitz 2011; Bilchitz 2012; De Vos 2008.

⁴⁶ Bilchitz 2011:248.

⁴⁷ Benson 2014:104.

⁴⁸ Aroney 2014:154, Such a narrow conception of religious freedom, Aroney writes, “...also has the tendency to suggest that the rights of religious groups must always be subordinated to the rights, not only of their individual members, but the rights of individuals that *do not belong to such groups but nonetheless make claims against them, such as through the universalising application of antidiscrimination and other regulatory laws* (emphasis added).” This is discussed further in section 4 of this chapter.

In South Africa, there are strong precedents regarding the importance of the right to freedom of belief, especially religious belief, and these precedents recognise the value of religious convictions as adding to the plurality of South African society, and as integral to individuals' understandings of human dignity.⁴⁹ However, this respect for the right to freedom of belief seems to become tenuous when its associational aspects are considered, especially when religious beliefs reflected in religious associations come into conflict with the equality claims of individuals (hereby also having implications for interpretations related to other rights such as the right to human dignity). In South Africa, this is most evident in cases involving rights conflicts between religious associations and homosexual individuals, as in, among others, *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*.⁵⁰ This case was primarily concerned with the limits of exemptions granted to religious associations as employers, but the principles of equality and associational freedom it considered were cause for lively scholarly debate. This case (along with the scholarship around it and similar cases) is where one finds the best parallels, in fact and principle, to foreign cases dealing with freedom of belief and transgenderism. One need only replace the category of conduct related to sexual orientation (and any consequent criterial considerations) with that of (trans)gender identity, whereupon it would be nearly analogous to cases considered abroad.

The South African courts have to date not been faced with a case involving associational rights and transgenderism, but as stated before, they have established precedent concerning the rights of transgender individuals and the obligations such rights place on others. In *September v Soobramoney*⁵¹ (hereafter, *September*), it was held that giving full effect to a transgender person's human dignity meant not only allowing that person to express themselves fully as their chosen gender, but also requiring others to recognise and address that person according to their chosen gender.⁵² It is important to note that this is not a problem in and of itself, but certain religious associations might, according to their doctrines,⁵³ refuse such a person

⁴⁹ One need not look further than the judgments in *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC); *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) to see how the courts have recognised how belief is integral to diversity and plurality; as well, in *Christian Education South Africa v Minister of Education* 2000 (CCT4/00) ZACC 11:par. 36 where the relationship between human dignity and religious belief was appreciated: "Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights."

⁵⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1.

⁵¹ *September v Soobramoney NO and Others* 2019 (EC10/2016) ZAEQC.

⁵² *September v Soobramoney NO and Others* 2019 (EC10/2016) ZAEQC 4:paras. 157 and 164.

⁵³ Vatican, Congregation for Catholic Education 2019. "'Male and Female He Created Them: ' Towards a path of dialogue on the question of gender theory in education.'" In this official document of the Roman Catholic Church,

membership or employment on the basis of their (trans)gender identity or require that person to act according to their biological sex; or they might refuse to address such a person by their preferred pronoun or new name (in the associational context).⁵⁴ Such a situation does not require malicious intent from either side for it to cause conflict and come before the courts. How courts would rule if faced with such conflicts would indicate how serious the South African judiciary is about the constitutional principles of equality, freedom, human dignity and diversity.

2.2 The legal framework underlying religious associational autonomy

Before delving too deeply into theoretical concepts, it will be apt to first provide an exposition of the rights that serve as the constitutional grounds for the protection of religious associations in South Africa. The relevant rights are contained in secs. 15(1), 18 and 31(1) of the Constitution. Sec. 15(1) protects peoples' entitlements to their beliefs, and this also applies to the individual members belonging to a specific religious association.⁵⁵ It should be noted that the phrasing of this provision (i.e. referring to belief broadly, not only religious belief) indicates a constitutional recognition that *every* person is a believer, religious or not.⁵⁶ This is relevant to discussions of the necessarily public elements of the right to religious belief, and casts doubt

it is stated in no uncertain terms that changing one's gender is contrary to Catholic doctrine and says of teaching such things in schools: "In many places, curricula are being planned and implemented which 'allegedly convey a neutral conception of the person and of life, yet in fact reflect an anthropology opposed to faith and to right reason.' ...This ideology leads to educational programmes and legislative enactments that promote a personal identity and emotional intimacy radically separated from the biological difference between male and female. Consequently, human identity becomes the choice of the individual, one which can also change over time." *Dialogo del Santo Padre con i Vescovi della Polonia* (Kraków, 27 luglio 2016), 02.08.2016: During a conversation with the archbishop of Łódź in 2016, Pope Francis himself remarked: "And one of these – I will call it clearly by its name – is [the ideology of] "gender". Today children – children! – are taught in school that everyone can choose his or her sex."

⁵⁴ Religious organisations have differing views on this. Focus on the Family <https://www.focusonthefamily.com/get-help/transgenderism-our-position/> aligns with the Catholic view: "We oppose the ordination of "transgender" and "transsexual" individuals into the clergy and the celebration of "transgenderism" as one of God's gifts." Whereas the Church of England and the United Church of Canada both embrace transgenderism <https://united-church.ca/community-and-faith/being-community/gender-sexuality-and-orientation>; <https://www.churchofengland.org/news-and-media/news-and-statements/guidance-welcoming-transgender-people-published>.

⁵⁵ *The Constitution*:sec 15(1) "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

⁵⁶ Thus, every opinion could be seen as informed by a particular belief system, with the implication that imposing hierarchies of importance on certain opinions because of the beliefs that inform them could be understood as unconstitutional where it relegates religious opinions solely to the private sphere. This connects to the idea of a "plural" public sphere as opposed to a "neutral" public sphere, since according to this view of this constitutional right, there would be no truly "neutral" public sphere when religious views are accorded less importance; merely an unrecognised domination of the public sphere by non-religious beliefs. This is discussed further in section 3 of this chapter.

on the idea that “secular” opinions on rights conflicts should carry more weight, but this is discussed further below. The right to freedom of belief has a public element to it, and this is also recognised by the Constitution in sec. 18,⁵⁷ providing for the freedom of association, read with sec. 31(1), which protects the enjoyment of this right to association.⁵⁸ Lastly, and this is pivotal to a nuanced understanding of the value of religious associations, are the rights to dignity in sec. 10⁵⁹ and non-discrimination in secs. 9(3-4).⁶⁰ These provisions have been brought up in individual equality claims against the actions of religious associations,⁶¹ but it should be emphasised that the Constitutional Court has explicitly recognised the integral role of religious belief in constituting human dignity and, in extension, the role of religious associational life in constituting human dignity.⁶² Recognising the nuances of these rights leads to a fuller understanding of their implications in the context of rights conflicts between individuals and religious associations.⁶³

Looking to international law, widespread recognition of, and provision for, the right to freedom of belief is evident. The right to freedom of belief is recognised in art. 18 of the Universal Declaration of Human Rights (hereinafter, UDHR),⁶⁴ and in almost exactly the same wording in art. 18 of the *International Covenant on Civil and Political Rights* (hereinafter, ICCPR)⁶⁵ and in art. 1(1) of the *Declaration on the Elimination of All Forms of Intolerance and of*

⁵⁷ *The Constitution*:sec 18 “Everyone has the right to freedom of association.”

⁵⁸ *The Constitution*:sec 31(1) “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community - (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

⁵⁹ *The Constitution*:sec. 10 “Everyone has inherent dignity and the right to have their dignity respected and protected.”

⁶⁰ *The Constitution*:secs. 9(3-4) “(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex... religion, conscience, belief, culture... (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)...”

⁶¹ As in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1.

⁶² As in the case of *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par. 36: “Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.” *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC);par. 145: “Associative practices, which may well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character.” Also notable in this regard are the cases of *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) and *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

⁶³ For an overview of what is being attempted in South Africa to give effect to deeper understandings of religious rights, see Benson 2011, “South African Charter of Religious Rights and Freedoms.”

⁶⁴ Universal Declaration of Human Rights (UDHR) 1948:art. 18, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

⁶⁵ International Covenant on Civil and Political Rights (ICCPR) 1966:art. 18.

Discrimination Based on Religion or Belief (hereinafter, DEID).⁶⁶ It should be noted at the outset that the wording of these provisions, as in the later *South African Constitution*, indicates an understanding of the nuance of belief, and that all people are believers, religious or not. It should also be noted that what could be called the public, associational or communal aspects of religious freedom are recognised in international law.⁶⁷ This is already obvious from the wording of those provisions of the UDHR, ICCPR and DEID (referred to earlier) that guarantee freedom of belief, “either individually or in community with others and in public or private;”⁶⁸ but it can also be gleaned from complementary provisions which guarantee freedom of association, as in art. 20 of the UDHR⁶⁹ and Arts. 22 and 27 of the ICCPR.⁷⁰ The DEID itself expands on the communal aspects of freedom of belief, so as to explicitly include, *inter alia*, the freedoms to faith-related assembly, faith-based teaching and the appointment of community leaders.⁷¹ Furthermore, the United Nations Human Rights Committee’s General Comment No. 22 (par.4), concerning art. 18 of the ICCPR, buttresses this view, stating that the freedom of religion manifests itself in various acts, including (but not limited to):⁷² “acts integral to the conduct of religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish religious seminaries and religious schools....”⁷³

The *Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe* reiterates the many aspects of religious freedom included in the previously-mentioned documents, and furthermore requires that states: “favourably consider the interest of religious communities to participate in public dialogue, including through the mass media.”⁷⁴ Recognition of the right to freedom of religion

⁶⁶ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEID) 1981:art. 1(1).

⁶⁷ See Evans 2009:9-18; Ahdar & Leigh 2013:376-383; Aroney 2014:178-181; and Rivers 2010:33-71.

⁶⁸ Ahdar & Leigh 2013:376, Ahdar & Leigh take this passage to imply the following: “If an individual’s religious life is dependent upon the vitality of the group to which the individual belongs, then it follows that the religious group must have some independent autonomy of its own.” This is fine, but we should be weary of reductions to individualism; as Aroney (2014:154) warns, this tendency to derive group rights solely from individual rights has the potential to suggest that individual rights have priority and should always override group rights. This is discussed further in section 4 of this chapter.

⁶⁹ UDHR:art. 20.

⁷⁰ ICCPR:arts. 22;27.

⁷¹ DEID:art. 6.

⁷² Ahdar & Leigh 2013:377, It should be noted, as Ahdar & Leigh point out, that this provision does not constitute an exhaustive list; this is also the case with Art. 6 of the DEID, denoted by its use of *inter alia*.

⁷³ United Nations Human Rights Committee’s General Comment No. 22 1993:para 4.

⁷⁴ *Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe* 1989:Principle 16(11).

and belief is also present in art. 10 of the *Charter of Fundamental Rights of the European Union* (hereafter, *European Charter*)⁷⁵ and in art. 9 of the *European Framework Convention for the Protection of National Minorities* (hereafter, FCNM).⁷⁶ Both instruments also recognise the right to freedom of association, the *European Charter* at art. 12⁷⁷ and the FCNM at art. 11.⁷⁸ The importance of religious associational life in manifesting religious freedom has duly been recognised in the decisions of the European Court of Human Rights (hereafter, ECHR), as in the oft cited *Hasan & Chaush v Bulgaria*:

The Court recalls that religious communities traditionally and universally exist in the form of organised structures... Participation in the life of a community is thus a manifestation of one's religion, protected by Article 9 of the Convention. Where the organisation of religious community is at issue, Article 9 must be interpreted in light of Article 11 of the Convention which safeguards associative life against unjustified State interference... *Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society* and is thus an issue at the very heart of the protection which Article 9 affords (emphasis added).⁷⁹

It seems then that, in large part, international law supports a nuanced understanding of religious freedom where religious associational life is recognised as playing an essential part.

Respect for the associational aspects of the right to freedom of belief is observed in many foreign jurisdictions, some of which could serve as useful points of comparison. Germany, in the *German Basic Law*, recognises a general religious liberty right in art. 4, and it further recognises in art. 19(3) that basic rights, like religious freedom, shall apply even to “domestic artificial persons.”⁸⁰ This linkage between basic rights and associations of course leads to questions about the limits of religious associational autonomy, but even this is specifically dealt with at art. 140 of the *German Basic law* which holds that: “Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all.”⁸¹ Scholars have noted how broad the scope of German legal recognition of a religious association

⁷⁵ *Charter of Fundamental Rights of the European Union* (European Charter) 2007:art. 10.

⁷⁶ *European Framework Convention for the Protection of National Minorities* (FCNM) 1995:art. 9.

⁷⁷ European Charter:art. 12.

⁷⁸ FCNM:art. 11.

⁷⁹ *Hasan & Chaush v Bulgaria* ECHR 2000, in the European Human Rights Reports 2002 34 554:62.

⁸⁰ *Basic Law of the Federal Republic of Germany* (German Basic Law) 1949:arts. 4;19(3).

⁸¹ *German Basic Law*:art. 140, read with the Weimar Constitution 1919:art. 137.

is; some religious associations may be private entities under civil law and others may have the status of a public corporation, signifying their role in public life.⁸² Under this state of affairs, it is easy to see how German law can recognise the religious rights of religiously-affiliated public entities like religiously affiliated schools, hospitals, universities and more. However, it should be noted that such entities, while they are granted varying degrees of autonomy in ordering their internal affairs, are still subject in their labour practices to “the limits of the law that applies to all.”⁸³ What this means is not that these associations are always subject to laws of general application,⁸⁴ but rather that, when, for instance, labour conflicts arise within religious associations, a balance must be struck between state interests and the religious interests of the associations according to their self-understanding.⁸⁵

Whereas the German approach is praised by scholars for its broad conception of religious associational autonomy within its legislative framework, the legislative and judicial activities of some states have instead been the topics of broad criticism. The *UK Human Rights Act* (hereafter, HRA), sec. 13(1) is one example.⁸⁶ Sec. 13 came about after extended lobbying against initial versions of the HRA, which, it was argued, did not give due regard to various aspects of religious associational autonomy, such as the freedom of ministers to refuse to administer marriages against their religious convictions, or the freedom of church schools or religious charities to terminate the employment of staff whose beliefs and behaviour were

⁸² Robbers 2010-2011:284-285.

⁸³ Robbers 2010-2011:286, It should be noted that this provision, while it may seem similar to the legal idea of a law of general application, is strictly differentiated therefrom. Durham (2001:688-689) expands on this, quoting von Campenhausen (2001:77-85 in Robbers (ed.)): “a law that applies to all is only one which is mandatory for a peaceful communal life in a state, which is neutral towards religion and ideology thus respecting the independence of the religious communities.”

⁸⁴ Robbers (2010-2011:286-288) states that the relevant courts have not always been consistent in interpreting “the limits of the law that applies to all.” The balance which must be struck in fact often involves considerations analogous to weighing up those provisions in the European Charter protecting privacy and family life (Art. 8) on the one hand, and freedom of religion, belief and thought (Art. 9) on the other. Robbers and others’ analyses of German Federal Constitutional Court case law as well as ECHR case law seem to bear this out, see: Van der Vyver 2012 “State interference in the internal affairs of religious institutions.”

⁸⁵ Durham 2001:687-690; Robbers 2010-2011:283-288; Van der Vyver 2012:2-4: These authors recognise that the German position places a particularly high premium on religious associations’ self-understanding of their doctrine. However, Robbers (2010-11:287) has criticised the German approach where it engaged in “line drawing” between what types of activities of a religious association may be limited by a “law that applies to all,” (similar to the doctrinal core approach of many countries) stating that: “Line-drawing by a secular court would easily interfere with the right of religious communities to independently determine which of their activities are religious and which are not.”

⁸⁶ UK Human Rights Act (HRA) 1998:art. 13(1), “If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.”

contrary to such organisations' basic ethos.⁸⁷ Sec. 13 was supposed to address these and other concerns on religious freedom, especially religious associational freedom. However, scholars maintain that case law following its enactment has borne out initial scepticism about the provision's effectiveness;⁸⁸ to this point Julian Rivers maintains that there is "no evidence that [sec. 13] has had any effect at all on the post-HRA-case-law,"⁸⁹ and that its promulgation in fact coincided with the erosion of religious associational autonomy in the UK.

Another example, this time from the United States, is the case of *Employment Division v. Smith* (hereafter, *Smith*).⁹⁰ In the US, there exist various approaches to the issue of religious associational autonomy, each relying on different sets of legal arguments fashioned from different sections of the US Constitution or following certain strands of US case law.⁹¹ The most prominent of these is the "free exercise" approach based on the US Constitution's free exercise clause,⁹² which, prior to the passing of the *Smith*-decision, "appeared to provide a very secure anchor for protection of the full range of autonomy issues."⁹³ The US free exercise approach prior to *Smith* meant that "a burden on religion could not withstand constitutional scrutiny unless it was justified by a compelling state interest that could not be achieved in a less restrictive way."⁹⁴ This "compelling state interest" or "strict scrutiny"⁹⁵ test was, some US scholars argue, overruled in the US Supreme Court's ruling in *Smith*, which held that a valid general and neutral law should not be subject to strict scrutiny regarding its potential conflict with individualised claims to religious liberty.⁹⁶ Now, the intricacies of this case cannot be treated in detail here; shortly stated, the Court had to deal with an individualised free exercise claim and ultimately held that anarchy would ensue if every individual religious exemption

⁸⁷ Ahdar & Leigh 2013:378-380.

⁸⁸ Ahdar & Leigh 2013:380 at fn. 25 for a list of relevant cases.

⁸⁹ Rivers 2010:339.

⁹⁰ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁹¹ Durham 2001:697.

⁹² Constitution of the United States:Amendment I, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." As Durham (2001:697 at fn. 51) has clarified, this check on federal power was also extended by precedent as a check on individual state power.

⁹³ Durham 2001:698-704. Other US approaches Durham discusses are the establishment approach and the internal disputes approach.

⁹⁴ Durham 2001:698.

⁹⁵ Horwitz 2008:64. Horwitz refers to the test as one of "strict scrutiny." Many terms are used interchangeably to describe this test, and Justice Scalia in *Smith* 494 U.S. at 873 made use of the phrase "compelling governmental interest."

⁹⁶ Horwitz 2008:64. Durham and Horwitz are hardly alone in expressing concern about the developments in the *Smith*-case; see for instance Smith (2010:107-108).

claim could succeed on the basis of free exercise.⁹⁷ This is radically oversimplified, but it explains why authors like Perry Dane have instead argued that the *Smith*-decision does not really reduce religious associational autonomy in the US, given the rationale behind a slide into anarchy would only apply to highly individualised claims seeking to exploit free exercise protections, and therefore not to claims involving religious associational autonomy.⁹⁸

There is another, perhaps more troubling, insight regarding the *Smith*-decision that some scholars have arrived at, and which is arguably something of a broader trend in modern human rights jurisprudence. This is, simply put, the problematic juristic predisposition towards a kind of secular neutrality, which, while it nobly aims at the production of blind equality in rights disputes, tends rather to produce uncertainty about the future of religious rights.⁹⁹ Where rights disputes are to be determined under the rubric of state secular neutrality, an inchoate value structure favouring secularism as defined is necessarily imposed.¹⁰⁰ In such circumstances, it seems reasonable to be concerned about the security of religious associations, themselves being values-producing-and-maintaining entities, which in the secular-neutral model merely exist at the sufferance of the state.¹⁰¹ Yet, as the above overview has shown, there is widespread

⁹⁷ *Employment Division v. Smith*, 494 U.S. 878-879;888 (1990), Justice Antonin Scalia, writing for the majority, explains why this decision is not a departure from the “compelling interest” test: “We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate... *Any society adopting such a system would be courting anarchy*, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. *Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' ...and precisely because we value and protect that religious divergence*, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.” (emphasis added)

⁹⁸ Perry Dane (1999:4) differentiates religious associational claims from individualised claims as per *Smith*: “For one thing, it generally involves a well-defined institutional or communal interest, and not merely an individual one. Moreover, at least the paradigmatic claims to religious autonomy do not depend for their force on the specific norms of a particular religious community. Rather, they invoke limitations on government intrusion in any religious community.” As Dane notes, this differentiation is a vital one for religious liberty claims in the US going forward, and it explains why the holding in *Smith* would not necessarily apply in the context of religious associational autonomy.

⁹⁹ Horwitz (2008:8-9) points out how the US judiciary in its recent attempts at equal treatment, not excepting *Smith*, has shied away from more robust readings of the “religion clauses” that treat religion as a special category, since such readings would not be seen to treat religion neutrally. See also *Smith* (2010:110-150), who at length discusses how this confusion about the special nature of religious rights arose, and how modern conceptions of the secular have bedevilled attempts at understanding the proper roles and limits of church and state in relation to each other.

¹⁰⁰ Benson 2013(b):59. This is elaborated on in section 3 of this chapter.

¹⁰¹ Aroney 2014:182. To this point on how religious associations foster a diversity of moral opinion within the state: whether the state merely endures this diversity “in the faith that it is destined to disappear” or embraces it would tell us a great deal about its self-understanding as led by convergent (eventually totalistic) or divergent (truly diverse) understandings of liberalism (Gray 2001:105).

recognition of the constitutive role of religious associations in religious life, and thus a widespread admission of the need for states to protect religious associational autonomy. It follows, then, that the idea of secular neutrality in the liberal state ought to be addressed, in order to map out how the state should understand its role and limits with regard to religion, and in particular, religious associations.

2.3 Rebutting the presumption of secular neutrality

In order to develop a solid foundation for the defence of religious associational autonomy against rising, actually intolerant social trends, we need to clarify the relevant terminology, such as the words secular, diversity and liberalism. The first of these to consider is the term, “secular.” “Secular” when applied in discussions on law or politics is often implicitly understood to mean “free of religious belief,” (notably in phrases like “secular state”), and this use of the term has a sort of “butterfly effect” on our understandings of various concepts, particularly regarding the proper competencies of the state and the role of religion.¹⁰² In terms of principled discourse, the secular public sphere and secular state should be understood as inclusive of religious belief and opinion (just as it is inclusive of non-religious belief and opinion), with religions and the state functioning in cooperation, neither overstepping the bounds of their respective competencies.

Secularism as a principle of modern liberal thought, if understood in the ideological terms originally laid out by its coiner, George Jacob Holyoake, is incompatible with truly liberal and pluralistic conceptions of democratic society which accord sufficient respect to religious and non-religious beliefs. Holyoake coined the term “secularism” in 1851¹⁰³ and laid out some of its main claims and tenets in his 1896 work, *English Secularism*.¹⁰⁴ Benson provides a useful

¹⁰² Benson 2010:21, “When the ‘secular’ is read as ‘non-religious’ in its exclusivist position, then the beliefs of atheists and agnostics, who define themselves as ‘non-religious,’ are accorded representation, but those who define themselves as ‘religious’ are not. This is neither representative nor fair, yet it is the dominant and largely unexamined result of assuming the ‘public’ as ‘secular,’ and the ‘secular’ as ‘non-religious.’”

¹⁰³ Holyoake (1896:46-48) traces the rise and development of secularism, noting the first use of the word “Secular” in its modern meaning in an 1851 *Reasoner* article, “Truths to Teach,” and the first use of “Secularist” in the same vein of thought. Finally, he notes the first ever use of the word “Secularism” in print, again in the *Reasoner*, Dec. 10, 1851.

¹⁰⁴ Holyoake 1896:v-vi. The publisher’s preface to “English Secularism” describes it thusly: “What is Secularism? Secularism espouses the cause of the world *versus* theology; of the secular and temporal *versus* the sacred and ecclesiastical. *Secularism claims that religion ought never to be anything but a private affair; it denies the right of any kind of church to be associated with the public life of a nation* and proposes to supersede the official influence which religious institutions still exercise in both hemispheres.” (emphasis added)

overview of the arguments against religion in that work, demonstrating how secularism was intended to function in relation to religious belief:

Secularist truth, he insists, “should tread close upon the heels of theological error” so as to counteract and remedy it. Thus, for example, “for the providence of Scripture, Secularism directs men to the providence of science, which provides against peril, or brings deliverance when peril comes.” Instead of “futile prayer,” secularism proposes “self-help and the employment of all the resources of manliness and industry.” Instead of belief in “original depravity,” secularism aims to “promote the moralisation of this world which Christianity has proved ineffectual to accomplish.”¹⁰⁵

Secularism so encapsulated cannot be said to regard religious belief neutrally. Explicit in secularism (or at least in Holyoake’s original secularism) is the claim to neutrality, and the simultaneous claim that moral theories, “metaphysical or theological,” should only seriously be considered when it is useful and sensible to do so.¹⁰⁶ The inverse being that, when the observer or decisionmaker in question *reasons* that it is not “useful” or “sensible” in a particular instance, then the given moral theory is neglectable. And here is where the problem eventually crops up in contemporary thought: religious beliefs, or rules resulting therefrom, are not often viewed as being “useful” nor “sensible” to many modern minds,¹⁰⁷ especially not when deciding on matters of law or public policy. Yet, as Benson writes, “religious rules are not intended to make sense to everyone.”¹⁰⁸ Religious rules, similar to cultural traditions, function to preserve particular ways of life that give meaning to religious and/or cultural groups, and for this reason they should be recognised and duly protected by constitutional dispensations that respect diversity and pluralism. However, according to the principles of secularism, even in the case where a religious rule or moral stance might be useful, say it provides a sense of meaning to a religious individual or community, if it is not sensible (according to the rational *secularist*

¹⁰⁵ Benson 2004:88, quoting Holyoake 1896:71-73.

¹⁰⁶ Holyoake (1896:37), “Whatever may be the value of metaphysical or theological theories of morals, utility in conduct is a daily test of common sense and is capable of deciding intelligently more questions of practical duty than any other rule.” -from the latter half of Holyoake’s account of Secularism to the International Congress of Liberal Thinkers in 1886, reproduced in “English Secularism,” also quoted in Benson 2004:87.

¹⁰⁷ Pratchett (1992:35) provides an example from popular fiction: “What have I always believed? That... if a man lived properly, not according to what any priests said, but according to what seemed decent and honest inside, then it would... turn out all right.”

¹⁰⁸ Benson (2013(b):108), “These rules do not and are not intended to “make sense” to those outside of the particular traditions that uphold them, and *it is their very peculiarity to outsiders that ought to and does make us chary about trying to judge such beliefs from outside.*” (emphasis added)

mind) to observe, then it should not receive due consideration by the decisionmaker.¹⁰⁹ Holyoake's secularism is, therefore, inherently subjective in that it requires value judgements based on utility and rational sensibility above all else. It is, in a very real sense, a road that leads to totalistic, convergent ideas of liberalism, but I will discuss this later on. Holyoake explicitly intended for secularism to serve as an ethical system for those who had abandoned religion (specifically Christianity);¹¹⁰ through secularism, what was useful and sensible could be salvaged from religion, and what contents of religion offended reason could be duly discarded. Secularism understood in such reactionary terms cannot serve as a guiding principle in a pluralistic society where religious belief is to be taken seriously and treated fairly in all aspects of democratic life, from the public and political to the private and personal.¹¹¹

How then should Holyoake's conceptions of secularism (and derivative ideas of the secular, such as the secular public sphere or secular government) be understood in a truly pluralistic democratic society? Maybe the question should be whether the playing of the secular against that of the religious should not rather be replaced with the religious versus the non-religious? First, let us note how the conception of the secular should not be understood, and for this we need simply turn to the most prominent contemporary proponents of hard-line secularism: the New Atheists. The New Atheist movement, with its "four horsemen,"¹¹² Christopher Hitchens, Richard Dawkins, Sam Harris and Daniel Dennett, has been described as the most recent iteration of a subdivision of the naturalist tradition, distinguished as scientific naturalism.¹¹³

¹⁰⁹ Similar criticisms of the criterion of "reasonableness" (or in this case "sensibility") have been raised regarding similar ideologies, such as John Rawls' political liberalism; consider this critique by Paul Campos ("Secular Fundamentalism" 1994:1824 fn. 21): "(I)f-as his comments on judicial review as an embodiment of public reason suggest-the account entails that some anti-democratic institution have the ultimate power to determine what public reason in fact requires, then we have reason to worry *that the author's supreme confidence concerning his ability to discern what he believes are the right answers to such questions will be replicated in the opinions of those appointed to safeguard the exercise of "public reason."* (emphasis added)

¹¹⁰ Holyoake (1896:82), "None of the earlier critics of Secularism... realised that it was addressed, not to Christians, but to those who rejected Christianity, or who were indifferent to it, and were outside it."

¹¹¹ If there be any doubt of the reactionary nature of original secularism, note at page 178 of "Christianity and Secularism" (an 1853 report on a series of debates between Holyoake and Reverend Brewin Grant), Holyoake's indignant response to his interlocutor's claims of "the loose, immoral notions of sceptics": "I am constrained to say that the Bible is not a book which entitles Christians to assume this tone towards us. The Bible is a disqualified book, by the nature of many of its narratives – disqualified for the perusal of children, disqualified for the family table."

¹¹² This term came about following a recording (made available online via the Richard Dawkins Foundation for Reason and Science) on the 30th of September 2007 of the four authors engaged in conversation on topics relating to religion and theistic belief. In 2019, a book recounting the conversation was published: Hitchens, Dawkins, Harris and Dennett 2019 "The Four Horsemen: The Conversation That Sparked an Atheist Revolution". For their individual contributions see: Harris 2004; Dawkins 2006; Dennett 2006; and Hitchens 2007.

¹¹³ Murphy 2010:198.

Secularism originally emerged somewhere between these traditions: where on the one side we would find the work of, for example, David Hume and Immanuel Kant, and on the other, the work of Christopher Hitchens, Richard Dawkins and company, we would find Holyoake's secularism ensconced somewhere in the middle.¹¹⁴ The views of the most recent secularists – perhaps more accurately termed “anti-religionists” – removed from Holyoake's original (ostensibly neutral) formulations by a span of little over a century, reveal the direction in which the popular idea of secularism has developed today.¹¹⁵ Consider this quote from Christopher Hitchens: “As I write these words, and as you read them, people of faith are in their different ways planning yours and my destruction, and the destruction of all the hard-won human attainments that I have touched upon. *Religion poisons everything* (original author's emphasis).”¹¹⁶ Another, now from Dawkins, on the topic of religiously-derived morals: “...scriptural routes, if followed through religiously... encourage a system of morals which any civilized modern person, whether religious or not, would find – I can put it no more gently – obnoxious.”¹¹⁷ Clearly, whatever neutrality towards religious belief Holyoake might have originally intended has been left by the wayside by the New Atheists, and it is this new view of secularism that enjoys much popularity in the public life of liberal democratic societies.

There is one more notable feature of the New Atheist movement to mention before concluding on this topic, notable because it is also commonly a feature in modern political and legal discourse involving the “secular” public sphere. I refer here to the conception of an atheistic and/or secular worldview as being void of belief and by virtue of this neutral.¹¹⁸ “Our belief is not a belief.”¹¹⁹ Hitchens writes, “Our principles are not a faith. We do not rely solely upon science and reason, because these are necessary rather than sufficient factors, but we distrust

¹¹⁴ Murphy 2010:197-201.

¹¹⁵ It should be noted that my description here of Holyoake and the New Atheists as sharing a common tradition does not imply that the New Atheists have spent their careers explicitly reinterpreting and reapplying Holyoake's original texts in the mode of a MacIntyrean tradition (just as Murphy (Murphy 2010:197) writes that “...most adherents of naturalism do not spend their time reinterpreting and applying David Hume's texts.”); what I mean to show is that they have nevertheless advanced Holyoake's secularism's original goal of denying the validity of religious beliefs in public life.

¹¹⁶ Hitchens 2007:13.

¹¹⁷ Dawkins 2006:237.

¹¹⁸ The terms “secular” and “atheistic” ought not be used interchangeably, however, in the works of some scholars (such as Bilchitz and De Vos, mentioned above) who assume that what is properly secular is removed from religious belief, there seems to be no real distinction. The only distinction that can be gleaned, which is telling, is that when private atheistic or otherwise non-religious belief moves into the public sphere, it is favourably termed secular.

¹¹⁹ Hitchens 2007:9. Here we can see some continuity between the New Atheists' and Holyoake's thought, quoting Holyoake (1896:87-88): “Adherents who accept the theory of this life for this life dwell in... the land of certitude. Science and utilitarian morality are kings in this country, and rule by right of conquest over error and superstition.”

anything that contradicts science or outrages reason... We do not hold our convictions dogmatically.”¹²⁰ Such an unexamined, purely materialist notion of belief cannot guide a society which purports to protect a plurality of beliefs. To this point on belief Jordan Peterson, speaking at a seminar on classical liberalism, comments that:

You might say, ‘I do not believe in that.’ You do not believe there is any such thing as good? You do not believe there is any such thing as ultimate good? I am not making some ontological claim about an old man in the sky... my point is: you do have a belief system, whether you know it or not, and there is something fundamental that unifies it... maybe you do not know what that unifying belief is, but that does not mean it is not there; it just means you do not know what it is.¹²¹

The beliefs held by many in the modern, rationalistic age are not simply non-existent; it would be more accurate to state that they are inchoate, relying on metaphysical presumptions developed in older traditions – largely religious ones.¹²² The secularist tradition attempts to gloss over important metaphysical questions, such as truth, beauty and goodness – and various religious and non-religious traditions’ answers to them – in favour of a materialist utilitarian ordering of society. But what then becomes of value-laden normative concepts like equality, freedom and even human dignity if determinations of what is “good” or “true” are suspect, except when left to the machinations of modernity’s inchoate and unexamined beliefs? An insight in this regard, looking to history, would be that the complete excision of religion (*i.e.* any non-atheistic/non-*secular* opinions) from public life does not, in fact, result in anything resembling a neutral public sphere. Rather, what seems to occur is a proliferation of secular ideologies which capture public institutions, and whose inchoate beliefs tend to dominate public life; as Clifford Geertz held: “It is, in fact, precisely at the point at which a political system begins to free itself from the immediate governance of received traditions...that formal

¹²⁰ Hitchens 2007:9.

¹²¹ Peterson “The Importance of Being Ethical”, <https://www.hoover.org/research/importance-being-ethical-jordan-peterson> (accessed on 3 May 2022). In this it is not implied that Peterson is the first to have unveiled this insight; there are numerous thinkers that have already done so over the years. Having said this, Peterson provides a succinct explanation in this regard.

¹²² Benson (2013(b):59), “Epistemological insecurity is papered over by avoidance or, worse, simplistic and superficial appeals to shared conceptions that exist only because they were developed in other traditions - - and are no longer upheld by those “teaching” those frameworks and concepts.” Benson points to Polanyi’s (1946:69) insight: “Hence, tradition, which the rationalist age abhorred, I regard as the true and indispensable foundation for the ideals of that age.”

ideologies tend first to emerge and take hold.”¹²³ I will elaborate on this point of ideology (specifically relating to gender identity) in a later chapter, but here a brief example will do to demonstrate how morality (ideological, religious or otherwise) is inevitable, and that a purely materialist approach to ordering public life does not necessarily result in a perfectly reasonable society.

Consider the case of Richard Dawkins: Dawkins, as mentioned above, was a prominent voice of the New Atheist movement and a recipient of numerous accolades for his advancement of a sceptical, scientific approach to matters of general interest.¹²⁴ Yet, as soon as his sceptical, scientific approach turned to the topic of gender identity, he faced vilification and the retraction of awards, most notably from those very humanist circles which had once lauded him for his scientific scepticism. In the words of the American Humanist Society, withdrawing Dawkins’ 1996 “Humanist of the Year” award, Dawkins had “...over the past several years accumulated a history of making statements that use the guise of scientific discourse to demean marginalised groups,”¹²⁵ and this was “antithetical to humanist values.”¹²⁶ This use of values-language, especially relating to “marginalised groups” is a common feature in contemporary Western rights discourse, however, as is often remarked in this regard, values language (as a manifestation of inchoate belief, perhaps) is ambiguous and highly manipulable.¹²⁷ This is beside the point. What I highlight here is the insurmountable difficulty of claiming neutrality when it comes to matters such as what constitutes morally permissible behaviour. In this regard, even the eminently reasonable find difficulty and disagreement; and where there is such real difficulty, there should be no presumption against the equal participation of religiously informed opinions in the public sphere.

¹²³ Benson 2013(b):60, quoting Geertz at fn. 190. Similar observations are made by Polanyi (1946:49-70) in the section entitled “Dedication or Servitude.”

¹²⁴ Dawkins is a Fellow of the Royal Society and Fellow of the Royal Society of Literature, and according to his website, <https://richarddawkins.net/richarddawkins/> (accessed on 5 May 2022), Dawkins is “One of the most respected scientists in the world and the biggest draw in secularism... Secularism is sweeping America as a movement, and Richard Dawkins is the catalyst who galvanizes it.”

¹²⁵ American Humanist Association “American Humanist Association Board Statement Withdrawing Honor from Richard Dawkins” <https://american-humanist.org/news/American-humanist-association-board-statement-withdrawing-honor-from-richard-dawkins/> (accessed 5 May 2022).

¹²⁶ One wonders what “humanist values” must actually consist of if the rational scepticism of an Oxonian professor emeritus of biology on the matter of biological sex is labelled “demeaning,” and if rational enquiry is indeed the bedrock of the supposedly objective secular, then how can its scope be so arbitrarily limited?

¹²⁷ Benson 2014; Bussey 2018 and Esau 2000 & 2009 are not in favour of values-language being the basis of judicial decisions. Bussey (2018:561-562) refers to two dissenting Canadian Justices: “Cote and Brown JJ critiqued ‘Charter values’ as ‘the product of the idiosyncrasies of the judicial mind that pronounces them to be so.’ Such ‘values’ are amorphous, undefined and may become mere rhetorical devices for moral judgements.”

Returning now to my previous question: “How should Holyoake’s conceptions of secularism (and derivative ideas of the secular, such as the secular public sphere or secular government) be understood in a truly pluralistic democratic society?” And, as alluded to earlier, should the comparing of religion with that of the secular not rather be replaced with a comparison between the religious and the non-religious?¹²⁸ It is suggested that secularism, viewed in the religiously exclusive ideological terms above, can correctly be understood to describe various forms of inchoate belief, and, as such, its adherents deserve no special privilege over others to engage fully in public life according to their beliefs. If what we mean by “secular” when we speak of the secular public sphere or the secular state is merely exclusionary public atheism (with its own set of half-articulated moral beliefs) or the belief that there is a universal rationality that stands outside of religion, then we should be weary of calling them neutral.¹²⁹ This is a fine state of affairs if one wishes for an eventually totalistic state morality. However, if one would advocate a state that understands itself as truly neutral concerning belief, then one would advocate either the disuse of the term “secular” to mean neutrality or, more realistically, one would advocate an understanding of “secular” as inclusive of religious belief *alongside and on par with* non-religious belief.¹³⁰ Then there is probably the more apt option of discarding of the comparison between the religious and the secular altogether, rather referring to the religious versus the non-religious or to the spectrum of foundational beliefs whether religious or non-religious.

It seems that, at the most basic level, there needs to be a clarification of how “belief” and its equivalents are understood by the courts. As Benson put it: “...*(H)ow the State is understood in the context of accommodation will vary in relation to how the terms secular and diversity are defined.*”¹³¹ Put simply, the distinction between “religious believers” and “non-believers” and the larger scale idea of a “secular,” “neutral” public sphere (that is, a public sphere that is

¹²⁸ There is also the proposal of referring to the spectrum of foundational beliefs whether religious or non-religious.

¹²⁹ Stanley Fish comments that: “Committed at once to allowing competing world views equal access to its deliberative arena, and to disallowing the claims of any one of them to be supreme, unless of course it is demonstrated to be at all points compatible with the principles of reason... The one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue”, Stanley Fish, “Liberalism Doesn’t Exist”, *Duke Law Journal*, Vol. 36, (1987), 997.

¹³⁰ Benson (2013(a):17), “The secular is, properly understood, a realm of competing faith/belief claims, not a realm of ‘non-faith’ or ‘non-belief’ claims because, strictly speaking, there can be no such realm.”

¹³¹ Benson 2017:121.

free of religion) espoused in modern constitutional jurisprudence leads to a whole host of problems down the road. Among other things, such distinctions obscure the roles and entitlements religious associations (and their members) have to participate in the public sphere. Importantly for this dissertation, such distinctions lead to the erroneous presumption that other beliefs informed by non-religious philosophies are “neutral” (and rational) and therefore deserve greater consideration by a “neutral” (and rational) judiciary.¹³² This in turn leads to convergence¹³³ liberalism and civic totalism, where the perceived validity of beliefs other than those supposedly neutral ones are gradually suppressed. Therefore, secularism and belief first need to be re-evaluated before the constitutional principles of equality, freedom, human dignity and diversity can be properly argued in the context of religious associational rights.

2.4 The need to traverse beyond individualism

Another common assumption which must be rebutted in order to properly reframe the debate around associational autonomy is that of an overly simplistic individualist understanding of religious freedom. It is not denied that at least one element of the right to religious freedom occurs at the individual level – after all, it is a group of individuals in community with each other that constitutes a religious association – however, this does not mean that religious freedom consists only in, and should always in analysis be reduced to, the individual level. Such a reduction leads to a chain of misconceptions that chip away at the right, ultimately resulting in a situation where the religious association, understood merely as a conglomeration of its members’ private preferences, must always bend to the rhetoric of antidiscrimination and equality activists.¹³⁴ Founding religious liberty on a purely individualistic basis makes it seem sensible to (incorrectly) frame debates about religious associations in terms of outside individuals’ rights to enter, remain in or work for such associations on terms that would unfairly alter the association’s self-understanding. As well, grounding religious freedom strictly in individualism, furthers the relegation of religious beliefs to the private sphere, playing into the problematic idea of a non-religious-secular public sphere.¹³⁵ The assumption of a strictly individualistic approach to religious freedom therefore, must be rebutted in favour of a holistic

¹³² Benson 2017:129.

¹³³ This concept will be explicated in more detail below.

¹³⁴ Rivers 2010:338-339; Ahdar & Leigh 2013:375-376; Aroney 2014:154.

¹³⁵ Aroney (2014:183), “If religious rights are conceptualised as inherently ‘private’ in this sense, it will be that much more difficult to establish that such rights are really being exercised as private rights in various domains of ‘public’ or ‘quasi-public’ life.”

approach that understands religious freedom as consisting of necessarily individual yet irradicably communal (and therefore associational) elements.

Religious freedom, religious liberty, freedom of belief or of conscience; whatever name it takes, this right means nothing, has no substance, if it means that only the individual's privately held beliefs are protected. If one is not free to practice or express one's beliefs publicly, individually *and* in community with other believers, then it would be true to say one is denied that freedom.¹³⁶ Accordingly, many authors have held that the right to religious freedom is incomplete if considered without its essentially communal and associational dimensions.¹³⁷ Religious associations and their right to religious associational autonomy are thus inseparable components of the right to freedom of religion. Religious associations not only serve as meaning-making structures for their members and as a means for mediating between the state and the individual; they also constitute collective entities that pursue ends in their own right as parts of civil society.¹³⁸ It follows that a reductively individualistic understanding of religious freedom causes trouble at the individual, associational and societal levels, since these are all interrelated aspects of the right. It should nevertheless be noted how exactly the purely individualistic approach could unduly reduce religious associational autonomy. Consider Nicholas Aroney's observation in this regard:

Much is at stake in the question whether freedom of religion is understood, in essence, to be an individual, associational or communal right. If it is solely an individual right to believe, with no right to practice one's belief, then it does not amount to very much at all. If it is essentially an individual's right to believe and practice, then the freedom will indirectly protect the beliefs and practices of religious groups and organisations in so far as this is necessary to protect the rights of individuals to manifest and practice their religious beliefs.¹³⁹

¹³⁶ Benson (2013(b):72), "The freedom of religion then is not just the right to have beliefs privately but the right to engage in the public dimensions of manifestation, declaration and teaching."

¹³⁷ Aroney 2014:153-154. Durham (2001:683), "Protection of the right of religious communities to autonomy in structuring their religious affairs lies at the very core of protecting religious freedom. We often think of religious freedom as an individual right rooted in individual conscience, but in fact, religion virtually always has a communal dimension, and *religious freedom can be negated as effectively by coercing or interfering with a religious group as by coercing one of its individual members.*" (emphasis added)

¹³⁸ Ahdar & Leigh (2013:375), "This freedom is not merely a 'compound' or 'aggregation' of individual members' freedoms; it is the right the group asserts to its own religious exercise, separate and distinct from the rights and interests of its members."

¹³⁹ Aroney 2014:154.

Aroney notes, however, that even this understanding of religious freedom, where the religious group or association is legitimated and protected only derivatively *via* individual rights and in furtherance of individual autonomy, is an inadequate justification for the protection of religious associational autonomy. It invites undue state intervention into the internal affairs of religious associations, as the focus would be on protecting individuals' interests within the group and not the interests of the group as a whole.¹⁴⁰ One very present danger this presents, which is particularly relevant to the overall thrust of this dissertation, is that such an approach to religious freedom and religious associational autonomy has the tendency to suggest, in Aroney's words, that: "(T)he rights of religious groups must always be subordinated to the rights, not only of their individual members, but the rights of individuals that do not belong to such groups but nonetheless make claims against them, such as through the universalising application of antidiscrimination and other regulatory laws."¹⁴¹ Therefore, I agree with the many scholars who have recognised, as Ahdar and Leigh put it, that: "(T)his characteristically liberal and atomistic way of viewing religious groups (an aggregation of individuals contingently linked by religious preferences) seriously undermines religious freedom."¹⁴² Individual rights to religious freedom are important, yet relying on them in isolation warps the discourse; to quote Rivers: "They fail to capture central parts of the subject-matter... and they risk capture by a statist agenda that subjects all of civil society to its own ethos. As candidates for a constitutional principle underlying the law of organized religions, they are descriptively inadequate and prescriptively unappealing."¹⁴³ The protection of religious rights must find a firmer grounding than individualism alone can provide.

¹⁴⁰ Ahdar & Leigh 2013:375-376.

¹⁴¹ Aroney 2014:154. Other authors, such as Elshtain (1995:57), Rivers (2010:338-339) and Evans (2012:35), to name only a few, have voiced similar concerns about the overextension of state competencies into the religious domain via the undue application of antidiscrimination provisions.

¹⁴² Ahdar & Leigh 2013:376. Ahdar and Leigh refer to the South African scholarly discourse on the topic, which I have also noted in the background section of this chapter. With further regard to individualism, Robert George (2013:76) has similarly stated: "Individualism overlooks the intrinsic value of human sociability and tends mistakenly to view human beings atomistically... reducing all relationships to means by which the partners collaborate with a view to more fully or efficiently achieving their individual goals and objectives." Also, taken with Paul Horwitz' (2008:65-66) observation that: "In any communal religious setting, *individuals take their religious obligations from those of the religious community as a whole*. Their own practices, and the burdens they experience... are thus part of the broader fabric of the group religious experience," and with Michael McConnell's (1992:172-173) acknowledgement that: "The essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole," it seems scholars agree it is totally counterintuitive to approach religious protections primarily from an individualistic standpoint. (footnotes omitted and emphasis added)

¹⁴³ Rivers 2010:322.

Most religious believers depend on religious associations not only as structures that preserve and further their religious traditions and communities, but also as representative entities that express and give weight to their normative moral beliefs in civil society.¹⁴⁴ Religious associations, usually in the form of religious institutions such as churches,¹⁴⁵ are integral to the private lives of religious believers, and they are also indispensable components of a truly pluralistic democratic public life. To demonstrate this point, we should look to Charles Taylor's encapsulation of the idea of civil society: "...a web of autonomous associations, independent of the state, which bound citizens together in matters of common concern, and by their mere existence or action could have an effect on public policy. In this sense, western liberal democracies were thought to have functioning civil societies."¹⁴⁶

An independent state and autonomous (religious) associations are, in this view, part and parcel of a properly functioning civil society, which is itself an essential element of a true liberal democracy. Nevertheless, the nature of the relationship between religious associations and the state must be set on firm ground. The state being independent does not suggest it is unaccountable or free from the normative influence of its constituents, likewise associations being autonomous does not suggest their practices are always absolutely free from state scrutiny. The state is supposed to be kept in check by the separation of powers and further held accountable to its people by the periodic election of representatives in the executive and the legislature. Thus, the state is shaped by the people, whose opinions – political, moral or otherwise – are moulded to some degree by social life, and social life to many religious believers consists, at least in part, of religious associational life. It follows then that if religious associational life indeed plays a substantial role in influencing religious believers' worldviews, which in turn affects their opinions on public policy and the like, then the state would be acting illegitimately and undemocratically where it interferes unjustifiably in religious associations'

¹⁴⁴ I duly recognise that not all religious believers are necessarily members of religious associations, however this fact does not alter the analysis; I refer again to Ahdar and Leigh (2013:376): "Religion is seldom if ever solely an individual matter. While a lone individual may clearly follow his or her own unique chosen path in matters of belief, worship, and practice, the vast majority of human beings only find it meaningful to pursue their religious objectives together with other like-minded individuals."

¹⁴⁵ Witte 1996:xvii. I would do well to note that, while the most obvious and common example of a religious association is the church, mosque or synagogue, the scholarship indicates that rights ascribed to such bodies in many instances would also apply, *mutatis mutandis*, to religiously affiliated organisations, such as schools, universities and hospitals.

¹⁴⁶ Benson 2013(b):66, quoting Taylor 1995:224.

self determination.¹⁴⁷ Added to this is the age-old observation that aspects of the state, such as the judiciary or the legislature, would in any case not possess the requisite insight or comprehension of internal doctrine to successfully reorder or intimately supervise¹⁴⁸ the internal affairs of religious associations in a way that would ultimately preserve such an association's identity.¹⁴⁹

This is where civil society meets the concept of subsidiarity, a principle of good governance originating in the Catholic tradition,¹⁵⁰ which is now observed by many nation states particularly those party to the European Charter.¹⁵¹ Subsidiarity has as its fundament, the ancient and seemingly universal insight that man is by nature a social animal;¹⁵² that I am me through you.¹⁵³ It is a recognition that “the individual realizes his fulfilment in community with others.”¹⁵⁴ In function, the subsidiarity principle is a means “by which to regulate competencies between individual and communities and between smaller and larger communities.”¹⁵⁵ In its positive aspect, the subsidiarity principle recognises that at all levels of society, from the

¹⁴⁷ This implies of course that there are justifications for state intervention into the affairs of religious associations, however even the concepts of justice and the justifications for state interference derived therefrom must first be located on liberal principles before they can meet liberal ends; As per Galston (2014:1052), it is not at all apparent that the current “widespread tendency to parse normative attractiveness as justice or fairness, understood in egalitarian terms,” will land us in a truly free and diverse liberal democracy. I discuss this in detail below.

¹⁴⁸ Durham 2001:640. Durham points out that religious freedom tends to stultify where state overregulation is the norm, which also occurs not only with over-alienation of religion but also where the state and church are too intimately tied, such as in Greece (and to some extent, the UK): “bureaucratization alone, to say nothing of outright state supervision and approval processes, can reduce the autonomy of a state church to the vanishing point.” See Papastathis (2001:425-450 in Robbers (ed.)) and Hill (2001:267-283 in Robbers (ed.)) for more on Greece and the UK.

¹⁴⁹ Ahdar & Leigh (2013:381), citing the 1871 US case of *Watson v Jones* (80 US (13 Wall) 679, 729): “It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these [church] bodies as the ablest men in each are in reference to their own.” The recognition of the proper limits of state competence when dealing with the internal affairs of religious bodies is thus not a new or purely legislatively – nor even constitutionally – derived phenomenon, since this case was decided on universal common law principles (and not US First Amendment considerations).

¹⁵⁰ Benson 2013(b):68-69. Horwitz (2008:40) notes subsidiarity's catholic origins and relates Abraham Kuyper's similar (and also religiously derived) concept of sphere sovereignty. I will not in this dissertation treat sphere sovereignty nor differentiate the two concepts at length because, as per Horwitz' summation, the scholarship already recognises many connections between the two, and the concepts have developed to resemble one another: justifiable state intervention is recognised in sphere sovereignty and the hierarchical understanding of subsidiarity has come to include the idea of independent (yet naturally hierarchically related) spheres (Horwitz cites Pope Paul VI (1965:para. 76) “Encyclical Letter *Gaudium et Spes*”): “[I]n their proper spheres, the political community and the Church are mutually independent and self-governing.”

¹⁵¹ Paolo Carozza (2003:38-39) observes that the subsidiarity principle permeates the Western political tradition and argues for its recognition as a guiding principle in international law, particularly international human rights law.

¹⁵² Aristotle, *Politics*, book 1, 1253a 2-3.

¹⁵³ A common phrase used to express the African idea of Ubuntu.

¹⁵⁴ Carozza 2003:43.

¹⁵⁵ Benson 2013(b):69, citing George Weigel “Soul of the World” 1996:109-110.

individual to the association to the community and finally to the state, there should be a respect for, and positive enablement of, the self-determination of subsidiary entities. In its negative aspect, it entails an understanding that higher-order entities should not unduly interfere in the self-determination of their subsidiaries.¹⁵⁶

Applied in the context of the state's relationship to religious associations, the subsidiarity principle would imply that the state should exercise its regulatory authority in a way that does not deprive religious associations of the ability to govern themselves or to determine freely for themselves their moral or ethical stances on matters, with the caveat that religious associations in turn do not materially harm their subsidiaries nor deny them a right of exit. On this point it should be noted, however, that subsidiarity should not be taken to mean that the individual in isolation should exercise their individual will so as to alter an association's self-understanding; this would be a tyrannical inversion, since the association as a whole – not the lone individual – makes decisions according to its internal procedures regarding its self-understanding.¹⁵⁷ If an individual would disagree with their religious association's determinations, subsidiarity would not see them justifiably appeal to a higher authority to coerce said association, unless they were being deprived by the association of the ability to exit and faced material harm within it.¹⁵⁸ However, as is often the case, a formal principle such as subsidiarity is subject to exceptions requiring nuance. There is the problem of membership, for example. Membership in a religious association usually arises at birth and constitutes a great deal of an individual's self-understanding, as is often the case with individuals in communities linked by tradition and/or culture. The individual may not wish to exit their community, even when faced with material harm should they remain.¹⁵⁹ In such instances, the state should justifiably intervene, because as Ayelet Shachar states (writing specifically on the rights of Muslim women facing such troubles with Shari'a tribunals in the West): "Without such limitations in place, the state

¹⁵⁶ Benson 2013(b):69.

¹⁵⁷ Ahdar & Leigh (2013:380-381), again citing *Watson v Jones* (80 US (13 Wall) 679, 728–9): "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. *But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.*" (emphasis added)

¹⁵⁸ This notion of being "within" an association is a practical simplification here to relate the subsidiarity principle, but it should be noted that claims against religious associational autonomy often concern individuals who work for, yet are not strictly members of a religious association; this goes to the larger debate on law's understanding of the religious association's nature. The same is true for the consideration of "harm" and what might constitute material harm and what harm must be tolerated for the continued existence of religious associations.

¹⁵⁹ It should be reiterated here that "material harm" (which is dealt with in more detail in a following chapter) would first need to be proven and is assumed in this example.

becomes an implicit accomplice in tolerating infringements of... basic citizenship protections that may occur in the name of respecting cultural and religious diversity.”¹⁶⁰

It is through the protection of religious associational autonomy and the concomitant enablement of the equal participation of religious associations in the public sphere that religious believers are given a voice; in this way, they may contribute meaningfully to an understanding of the common good that binds a democratic society together. In fact, an understanding of the public good should include the inclusion of ‘worlds of meaning’ in society such as is found in religious associations and the concomitant expressions of such meanings in the public sphere. Without this, religious believers are denied what might be called the societal aspect of the right to religious freedom, in that the mores that inform public policy and guide judicial decision-making would be understood as strictly exempting any religious moral influence.

2.5 Convergence versus divergence

Thus far, clarity was gained on several key issues misleading and often antagonising the discourse around the right to freedom of religion (also from an associational context). Ideas have been rebutted regarding the erroneous assumption of the superior status (here I point to the claims of “state morality” mentioned before) and unique neutrality of non-religious beliefs and moralities in a liberal state that is supposed to value a plurality of ways of life. Also, how the individualist tendencies dominant in rights jurisprudence tend to hinder an appreciation of the inherently communal aspects of religious rights have been clarified. There are still many clarifications that could follow, but the aim in this chapter is to clarify only those core aspects of the discourse that are necessary for a coherent, informed and fair discussion on religious associational autonomy as it relates to the modern phenomenon of transgenderism. What follows is therefore, a final set of clarifications to be made in this regard, which builds on and meets with the previous clarifications at certain junctures. This last section raises the issue of convergence, one of many terms used by scholars to describe ideas or theories that aim toward social, structural and normative homogenisation, in other words, the eventual erasure of meaningful difference in a society.¹⁶¹ Throughout the course of this chapter, it will become

¹⁶⁰ Shachar 2010:122-123.

¹⁶¹ Benson 2010(b):24. “Convergence liberalism” and “totalism” are Benson’s preferred terms; other authors describe this in terms of “civic totalism” (Macedo’s term, as noted by Galston in Galston 2005:24), “fundamentalism” (Leigh 1998:38), “rational consensus” (Gray 2000:21), “secular fundamentalism” (Campos 1994:1814-1827) or “monism” (Galston 2004(a):6; 2005:187-197), among others.

obvious how the misassumptions of excluding religious beliefs from the public sphere and reducing religious rights to the purely individual, private realm, lead ineluctably to diversity-erasing convergence.¹⁶²

What is convergence exactly, and why is it an issue in the religious rights context? Before I elaborate on this, it would be helpful to sketch it out plainly. Convergence, in simple terms, means eventual total agreement in society on all topics of import. Now, it is obvious that, in most liberal democratic states, we have reached agreement on a few very important topics: one has a right to life, liberty, security and belief, among others. These rights are said to be natural or universal because they exist before the state, yet the state is charged with their protection.¹⁶³ Rights are seldom unlimited, and the liberal state would in special circumstances legitimately be able to restrict them in service to the common good (imprisonment and capital punishment serve as examples, though many states have dropped capital punishment).¹⁶⁴ Nevertheless, on many issues democratic states differ,¹⁶⁵ and so do many groups within those states. Also, as alluded to earlier, what should be understood regarding what the parameters of the common good should be, may differ amongst individuals and groups within society. It is never the liberal state's place, either through imposition of laws or by judicial fiat, to force down comprehensive agreement on all matters where reasonable people might differ.¹⁶⁶ The state and law are limited, and these limits must be properly understood. After all, a part of the liberal idea is that man existed in a state of freedom (and terror or bliss, depending on one's philosophical approach) prior to lawfully ordered society, and that the state and its laws are necessary constructs for

¹⁶² Benson 2010(a):21. "The combined effect of these two tendencies is to leave religious belief systems at a public disadvantage... in relation to the unexamined faiths of atheism and agnosticism."

¹⁶³ Galston 2004(a):6. "Some goods are basic in the sense that they form part of any choiceworthy conception of a human life... All decent regimes endeavour to minimize the frequency and scope of such deprivations." The state should be understood not as the source of these rights but as the protector of human goods to which these rights relate; then the state's limits in respect of certain basic goods (as those associated with religious belief) and the producers of such goods (like as religious associations) becomes clearer.

¹⁶⁴ Benson 2014:101-105. There is a point of connection: the state's purpose is the protection of the common good for its people, and in so being charged with these duties it is given equal authority to punish those that endanger these goods, but only so far as can be justified by its original purpose grounded in the common good.

¹⁶⁵ Perry Dane (2018:125), notes such a point of difference among liberal democracies: "[T]he first thing to notice specifically about religion-state dispensations in various legal systems is their dramatic diversity. Even among Western liberal states that otherwise share basic constitutional and moral traditions, the range of approaches to this basic set of questions is stunning."

¹⁶⁶ Galston (2004(b):49), "[T]here is a distinction between basic human goods, which the state must defend, and diverse conceptions of flourishing above that base-line, which the state should accommodate to the maximum extent possible... an account of liberal democracy built on a foundation of political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity."

order and peace.¹⁶⁷ As Francis Lyall wrote: “Liberty is not conferred by a legal instrument: it is the normal condition, and infringements on that liberty can exist only as allowed by legislation or case law.”¹⁶⁸

To this we might add that in South Africa, and surely this is true for many constitutional liberal democracies, even legislation and case law are constitutionally limited in their power to restrict liberties. So, while we say it is right to punish murder (something we have reached near universal agreement on),¹⁶⁹ we cannot, in keeping with liberal principles, say it is right for everyone to be forced to agree with our religious, moral or political positions; topics which always, in free societies, breed disagreement. In a properly liberal – that is, free – and democratic state, all believers, atheistic, agnostic or theistic, contribute to the common good that is the ultimate reason and justification for the state’s authority; therefore, none can legitimately claim that theirs is the state’s morality, nor that whatever is public ought to be non-religious. Most importantly for our purposes here, this means that a properly liberal state that values diversity should not aim towards convergence, which would in fact mean the domination or overrepresentation of one set of views at the expense of all others.

The phenomenon I have chosen to refer to as convergence in this dissertation goes by many names; in the literature, it has variously been described as totalism (civic, legal, etc...), rational consensus, monism and even illiberal or secular fundamentalism.¹⁷⁰ Benson explains convergence or totalism as falling primarily into three categories: ideological, secularist and structural.¹⁷¹ Benson’s categories of convergence often do, and he admits this, bleed into one another (this is most apparent with structural and ideological convergence). Nevertheless, the purpose of his categorisation was to order a larger analysis, whereas my purpose here is strictly descriptive. A brief description of the categories follows.

¹⁶⁷ This refers to Hobbes’ and Rousseau’s contrasting ideas of man in a state of nature.

¹⁶⁸ Lyall 2000:253, as cited in Benson 2013(b):117.

¹⁶⁹ I say “near universal” because there will always be dissenters: some say abortion is murder but see little issue with capital punishment, whereas their opponents say abortion is a woman’s (or birthing person’s, if you subscribe to gender ideology) right, while decrying capital punishment as a violation of the right to life. There is agreement on the importance of the right to life, we see, but its limits, like many other rights’, are continually renegotiated by necessary disagreement.

¹⁷⁰ See Campos 1994:1814-1827; Leigh 1998:38; Gray 2000:21; Galston 2004(a):6; Galston 2005:24,187-197; and Benson 2013(b):101-125.

¹⁷¹ Benson 2013(b):101.

Throughout this dissertation, I have often made note of Benson's opposition to "secularist convergence or totalism", the idea that religiously informed beliefs should be excluded from whatever is defined as public, since such spaces are reserved for the "secular". As has already been postulated, this leads to convergence in the sense that it seeks to restrict the influence of religious beliefs to the private sphere, which implies a state-endorsed dominance of only non-religious thought in public life.¹⁷² Structural convergence is seen in a misassumption of the proper role of law as relates to religion. Structural convergence would see law as an all-encapsulating matrix to which all other aspects of society are subordinated, and thus all things are regulable and eventually subject to the approval of the governing authorities.¹⁷³ It also presents the danger of law overstepping its bounds and interfering in spheres of human action (such as the meaning-making, morality-informing religious sphere) where it has no legitimate place. A proper understanding of the structure of liberal democratic society would understand the state and its law, as I have explained above, as necessary creations for order and peace. As Rivers notes: "Human and constitutional rights as originally conceived were designed to prevent the state from overstepping its proper boundaries and thus jeopardising political stability."¹⁷⁴ Law properly understood, then, does not permeate all aspects of a liberal society; that would be legal totalism. Instead, law enters into the equation only when it is clearly related to its duties in terms of protecting the public order in the sense of fundamental basic rights that protect against a substantive degree of harm such as (but not limited to) physical or psychological harm.¹⁷⁵ In this regard, the idea is to counter the risk of the law being viewed as that which enforces agreement on more and more matters that are in fact outside of the realm of law in a liberal state.¹⁷⁶

¹⁷² In Benson's (2013(b):112), words, this type of convergence uses: "the 'social imaginary' of 'the secular'... to explain why religion should be kept out of properly public realms."

¹⁷³ Benson 2013(b):116-125.

¹⁷⁴ Rivers 2007:51.

¹⁷⁵ In this regard, I think article 18(3) of the *International Covenant on Civil and Political Rights* to be most apt namely: "Freedom to manifest one's religion or beliefs may be subject only to 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."

¹⁷⁶ Rivers (2007:47), presents current preoccupations with certain (convergent) interpretations of "equality" as one arena where modern liberal states misunderstand the proper grounds for intervention in rights disputes: "Human rights reasoning originally required the state to justify its (often laudable) legislative incursions into a sphere of natural liberty, but the question is now whether the state has promoted religious liberty excessively in its legislative protection of 'equality rights'. There seems to be a new priority to equality."

Now we come to ideological convergence, and here is where some work may be done in elucidating how convergence is present in the discourse on religious rights. First, a quote from John Gray's *Two Faces of Liberalism*, a noted work on the topic:

Liberalism has always had two faces. From one side, toleration is the pursuit of an ideal form of life. From the other, it is the search for terms of peace among different ways of life... In the first, liberalism is a prescription for a universal regime. In the second, it is a project of coexistence that can be pursued in many regimes... It is a mark of an illiberal regime that conflicts of value are viewed as signs of error. Yet liberal regimes which claim that one set of liberties – their own – is universally legitimate adopt precisely that view. They treat conflicts among liberties as symptoms of error, not dilemmas to which different solutions can be reasonable.¹⁷⁷

Gray describes the idea of liberalism (and thus, the many concepts flowing therefrom that permeate modern discourse) as being capable of going in two directions, one convergent and one divergent (calling the second *modus vivendi*; literally translated: “a way of living”). He goes on to explain that the type of liberalism prescribing a universal regime has its origins in classical and enlightenment thought, noting how this convergent conception must now be refashioned from its individualist preoccupations (diversity in the ideals of individuals) to address the issue of accommodating different ways of life in modern societies (diversity in normative communities).¹⁷⁸ Liberalism in this sense (Benson calls it “convergence liberalism”) describes a general ideological bent towards consensus (Gray’s phrase is “rational consensus”) in the context of incommensurable claims.¹⁷⁹ It is a tendency that perhaps makes sense in a closed homogenous society where most people share the same religion and culture (as in the enlightenment context where liberalism developed), but this is rarely the case in most liberal

¹⁷⁷ Gray 2000:2, 20.

¹⁷⁸ Gray (2000:12), “Late modern democracies are notable for the diversity of ways of life they contain... This fact of pluralism was not foreseen in liberal thought. Even now it has not been fully comprehended.” Jaclyn Neo (Neo 2018:178) writes of this relatively recent problem facing liberal legal systems: “If one accepts that religious differences are permanent features of societies, and could not and should not be eliminated by force (expulsion or genocide) or overcome by coercion (forced conversion), formulating systems of governance to manage different religious communities within the nation-state becomes imperative.”

¹⁷⁹ With regards to what is meant by “incommensurable claims” in the general sense, I refer to Galston’s (2005:12-13) phrasing: “Incommensurability means the absence of any single scale of units of value along which items can be precisely measured.” Narrowed down to our current discussion, convergence would mean either the denial or ignorance of the incommensurability of certain rights claims, which are incommensurable because they aim towards the conservation or furtherance of heterogeneously natured goods. I do not for my purposes see the need to further differentiate between incommensurability and incomparability, but if this is sought, refer to the volume edited by Ruth Chang, “Incommensurability, Incomparability, and Practical Reason” (Chang (ed.) 1997).

democracies today, where plurality, not just in the “divergent ideals of individuals”¹⁸⁰ but also in religion and culture, is valued as an indicator of the flourishing of liberty. Essentially, ideological convergence taken to its endpoint means that even in societies which purport to value a diversity of ways of life, meaningful differences in values will eventually be erased as conflicts of value are reconciled. We will come to Gray’s and others’ answers to ideological convergence, but first we must deal with the terminological clarifications necessitated by convergence.

While ideological convergence might be hinted at by many of the terms used frequently in rights discourse, the concepts of equality and diversity, which crop up quite frequently, would serve as good starting points. Diversity and equality could be hermeneutically bounced around to mean any range of things, but just going by their effective application in recent domestic and foreign case law, two hopefully revelatory questions beg emphasis: Do our interpretations of diversity result in us all eventually holding (perhaps even by force of law) the same beliefs on sex, gender, sexual orientation, gender roles, sexual conduct, etc..., or do they result in us being allowed to disagree, in private and publicly, on important matters, even when these are inextricably tied to our human dignity? Furthermore, do our interpretations of equality result in state scrutiny opening up and enforcing compliance in ever more spaces previously exempt from state interference, or do they result in the state recognising its limits (in accordance with the principle of subsidiarity) with respect to independent spheres of human life or different worlds of meaning in society? These questions are drawn from Benson’s problematisation of the “secular” in the Canadian case of *Chamberlain v Surrey School District*,¹⁸¹ and it will hopefully become apparent that the issues addressed therein are not at all removed from -and in fact are instructive to- similar issues facing other countries, namely South Africa.¹⁸²

In the *Chamberlain*-case, a primary school teacher, Mr Chamberlain, made a request to the district school board that he be allowed to teach from three books depicting same-sex couples in his kindergarten and grade one classes.¹⁸³ Mr Chamberlain asserted that these books were necessary in teaching pupils about diversity and tolerance regarding family life. The school

¹⁸⁰ Gray 2000:12.

¹⁸¹ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710.

¹⁸² Benson 2010(b):11-16.

¹⁸³ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:711. The three books in question were: “Asha’s Mums”, “Belinda’s Bouquet” and “One Dad, Two Dads, Brown Dad, Blue Dads”.

board voted to deny his request, and Mr Chamberlain approached the courts. The matter ultimately reached Canada's Supreme Court, and there the majority held, among other things, that the school board had erred in that, even though it was allowed to take the majority of parents' religious moral views into account in its vote, it nevertheless should have acted (meaning voted) in a way that "promotes respect and tolerance for all the diverse groups that it represents and serves."¹⁸⁴ Justice LeBel, perhaps confusingly, was of the view that the relevant legislation did not prohibit religiously informed decisions by the school board nor was it intended to exclude religion from this arena: "It does not limit *in any way* the freedom of parents and Board members to adhere to a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view."¹⁸⁵ In other words, religious liberty is not at all limited here; it is simply that, whenever one's religious views would mean voting accordingly in a public setting, if this would contradict certain interpretations of "tolerance" and "diversity", it is not allowed. It should also be pointed out, as some authors do, that "denying the validity of other points of view" would occur either way.¹⁸⁶ It is similarly a denial of many religious people's point of view to teach children to approve of or recognise the validity of homosexual conduct, just as it is a denial of validity to exclude the teaching of same-sex conduct. It seems a circular argument to say that religious views are fine, as long as they do not result in public policies that exclude other views which in turn exclude their views.

In discussing this first case, it should be recognised that the majority relied on the idea that this school, as a public space, was subject to certain interpretations of secularism, diversity and tolerance. Justice McLachlin stated that:

The requirement of secularism... the emphasis on tolerance in the preamble, and the insistence of the curriculum on increasing awareness of a broad array of family types, all show, in my view, that parental concerns must be accommodated in a way that respects diversity. Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and *teach tolerance and understanding of difference*.¹⁸⁷

¹⁸⁴ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:712.

¹⁸⁵ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:713.

¹⁸⁶ Benson 2010(b):13-14: "To parents who view respect for persons... as all that can reasonably be required of them by civil society, it is rather alarming to be told in cool and dispassionate tones that neutrality requires that their children be taught that what the parents believe to be wrong is, in fact, right."

¹⁸⁷ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:734:par. 33.

Our inspection here centres on a convergent understanding of diversity, which as well produces a convergent version of tolerance. At first, one could have understood the majority's position to be: "Teach the children about every possible type of family, without any indication that they should approve or disapprove, since their moral education is their parents' duty and not ours." It should be noted that there are issues even with such a statement: would the proposed materials (which portray same-sex couples positively) not indicate approval; would the equating of same-sex households with traditional ones not in any regard be teaching approval? Nevertheless, the majority's view was not this; instead, they held it to be absolutely neutral and in furtherance of diversity to inculcate in children beliefs contrary to their parents' beliefs. There is no consideration of whether Mr Chamberlain's beliefs would have been afforded precedence over the parents' in this scenario (as his position is understood to be neutral), or of how parents or board members with contrary beliefs could possibly have voted in any other way and still remained true to their consciences.

As an aside, it should be noted that this is essentially contrary to the idea of subsidiarity (as explained earlier). Instead of allowing local bodies to make decisions regarding the moral and ethical education of their children, which is surely an integral aspect of how a community's identity is formed, the state instead opts to interpret the legislative requirements of "diversity" and "tolerance" as license to intervene in and overrule the organic formation of community mores.

We should keep in mind that the school board *in casu* was a local decision-making body, whose role was to represent the community and, *through authority delegated by parents*, make decisions regarding, in part, the moral education of the community's children.¹⁸⁸ Note that none of the appellants (against the school board's decision) were same-sex parents or children of such who could actually attest to discriminatory or exclusionary treatment.¹⁸⁹ Note as well that the legislation the court relied on for purposes of "diversity" and "tolerance" also recognises the role of public education as being necessarily representative of community mores (including

¹⁸⁸ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:799:par. 148. Justice Gonthier reminds that: "the PP curriculum itself expressly recognizes that '[t]he family is the primary educator in the development of children's attitudes and values'... In addition... 'teachers must consider the appropriateness of any resource from the perspective of the local community'... Thus, the curriculum established by the Minister clearly contemplates that even provincially approved resources may be considered inappropriate for use in certain local communities, and that parental concerns about such "sensitive issues" constitute a valid and proper consideration in the exercise of the teacher's discretion to use such materials."

¹⁸⁹ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:781:par. 123.

those of religious believers) and it recognises that the authority to educate children is derived from parental consent.¹⁹⁰ Lastly, it should be noted that the objection in question was not simply against teaching about the existence of same-sex orientations, but rather that it was inappropriate to teach this at kindergarten and grade one level; such content was included in curricula, but at a later stage, where it was deemed more appropriate.¹⁹¹

This is illustrative of how ideological convergence can affect understandings of diversity. In the *Chamberlain*-case, it is said that considerations of secularity and non-sectarianism should have moved members of the school board to vote in a way effectively contrary to their beliefs, as this would be giving effect to “tolerance” and “diversity”. Diversity in this case for some meant including more representations of variations in the protected inherent characteristic of sexual orientation (which falls under the rubric of an “equality right”). For others, diversity applied not only to the characteristic of sexual orientation, but also to the protected characteristics of conscience and belief. And we should note an insight from the dissenting Justice Gonthier that the requirements of secularism and non-sectarianism meant religious doctrine strictly defined could not be taught in schools; but this did not mean religiously informed mores had no place in the children’s education (that would be obviously excluding one point of view).¹⁹² This case could be understood as an instance where supposedly intolerant views (those who voted against approving the books) did not triumph over inclusivity and diversity. However, this would be a convergent reading of diversity, informed by the idea that the rejection of the books on consideration of parents’ religiously-motivated objections would not have been a “tolerant” outcome,¹⁹³ whereas approving the books (an act which must be motivated by *some* beliefs, however inchoate) would presumably have resulted in a neutral,

¹⁹⁰ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:798:par. 147.

¹⁹¹ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:798:par. 151.

¹⁹² *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:793:par.139. “Therefore, in my view, the dual requirements that education be ‘secular’ and ‘non-sectarian’ refer to keeping the schools free from inculcation or indoctrination in the precepts of any religion, and do not prevent persons with religiously based moral positions on matters of public policy from participating in deliberations concerning moral education in public schools.” In a preceding paragraph (par. 137), Justice Gonthier writes: “[W]hy... should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism.”

¹⁹³ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:788:par. 132. Note Justice Gonthier’s rejection of this interpretation of tolerance: “[I]t is a feeble notion of pluralism that transforms ‘tolerance’ into ‘mandated approval or acceptance’. In my view, the inherent dignity of the individual not only survives such moral disapproval, but to insist on the alternative risks treating another person in a manner inconsistent with their human dignity: there is a potential for a collision of dignities.”

“tolerant” outcome.¹⁹⁴ However, if one understands that the concept of the family unit is one that reasonable people may disagree on, then it would seem reasonable for a local body to balance their local community’s interests and come to holistic decisions reflective of such a community’s mores. As Justice Gonthier further elucidated:

The School Board was clearly caught between two vocal and passionate sides in this dispute... Clearly, this case involves competing interests: those of parents in same-sex relationships and certain teachers, such as Mr. Chamberlain... and those of parents who are concerned about the use of such material in classrooms with children of such a young age. I am of the view, on these facts, that while it would not have been unconstitutional to approve the Three Books for use as educational resources, it is similarly not unconstitutional not to approve the books... state interests, be they provincial or local, are subsidiary to those of parents in the education context.¹⁹⁵

On one side, activists wanted children to approve of their moral views of society (that same-sex households are as morally acceptable as traditional households), whereas on the other side, the parents of the children in question wanted the children to be taught in accordance with their moral views of society (that different-sex parented households are the morally acceptable norm). Taking Justice Gonthier’s opinion into account, the most important question should have been, “Who has the greater claim to these children’s moral education,” but the answer perhaps would have been obvious and not in keeping with dominant convergent interpretations of diversity. Reasonable people would have been allowed to disagree on an important topic. Instead, it was said that the state had a greater obligation to teach the children about “tolerance” even when this was against parents’ wishes as expressed through democratic means.

What is vital in re-interpreting diversity here is understanding that Mr Chamberlain and others’ views that the family unit not only does but *should* include same-sex parents, is *not a purely descriptive* (as is assumed) *but also normatively prescriptive view*; the same is true for those who oppose Mr Chamberlain. The argument for diversity here seems to assume it is possible to teach children in kindergarten and grade one about such topics at a merely descriptive level, without affecting in any way the development of their normative outlooks. This is a dubious

¹⁹⁴ I am not here implying that the Court required approval of the books; they remanded the decision back to the board. However, if the board’s initial objections were seen to be based on religious grounds, which were held to lead to illegitimate results, then the expected outcome of a re-vote where such objections are not allowed seems clear.

¹⁹⁵ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:798;par. 147.

assumption, as Justice Gonthier points out: “Must [same-sex parents] be just shown to exist as one family model amongst many, or must they be portrayed as “morally equivalent” to heterosexual parents? Is a distinction between these two methods of portrayal possible when the target audience is comprised of five- and six-year-old children?”¹⁹⁶

The result of teaching children at impressionable ages about controversial moral topics would arguably be to reinforce certain normative views on said topics, and this has the potential to erase religious and moral diversity.¹⁹⁷ Are children at kindergarten and grade one level capable of understanding the nuance between “is” and “ought” when it comes to family life? Is it not wiser to defer to parents in such circumstances? Again I refer to Gonthier, stating: “It is clear that the books have normative content, but the question is what content is perceived by five- and six-year-olds, a determination which must be addressed from the perspective of parents, who are the arbiters of such a question.”¹⁹⁸ This is why the school board in question opted to delay education in such topics to more appropriate ages, where children (at that point, teenagers) would be more capable of understanding their right to agree or disagree with certain forms of sexual conduct.

2.6 Conclusion

This chapter highlights the significance of understanding and reframing the discourse surrounding the protection of religious associational autonomy. It emphasizes the vital role played by religious associations in fostering pluralistic democratic societies, rather than focusing on conflicts between religious associations and individuals with differing beliefs. The chapter advocates for safeguarding the autonomy of these associations, recognizing their contributions to the common good and their communal nature.

The chapter critically evaluates misleading assumptions that shape the discourse surrounding religious associational autonomy. These flawed assumptions include misconceptions about secularism, the neutrality of the state and public sphere, the individualistic nature of religious rights, and the dominance of a state pseudo-morality over religious associations. Addressing

¹⁹⁶ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:801:par. 149.

¹⁹⁷ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:800:par. 150. “The moral status of same-sex relationships is controversial: to say otherwise is to ignore the reality of competing beliefs which led to this case.”

¹⁹⁸ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710:801:par. 151.

these flawed claims is essential for understanding and appreciating the significance of protecting religious associational autonomy and limiting undue state interference. The South African context provides relevant examples of the importance of freedom of belief, particularly religious belief, in upholding diversity and human dignity. While there is a need to explore conflicts between associational rights and equality claims related to transgenderism, South African courts have recognized the rights of transgender individuals and the obligations they impose on others. The resolution of these potential conflicts would reflect the judiciary's commitment to constitutional principles of equality, freedom, human dignity, and diversity.

The subsequent sections of this chapter delved into clarifying terminology related to secularism, diversity, and liberalism, highlighting the need for fair consideration of religious associational rights within a pluralistic democratic society. The discussion emphasises the communal and associational dimensions of religious freedom, advocating against an overly simplistic individualistic approach. It argues for the protection of religious associational autonomy grounded in the principles of subsidiarity and recognizes exceptions when individuals face harm within the association. The chapter concludes by examining the concept of convergence and its implications for religious rights. It rejects convergence as a desirable goal, emphasizing the value of a plurality of ways of life, including religious beliefs, within a liberal state. The importance of diversity, equality, and respecting different ways of life is emphasized, while cautioning against the exclusion of religious perspectives from public discourse. Preserving diversity and meaningful differences is crucial for upholding the principle of liberty and ensuring a comprehensive understanding of the public good.

In essence, this chapter advocates for reframing the discourse surrounding the protection of religious associational autonomy, addressing flawed assumptions, and recognising the vital role of religious associations in pluralistic democratic societies. It emphasises the need for a holistic understanding of religious freedom, rejects convergence, and underscores the significance of diversity and the respect for different ways of life in a liberal state. Having now thoroughly examined the issues surrounding religious associational autonomy, the next chapter will explore the legal framework concerning transgender persons. By examining relevant constitutional provisions, case law, legislation, and foreign and international policies, the following chapter will establish the extent of domestic and international recognition of “transgender rights.” In this way, a more nuanced exploration of potential rights conflicts may

be pursued, ensuring the recognition of both the transgender individual's identity and the identity of religious communities, without unduly compromising either.

CHAPTER 3

THE LAW AND THE TRANSGENDER

Given that our ultimate analysis concerning religious associational autonomy and transgenderism will necessarily include discussions of conflicting parties' respective rights and duties within the context of the liberal state, and given that we have already treated those rights relating to religious associations, it is now incumbent upon us to treat the legal framework relating to transgender persons. This entails an overview of the constitutional provisions on human dignity and equality, those concepts most frequently occurring in the human rights discourse on transgender inclusion. Furthermore, given the aims of this dissertation, we also consider the transgender person's constitutional rights to free expression, belief and association. Relevant case law and legislation are consulted in order to ascertain the scope of domestic judicial and legislative recognition of transgender rights. Finally, foreign and international policy relating to transgender persons' rights are considered. The framing provided by this is intended to undergird a more holistic approach to potential rights conflicts involving religious associations and transgender individuals, where due recognition is accorded to the importance of the transgender individual's identity without such recognition necessarily occurring at the expense of a religious community's identity.

3.1 Human rights

Transgender people are, as all other natural persons in South Africa, entitled to and bound by the rights and duties found in the Constitution, specifically Chapter 2. Several of what I refer to as primarily relevant rights deserve discussion as they relate to the transgender individual, bearing in mind that there will not be a comprehensive treatment of every possible right to which a transgender person is entitled.¹⁹⁹ This selection of primarily relevant rights is founded upon considerations of potential conflict with the rights commonly associated with religious associations. This limits the scope of analysis in this section to the following rights: the rights

¹⁹⁹ Southern Africa Litigation Centre 2016:38-42. For an overview of transgender persons' rights in South Africa which is not limited to the religious associational context, see the SALC's booklet on the topic: "Laws and Policies Affecting Transgender Persons in Southern Africa."

to equality,²⁰⁰ dignity,²⁰¹ freedom of belief,²⁰² free expression²⁰³ and free association.²⁰⁴ The rationale supporting this selection of rights is straightforward: in recent case law, most notably in the judgment of *September v Subramoney NO and Others*, a transgender person's rights to equality, dignity and free expression featured most prominently (alongside those rights afforded to incarcerated persons, but those are not relevant here).²⁰⁵ A transgender person's gender identity was held to comprise an integral element of their human dignity and, further, to manifest itself in forms of expression such as dress and behaviour.²⁰⁶ These pronouncements were all made in the language of equality. The rights to equality, dignity and free expression thus need be considered. Added to these are the rights to freedom of belief and association, as we are considering the transgender person *in the context of the religious association*, and these rights necessarily attach themselves in such a context. Of course, given the broad, complex nature of these rights, there will inevitably be instances of overlap. For instance, self-identity may be constitutive of human dignity, but self-identity is hardly limited to gender identity and could be said to include religious identity; likewise, self-expression may be a means by which gender identity is manifested and realised, but the same is also true for the manifestation and realisation of religious identity. Such an understanding of these rights must also be applied where freedom of belief and association are concerned, thus these must be considered from the side of the transgender.

3.1.1 Dignity as a foundation

The concept of human dignity is complex and, at times, controversial. Jacob Weinrib notes: "Human dignity leads a double life. On the one hand, the concept forms the unifying idea of the modern constitutional approach to rights protection. On the other, the shortcomings of the leading theories of human dignity generate increasing scepticism about the concept."²⁰⁷ As a point of departure, it should be understood that human dignity is (according to leading scholars

²⁰⁰ *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*):sec. 9.

²⁰¹ *Constitution*:sec. 10. The text of relevant constitutional sections are quoted in full at their respective discussions below.

²⁰² *Constitution*:sec. 15.

²⁰³ *Constitution*:sec. 16.

²⁰⁴ *Constitution*:sec. 18.

²⁰⁵ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 2.

²⁰⁶ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:paras. 113-114.

²⁰⁷ Weinrib 2019:9.

and Constitutional Court justices) a quality inherent in every human being, and that the Constitutional right to dignity consists in the state's duty to respect and protect that human dignity. On this, former Constitutional Court Justice Laurie Ackermann had the following to say:

The phrase '[e]veryone *has* inherent dignity'... is a constitutional proclamation about the essence of the natural person respected and protected by the Constitution... Human dignity is not acquired by the human being from the Constitution; it is already *inherent* in every human being... However much the *right to dignity* may suffer an infringement in an imperfect world, the inherent dignity that everyone *has* cannot be destroyed (original emphasis).²⁰⁸

The idea of dignity exercises tremendous influence: it appears in the *Constitution* as a founding value (Sec. 1(a));²⁰⁹ and the Bill of Rights is intended to affirm this (Sec. 7(1));²¹⁰ thus, it is afforded substantive protection as a right (Sec. 10);²¹¹ moreover, it informs our readings of both the limitation (Sec. 36(1))²¹² and interpretation clauses (Sec. 39(1)(a)).²¹³ The concept of dignity thus suffuses constitutional law and understandings of the state, and it is the basis of many other rights, not least the right of equality. The recurrent call to think on dignity can lead to considerable confusion, however, when one is, as with rival rights-claims of dignity, confronted by its conceptual ambiguity.

In his well-known article, "Equality: The Majesty of Legoland Jurisprudence", Judge Dennis Davis wrote of our Constitutional Court's treatment of dignity (specifically in equality determinations): "The Constitutional Court has rendered meaningless a fundamental value of

²⁰⁸ Ackermann 2012:95. To Ackermann's last point, the inviolability of dignity, see Anton Fagan's (2008:179) critique on the impact of this assumption on the political right to freedom: "The dignity-based explanation supposes that a person's dignity cannot be diminished, even less extinguished. But if a person's dignity cannot be diminished, if nothing anyone does can affect how much dignity one has, then one's dignity is not in need of protection. Of course, if one's dignity is not in need of protection, then it cannot be the aim of the political right to freedom to protect one's interest in one's dignity."

²⁰⁹ *Constitution*:sec. 1(a): "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

²¹⁰ *Constitution*:sec. 7(1): "This 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."

²¹¹ *Constitution*:sec. 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."

²¹² *Constitution*:sec. 36(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..."

²¹³ *Constitution*:sec. 39(1)(a): "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;"

our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of a jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer.”²¹⁴ Davis had conducted a thorough reading of the Court’s dignity jurisprudence and found it wanting, for, as important as it was and given how frequently it was employed in the Court’s hermeneutics, dignity seemed utterly lacking in clarity of definition and precision of application. Of course, much time has passed since the publishing of this article in 1999, and the Court has had ample time and opportunity to address this criticism and provide clarity on the topic. However, looking for answers from those cast as authorities on the subject, it is difficult to see, even in more recent and intentionally comprehensive case-by-case analyses of dignity, how Davis was wrong.²¹⁵

The aim to protect human dignity may indeed be praised as something common to virtually all modern human rights documents,²¹⁶ but this should be accompanied with suspicion when the invocation of dignity seems to result largely in outcomes pleasing to its interpreters. That is to say, when dignity plays a purely instrumental role in service to ultimate convictions, its interpretive ubiquity ought to be viewed with scepticism. Henk Botha quotes the US Seventh Circuit Court of Appeals Judge Easterbrook as stating: “[W]hen we observe that the Constitution stands for 'human dignity' but not rules, we have destroyed the basis for judicial review.”²¹⁷ If human dignity as a value employed in Constitutional interpretation results in a breakdown of consistency in application of the law, then it is untenable. Thus, human dignity, however described, “guides” our reading of the law best when it results in legal certainty, not when it serves as an interpretive panacea for judicial activism.²¹⁸

²¹⁴ Davis 1999:413.

²¹⁵ See: Cornell *et al.* (eds.) 2013 “The dignity jurisprudence of the Constitutional Court of South Africa: Cases and materials” for this type of comprehensive treatment of the South African situation; for international comparisons, see: Roux 2008 “The Dignity of Comparative Constitutional Law” and Botha 2009 “Human Dignity in Comparative Perspective.”

²¹⁶ Looking at other national constitutions (or their equivalents), we need not even leave the letter “A” to prove our point: Afghanistan’s Constitution mentions dignity at Art. 6: “The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity...”; Albania’s Constitution invokes it in its preamble: “[W]ith a pledge to protect human dignity and personhood...” as well as at Art. 3, “The independence of the state and the integrity of its territory, dignity of the individual, human rights and freedoms... are the bases of this state, which has the duty of respecting and protecting them”; and Andorra’s Constitution at Art. 4 states: “The Constitution recognises human dignity to be inalienable and therefore guarantees the inviolable and imprescriptible rights of the individual, which constitute the foundation of political order, social peace and justice.”

²¹⁷ Botha 2009:172 fn. 4.

²¹⁸ Rao 2008:201-203. Neomi Rao argues, in the American context, against this type of dignity-as-value-and-right jurisprudence, which is susceptible to judicial activism, stating in the opening to her article that: “In practice, modern constitutionalism prefers balancing and harmonizing rights with other political and social needs. The

There seems to be no definitive description of dignity²¹⁹ and, for better or worse, this seems to be the accepted, if not preferred, state of events for many jurists.²²⁰ One could perhaps argue, as we have above, that, regardless of definitional ambiguity, as long as there is a consistent trail of application by the relevant courts, it might be possible to tease some usefulness out of the term. And while the relevant courts have not laid out the clearest or most consistent trail of precedents regarding dignity, some important work has fortunately been done on the issue of systematising and clarifying South African courts' varying uses of the term. Stu Woolman, drawing on a wide-ranging analysis of the relevant case law, describes dignity as operating within the South African legal system in four ways: as a rule-generating right, a rule-informing right, a correlative right and, lastly, a fundamental value.²²¹ These categorisations are invaluable in explaining how dignity and other rights relate to the transgender person²²² in the context of religious associations, and they will therefore be discussed shortly before finding application.

Woolman's first operative dignity categorisation is of dignity as a rule-generating, case-dispositive right. In this use, the right to dignity in of itself forms the crux of a matter; it does not here co-occur with another right, nor merely inform another right. It is dignity's rarest use since, as Woolman explains, "The first rule of South African dignity jurisprudence is that where a court can identify the infringement of a more specific right, FC section 10 will (ostensibly)

widespread acceptance of such trade-offs minimizes the importance of rights because courts review rights as part of a political calculus... Politicians and activists across the political spectrum invoke dignity as part of their rhetoric in advancing various goals both at home and abroad. *Everyone is understandably in favor of dignity, even if they disagree about what it requires.*" (emphasis added).

²¹⁹ Currie & De Waal 2013:251.

²²⁰ Cornell & Fuller 2013:13. The closest we can come to a definition of dignity that has been accepted by the courts (given that this was Justice Ackermann's concept of dignity), is that of Kant's categorical imperative, and here Cornell & Fuller quote Ackermann: "This is the statement of the categorical imperative; however much the right to dignity may suffer infringement in an imperfect world, the inherent dignity that everyone has cannot be destroyed, short of death."

²²¹ In support of these categorisations, Woolman points to Justice O'Regan's finding in *Dawood & Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC):par. 35: "[D]ignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights... Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution; it is a justiciable and enforceable right that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour." (emphasis added)

²²² From this should not be implied that this does not apply to any other categorisations of persons.

not add to the enquiry.”²²³ This use of dignity as a standalone, rule-generating right, following the “first rule of South African dignity jurisprudence”, occurs when courts identify legitimate interests which are not explicitly afforded protection elsewhere in the Bill of Rights. An example from case law would be the important case of *Dawood & Another v Minister of Home Affairs and Others*, where the right to dignity was understood to include and protect certain spousal interests not covered by other rights, such as the right to family life and the right to sustain permanent intimate relationships.²²⁴

The second categorisation concerns dignity as right-informing or rule-informing right.²²⁵ Here, questions about the right to dignity inform the function of other rule-generating or case-dispositive rights. In other words, this categorisation refers to when a rule or test is formulated as part of a court’s application of a right, which rule or test includes considerations of the right to dignity. Thus, dignity in this categorisation could also be said to function as a “second-order rule” to be considered in determinations of other rights.²²⁶ Woolman notes how this use most obviously occurs when courts consider the right to equality, but that it also occurs elsewhere, for example in determinations of hate speech. One of the best instances of this use of dignity as a second-order rule is found in the landmark case of *Harksen v Lane*, where the Constitutional Court laid out its two-stage test for determining when differentiation amounts to unfair discrimination (this test will be expanded upon more appropriately when we deal specifically with the right to equality).²²⁷

The third categorisation is dignity as correlative right.²²⁸ It describes a court’s use of multiple rights simultaneously, where dignity is not limited to being merely informative of other rights nor held as the sole right that protects an interest. This use is relatively straightforward, though it could, if misread, seem to conflict with Woolman’s first categorisation. Simply put, it often occurs that, even when other rights are found to apply in a given case, and even when these already provide substantial protection to aspects of one’s dignity, there may still be aspects not enumerated otherwise that can be covered only by the right to dignity. Woolman offers the case

²²³ Woolman 2013:83.

²²⁴ *Dawood & Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC):par. 36: “[I]t cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in s 10.”

²²⁵ Woolman 2013:84.

²²⁶ Woolman 2013:84 fn. 44.

²²⁷ *Harksen v. Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC):par. 53.

²²⁸ Woolman 2013:84-85.

of *S v Jordaan* as an example of this use, noting how, even though the case was held to involve challenges which entailed significant overlap between the rights to dignity, privacy and freedom of the person, this did not mean these rights could be conglomerated into a single challenge in terms of some unenumerated right; each right, though it may have informed another, was still to be considered separately in answer to its respective challenge.²²⁹

Woolman's final categorisation is of dignity not as any variety of right but as value.²³⁰ Not surprisingly, Woolman notes it is dignity as value, not as right, that courts most frequently invoke. This is largely due to those sections of the Constitution requiring considerations of dignity as a value, namely sections 36 (the limitation clause) and 39 (the interpretation clause).²³¹ The trouble with judicial reliance upon "values language" has been touched on earlier in this dissertation, though it is worth noting that the Constitutional Court has explicitly stated, in the comments of Chief Justice Chaskalson, that Constitutional values, fundamentally important as they are, "[D]o not, however, give rise to discrete and enforceable rights in themselves."²³² This may be the stated position of the Constitutional Court, that dignity when it appears as a right creates legally enforceable claims whereas dignity appearing as a value does not, but we should nevertheless heed Woolman's warning that "It is hard to read the case law around dignity and reach such a pat conclusion."²³³

Now that we have grounded dignity somewhat by limiting its scope of application to those uses established in case law, we might find it more manageable to employ in the following rights-analyses. Following our stated rationale at the outset of this section, gender identity should be treated first. This is because, in short, gender identity is at the heart of what differentiates a transgender person in the religious associational context we are considering. In reading the text of the Constitution, no explicit right to one's gender identity appears, and this much was confirmed by the Equality Court in *September v Subramoney NO and Others*.²³⁴ However, it is also in this case that the right to dignity operated in one of its rarest guises, that is as a rule-generating or case-dispositive right, to effectively encompass the right to gender identity (note

²²⁹ *S v Jordaan* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC):paras. 52–53.

²³⁰ Woolman 2013:85-87.

²³¹ The Constitution:secs 36 and 39.

²³² *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC):par. 21.

²³³ Woolman 2015:86.

²³⁴ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 122: "'[T]ransgender' is not a listed ground under the Constitution, nor the Equality Act..."

that this did not preclude its correlative use with the rights to equality and free expression, which will be treated in due course).²³⁵ This can be derived from Judge Fortuin’s finding that:

[E]ven though "transgender" is not a listed ground under the Constitution, nor the Equality Act, it is the right to equality that is at the centre of this matter, and in particular how it relates to the right to dignity and the right to freedom of expression. *In my view, the right of dignity includes the applicant's right to her gender identity.*²³⁶

Thus, a transgender person is now recognised, at least according to this reading of recent South African precedent, to have a legally enforceable right to their gender identity. This right to gender identity, however, only really comes into play when it is manifested in one’s expressions of gender, and thus the need to consider the right to free expression arises, as the Court in *September* duly noted.²³⁷

3.1.2 Gender identity and free expression

The right to one’s unique gender identity exists, at least in the South African context, as an unenumerated right, being a judicial extension²³⁸ of the self-standing right to dignity.²³⁹ This unenumerated right, as it appeared in the *September* judgment, has clearly been connected to the rights of free expression and equality.²⁴⁰ What must now be understood is what forms of expression this right to gender identity protects as manifestations of such identity, and,

²³⁵ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 164: “This case is primarily about equality. *Not only equality, but it is also about dignity, freedom of expression, dignified detention, and the prohibition of inhumane treatment or punishment.*” (emphasis added) Thus, dignity also functioned here as a correlative right; dignity’s uses as a value or as a rule-informing right do not come to obvious light in the relevant paragraphs.

²³⁶ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 122. (emphasis added)

²³⁷ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 114: “The infringement of the right to freedom of expression is particularly severe when it is connected to another constitutional right such as the right to freedom of culture or religion. *In this case, it is linked to the rights to dignity and equality.* The applicant's choice of clothing is not merely an expression of taste or fashion, but the expression of her basic gender identity.” (emphasis added)

²³⁸ What is meant here is that the same process has occurred which often occurs in US constitutional interpretation, namely the “reading in” of rights into the Constitution *via* construal of its explicit provisions; in the present case, we refer to the “reading in” by Fortuin J of the right to one’s gender identity from the explicit constitutional provisions relating to dignity and equality. For an extensive and insightful elucidation of the topic, see Laurence H. Tribe’s 2007 “Reflections on Unenumerated Rights” (Tribe 2007:483-500).

²³⁹ It could be argued that, to some degree and depending on one’s ideological predisposition, *all* rights are emanations of the right to human dignity; there are nevertheless important differences between such judicial creations as the right to gender identity in *September* and those rights enumerated explicitly in the *Constitution* and legislation giving effect to constitutional provisions, and that is why the word “unenumerated” warrants repetition in this instance.

²⁴⁰ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 122.

furthermore, why and how a reciprocal, liberal (*i.e.*, limited state) understanding of the right to free expression must form the basis for our later treatment of this right in the context of religious associations.

The right to free expression, as grounded in the South African context, is found in section 16 of the *Constitution*.²⁴¹ Section 16(1) provides for a broad understanding of what freedom of expression entails, including some explicit examples of its manifestations. Section 16(2) reminds us that, unlike human dignity, the right to freedom of expression is not unlimited, as is evident from its prohibitions on war propaganda, incitement to violence and hate speech.²⁴² This formulation hints at a potential issue, however: in stating that the right to freedom of expression “does not extend to” those manifestations listed before (propaganda, incitement, hate speech), our *Constitution* seems to portray an understanding that the state is comprehensive, as opposed to limited, in its competencies regarding expression.²⁴³ In contrast, consider the *First Amendment of the US Constitution* (hereafter, “*First Amendment*”), where the right to free expression is formulated with the importance of free expression to a democracy – and its vulnerability to arbitrary limitation by a totalistic state – clearly in mind: “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...*”²⁴⁴

The state’s competencies in this formulation are clearly understood as having *limits*, whereas the South African *Constitution*, at least at section 16, seems to understand the state’s competencies as allowing *exceptions*; the difference arguably lies in alternative assumptions of comprehensiveness. These may, at this point, seem unimportant distinctions to make, but it should be kept in mind that they relate to the larger themes of this dissertation, not least of all

²⁴¹ *Constitution*:sec. 16: (1) Everyone has the right to freedom of expression, which includes—(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to— (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

²⁴² Haig 2006:194-195. Other limitations may occur in terms of limitation clause (*Constitution* secs. 7(3) and 36) analyses, common law rules (such as *crimen iniuria*) and state interests (*e.g.*, in states of emergency as per sec. 37 of the *Constitution*).

²⁴³ A clarificatory note: In the given context, the terms “comprehensiveness” and “comprehensive” refer to the extent or scope of the state’s competencies or authority regarding freedom of expression. On the other hand, the terms “limits” and “limited” indicate the constraints or boundaries on the state’s competencies or authority over freedom of expression.

²⁴⁴ *U.S. Constitution*:amend. I.

to convergence and secular neutrality: if the free expression right is formulated positively, then the dangers of limiting expression according to the state's "objective normative value system" are made all the more obscure, and convergence risks being masked in the pseudo-moralistic guise of dignity considerations.²⁴⁵ This distinction between comprehensive and limited understandings also draws out an important question: what legitimates the liberal state's authority to limit expression? An insightful answer comes from Joanna Botha:

Ultimately, the determination of whether any form of expression is unworthy of protection must be based on the premise that the unprotected expression does not sufficiently promote the rationales for freedom of expression. The values underlying the commitment to freedom of expression play an important doctrinal role in this determination. They delineate the nature, extent and purpose of the right, and underpin the limitation enquiry, guiding the question of how freedom of expression is to be balanced with competing rights.²⁴⁶

This effectively describes the South African approach to free expression, while also demonstrating how the comprehensive assumptions of section 16 can come to light.²⁴⁷ The gist of the first half of this statement we may agree with: rights-limitations must always be understood in terms of the legitimate purposes (or to use Botha's term, rationales) they serve in democratic society.²⁴⁸ It follows that, in order to understand the principled limits of the right to free expression, we need to understand what rationales or purposes underlie free expression in the liberal state. In this respect, we would do well to refer to Thomas Irwin Emerson's layout of the core rationales for a liberal democracy's commitment to freedom of expression.²⁴⁹ In

²⁴⁵ We refer here to the danger of dignity-as-value-based limitation and interpretation analyses in general, and in particular with regard to offensive or unpopular (subjectively evaluated) expressions. If this would seem an idle concern, one need only point to Professor De Vos' (2017:359) arguments in this regard: "[W]e should reject the metaphor of the free marketplace of ideas and should, instead, turn to the idea that *freedom of expression's protection depends to some extent at least on whether it advances, protects or reflects the values that form part of the 'objective normative value system' embodied in the South African Constitution.*" As I have argued in this dissertation, such appeals to state-enforced morality epitomise the type of rhetoric which erases political and moral difference, anathema to a truly pluralistic liberal order.

²⁴⁶ Botha 2017:781.

²⁴⁷ It should be pointed out here that Joanna Botha writes "towards a South African free-speech model" and must, by needs, work within the value-laden interpretive framework of the *Constitution*, whereas we are assuming a critical stance on the South African free expression clause.

²⁴⁸ Of course, what exactly qualifies purposes as legitimate or not in the first place is a question in of itself, and the following paragraph(s) are aimed at addressing this question.

²⁴⁹ Dorsen 1991:318: Emerson's rationales, though developed in First Amendment theory, are invaluable in understanding the limits of the liberal state's legitimate role in curtailing expression, as Dorsen states: "[W]hatever the fate of Emerson's opinions on particular First Amendment issues, his work will live on because of his masterful exposition of the underlying reasons to protect expression..." Emerson's key work, "The System of Free Expression," defined (and continues to define) First Amendment jurisprudence, which in turn has shaped the free expression jurisprudence of many other liberal democracies; Botha (2017:782) notes that: "These rationales have

Emerson's terms, the liberal promise of free expression is aimed at enabling individual self-fulfilment, providing a means of attaining truth and securing the people's participation in democratic self-government.²⁵⁰ The Constitutional Court in *South African National Defence Union v Minister of Defence* has confirmed this understanding of free expression's purposes, stating the following with regard to section 16:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.²⁵¹

Emerson's rationales have also received explicit recognition by the Constitutional Court in the more recent case of *Qwelane v South African Human Rights Commission and Another*:

According to Emerson, there are four particular values that undergird the right to freedom of expression. These, as I understand them, include: (a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfillment; and (d) the encouragement of tolerance (footnotes omitted).²⁵²

The purposes served by free expression seem well grounded in South African constitutional jurisprudence. Thus, an expression can only be legitimately limited when it does not give effect to at least one of these purposes. There are obvious problems with this, however. It is not difficult to see how it could get out of hand if the state does not limit its interventions in, say, the form of hate speech or misinformation inquests (in order to ascertain the intention or culpability aspects of those expressions).²⁵³ In the American context, this has often meant a very cautious, minimalist approach to the regulation of expression, whereas, in post-constitutional South Africa, a values-based approach to limitation has become dominant.

been accepted as justifications underlying the protection of freedom of expression in most jurisdictions worldwide, South Africa included (footnotes omitted)."

²⁵⁰ Emerson 1963:878-879.

²⁵¹ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC);par. 7 (footnotes omitted).

²⁵² *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 69.

²⁵³ Haigh 2017:205. This kind of criticism has been levelled at various iterations of South Africa's *Prevention and Combating of Hate Crimes and Hate Speech Bill* B9-2018 (hereafter, "Hate Speech Bill"), for instance, which in an earlier draft went so far as to allow the incurrence of vicarious liability for hate speech offences.

At this point it would serve to clarify that Botha’s statement is derived from an analysis of South African free expression jurisprudence, which, she avers, has to a large extent been influenced by uncritical readings of American *First Amendment* jurisprudence. According to Botha, these American influences have so far been uncritical because there are, as we have pointed out above, fundamental disconnects between South African and US understandings of free expression: the US affords the right to free expression “near absolutist protection”, and state regulation of “hate speech” is a rare occurrence.²⁵⁴ South Africa, however, does not provide comparable protection for free expression (one might note controversies surrounding the *Hate Speech Bill* and section 10 of the *Equality Act*),²⁵⁵ nor have South African courts, US influences notwithstanding, shown a similar willingness to limit state interference in free expression matters (as will be discussed, this could be seen as a result of the positive formulation of the free expression right).²⁵⁶ We ought to recognise these conflicts in legal foundations while applying principles developed out of American free expression theory, as this is essential to understanding why concepts such as the rationales for free expression may differ when applied in US as opposed to South African contexts.

The first half of Botha’s statement alludes to those near-universally recognised rationales underlying any true liberal democracy’s commitment to freedom of expression. The second half of the statement describes what value judgments must be made in determining whether the purposes said to be served by a given form of expression do indeed line up with the “values underlying the commitment to freedom of expression”, which values, in South Africa’s case, are explicitly stated in the *Constitution*.²⁵⁷ In plainer terms, when justifying the limitation or protection of a particular form of expression, our first question would be: “What purpose(s) does this expression serve?” If the expression were found to serve an illegitimate purpose, such as those listed in section 16(2) of the *Constitution* and sections 10 (amended) and 12 of the *Equality Act*, then it would, in all likelihood, be limited, “unprotected” or, using the

²⁵⁴ Botha 2017:780.

²⁵⁵ *Prevention and Combating of Hate Crimes and Hate Speech Bill*.

²⁵⁶ *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000*:sec. 10(1). As is discussed below, the Constitutional Court in *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 1 held the *Equality Act*’s prohibition on “hurtful” speech at sec. 10(1) to be unconstitutional and invalid.

²⁵⁷ *Constitution*:sec. 1: The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Constitution's phrasing, the right of free expression would not extend to it.²⁵⁸ However, if the expression were held to serve a legitimate purpose, then it could only be limited if it were found to conflict with *constitutional* values, and this is where section 36 of the *Constitution*, the limitations clause, would come into play.²⁵⁹ As noted in *Islamic Unity Convention v Independent Broadcasting Authority and Others*, which case is the “lodestar for the interpretation and application of section 16”,²⁶⁰ expression may be regulated beyond the scope of section 16(2) only if the criteria laid out in section 36 are met.²⁶¹ The outer limits of free expression in South Africa are thus broadly defined by judicial values-determinations.

This approach to free expression's limits under South African law has not done much to produce consistent free expression precedent, especially when issues such as unfair discrimination or hate speech have been treated. Judith Geldenhuys and Michelle Kelly-Louw have pointed out such inconsistencies in the cases of *South African Human Rights Commission v Khumalo*²⁶² and *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*;²⁶³ in the former case, historical justification was held to be inappropriate, whereas in the latter this was held to be an integral consideration.²⁶⁴ After the publication of this article, the 2022 case of *Afriforum v Economic Freedom Fighters and Others* was decided, where Judge Molahlehi seems to have misinterpreted the very paragraph in *Khumalo* which served as a warning against historicised justifications of hate speech:

The enquiry to be conducted in applying the objective test, is what meaning a reasonable reader or reasonable listener of ordinary intelligence would attribute to the statement in its context? In *Khumalo* the court having had regard to the historical context within which section 10(1) has to be applied, opined:

²⁵⁸ Constitution sec. 16(2); *Promotion of Equality and Prevention of Unfair Discrimination Act*:secs. 10 and 12.

²⁵⁹ *Constitution*:sec. 36: (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 in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

²⁶⁰ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 76.

²⁶¹ *Islamic Unity Convention v. Independent Broadcasting Authority and Others*, 2002(4) SA 294 (CC):par. 32: “Where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.”

²⁶² *South African Human Rights Commission v Khumalo* 2019 1 SA 289 (GJ).

²⁶³ *Rustenburg Platinum Mine v SAEWA obo Bester* 2018 5 SA 78 (CC).

²⁶⁴ Geldenhuys & Kelly-Louw 2020:3.

The reality is that, given our history, White South Africans collectively have a lot to answer for. However, being relaxed about vituperative outbursts against Whites, on those grounds, contributes nothing of value towards promoting social cohesion. Reference has already been made to the risk of spiralling invective with uncertain but frightening possibilities. *There can never be an excuse that absolves any one of us from accountability in terms of section 10(1)*. There may be surrounding circumstances which aggravate the utterances or mitigate the likelihood of incitement to cause harm; these are matters fall to dealt with when remedies are considered.²⁶⁵

The judge here avers that section 10(1) of the *Equality Act* must be applied with regard to the historical context of the expressions under issue, yet the paragraph quoted from *Khumalo*, while it does acknowledge historical context, nevertheless explicitly disavows any entrance of such historical considerations into determinations of hate speech. This case, read with those mentioned by Geldenhuys and Kelly-Louw, seems only to introduce more uncertainty into the law's position on free expression. Bearing these inconsistencies in mind, a healthy amount of scepticism should accompany any newly minted categories of judicially protected expression, such as gender identity, and all the more so when these categories are formulated in ways which extend rather than limit the state's interventive competencies. The *September* court elaborated on the expression aspect of gender identity as follows:

[I]t is entirely normal for her [Ms September], as a transgender female, to want to transition socially, i.e. to present herself as a woman. Until such time as she can undergo medical treatment, presenting and expressing herself as a woman is the only way in which she can express her gender identity.²⁶⁶

Contentions regarding required medical transition aside, it is apparent that the Court considered the right to expression of gender identity in this matter as separate from factual determinations of medical transition or legal alteration of sex status.²⁶⁷ This is because, at the time of these proceedings, Ms September was incarcerated as a male in a male prison on basis of being anatomically and legally male, though nevertheless self-identifying as female.²⁶⁸ She had expressed the intention to transition medically but had not yet accomplished this.²⁶⁹ Thus, given

²⁶⁵ *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAEQC 2:par. 95. (emphasis added)

²⁶⁶ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 112.

²⁶⁷ The medical prerequisites for legal alteration of sex, and prognostications on their fairness or unfairness, are discussed below.

²⁶⁸ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par.15.

²⁶⁹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 16.

her failure to meet the medical requirements as set out in the *Alteration of Sex Description and Sex Status Act* (hereafter, “*Alteration Act*”),²⁷⁰ she could not alter her gender in law, which in turn meant that she would be considered and treated as a male prisoner.²⁷¹ The Court therefore held that, failing medical transition (which services are not readily accessible, even through private healthcare), the very least a transgender person should be entitled to is the unfettered expression of their preferred gender.²⁷² I say unfettered here purposefully: the respondents claimed that feminine-acting prisoners, given that they are surrounded by males convicted of multiple violent crimes, were far more likely to be targets of sexual abuse.²⁷³ The Court’s answer to this amounted simply to a “that is in your hands” attitude; correctional facilities would simply have to function more efficiently and properly in future when it came to transgender inmates, so as to guarantee their safety.²⁷⁴ It is respectfully submitted that, while this sets a strong precedent for the expression of gender identity, its real effects will be felt either in more efficiently managed, safer prisons, or in exacerbated instances of transgender inmate abuse. The alternative offered (transferring an anatomically male inmate to a female prison) bodes no better.²⁷⁵

²⁷⁰ *Alteration of Sex Description and Sex Status Act* 49/2003:sec 2.

²⁷¹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 54: “According to the Acting Director of Correction Administration, a prisoner is managed in terms of the personal details appearing on the warrant of detention, e.g. if a prisoner is identified on the warrant as male, he will be treated as male while in detention.”

²⁷² *Wilson et al.* 2014:450: “Transgender healthcare, however, is not well accommodated in the National Department of Health’s programme or curriculum. In the public sector it is limited to a single comprehensive service at one transgender clinic and partial services at a few other centres.” Southern Africa Litigation Centre 2016:42: “Gender reassignment surgery is carried out mainly at two public hospitals: Groote Schuur Hospital in Cape Town and the Steve Biko Academic Hospital in Pretoria. However, both these facilities only do four operations a year resulting in a long waiting list for gender reassignment surgery.” Access to medical transition resources is, as we see, severely limited, and this has many negative downstream effects. However, this does not necessarily mean one should rush to open the floodgates on gender alteration legislation, especially along ideological lines such as “the destruction of the heteronormative patriarchy”, not least because such an attitude treats transgender people as means rather than ends in of themselves (the opposite of what our courts have identified as dignity); as discussed below legal sex distinctions serve various legitimate purposes, which purposes are endangered by trigger-happy legislative propositions that would diminish those distinctions.

²⁷³ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:paras. 50-52: “It is the respondents’ case that the applicant’s transgender requirements placed her in a high security risk category... the correctional centre is such that male inmates take physical possession or ownership of other male prisoners that display feminine characteristics... the applicant’s request for communal access to other male prisoners whilst the applicant express herself as a female, would expose the applicant to sexual violence, because ‘male rape is an undeniable reality of incarceration.’”

²⁷⁴ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 150: “Moreover, should there indeed be a threat, the respondents have alternative less restrictive measures available to ensure her safety instead of refusing her to allow her to express her gender identity.”

²⁷⁵ Arguments might be made along the lines of “Ms September is not sexually attracted to females; she poses them no risk”, but this could be refuted by arguing that the sexual preferences of the males who posed a danger to her (and each other) in the first place were never factors for consideration, as it was assumed that anatomical males with histories of violent behaviour posed sexual violence risks to anyone regardless of gender or sexual preference; thus she could be considered no less a risk to females than her anatomically male counterparts. This

We may accept, thus far, that the state’s protection of gender identity expression is not limited by considerations of medical or legal status, nor are legitimate concerns of physical safety or security sufficient to curtail instances of such expression. The *September* Court further accepted that gender identity may be expressed in various forms: “Wearing certain clothes, applying make-up, fashioning one’s hair in particular ways – as the applicant seeks to do – are all sorts of expressions. To deny someone the opportunity or ability to express themselves as such, in my view, limits their right under s 16(1).”²⁷⁶ This is not, nor could the Court have been expected to produce, an exhaustive list of gender identity expressions.²⁷⁷ Nevertheless, we should focus our attention on a particular form of expression, the protection of which goes a step further than merely ordering non-interference:

Until such time as the applicant has undergone gender reassignment treatment, the respondents are directed to take reasonable steps to give effect to the applicant’s constitutional rights by...

7.1.3/7.2.3 Addressing the applicant as a woman and using the female pronoun; and

7.1.4/7.2.4 Directing all correctional service officials who are employed under their authority to do the same.²⁷⁸

The Court effectively set a precedent which required employees to use gender-affirming language.²⁷⁹ Thus, in sum, the right to express one’s transgender identity is not contingent upon the election or progress of medical transition nor upon legal sex status, and the protection of transgender identity does not only imply others should not interfere with a person’s dress or behaviour, but it goes so far as to require others to positively affirm a transgender person’s gender identity by using their preferred pronouns.

would be the case until she has undergone gender reassignment, whereafter aspects of her anatomy (genitals, hormones, physicality, etc...) would be altered to a point where she could be differentiated in certain relevant respects from conventional anatomical males.

²⁷⁶ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 113.

²⁷⁷ The *Alteration Act* at section 1 also does not provide an exhaustive list in this regard: “gender characteristics’ means the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means;”

²⁷⁸ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 164.

²⁷⁹ This does raise the question of whether such positive language requirements infringe on the free expression and belief rights of public sector employees whose beliefs would cause them to object to the use of said pronouns. It could be argued that, as public servants, they forfeit such claims, but in keeping within the scope of this dissertation, we can consider the matter no further.

The trouble lies to some degree in formulating the right to free expression positively. For instance, in a positive formulation, what does it mean for a particular form of expression to be “protected” or “unprotected” by the state? If a certain type of expression, say one’s expression of gender identity, is “protected” by the state *via* the right to free expression, does this mean it is free from state regulation, or does this in fact mean the state must intervene to ensure others do not interfere with such expression? What if the state were to go one step further than requiring non-interference and instead required *compliance* (as in the *September* judgment)? If members of a religious community were found guilty of “hate speech” for “misgendering” or “deadnaming” a transgender person, and consequently the members’ expressions were found to be “unprotected”, would such “un-protection” in fact require state-mandated action or regulation?

3.1.3 Equality as a balance of identities

Thus far, we have discussed several rights as they relate to the transgender person, in each case briefly noting how potential complications could arise in the religious associational context. The last right to consider in this section as it relates to the transgender individual is that of equality. Transgender persons enjoy the right to equal treatment under the law just as all natural persons do, but the situation is hardly so simple. As has been stated previously, it is the “transgender” element’s implications we consider here: what does it mean for a transgender person to enjoy the right to equality under the South African *Constitution*, and of what consequence is this to the religious association?

Equality, just as human dignity, appears as both a founding value and a right in the South African Constitution.²⁸⁰ Equality as value enters at the interpretation and limitation of the rights in the Bill of Rights,²⁸¹ again in the same mode as human dignity, and in many respects, equality determinations rely on dignity considerations.²⁸² Equality as a substantive right, found at

²⁸⁰ *Constitution*:sec. 1(a): “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

²⁸¹ *Constitution*:sec. 36(1) would allow a limitation of the Bill of Rights only where the limitation is “reasonable and justifiable in an open and democratic society *based on human dignity, equality and freedom*”; sec. 39(1)(a) sees equality as one of the values courts must consider, so as to “promote the values that underlie an open and democratic society *based on human dignity, equality and freedom*” in their interpretations.

²⁸² Woolman 2005:25-29: “Dignity is the linchpin for equality analysis under FC s 9. Indeed, whether unfair discrimination is deemed to have occurred in terms of FC ss 9(3) s 9(4) and 9(5) will often turn on whether, and the extent to which, the complainant’s dignity has been impaired.” Also see: Liebenberg 2005:1-31 and Albertyn

section 9 of the *Constitution*, has certain fixed elements one must consider.²⁸³ It is doubtless that the right to equality implies “equal treatment” at the hands of the state, this being the vertical application of the right contemplated at sections 9(1)-(3). Section 9(3) is where one finds the prohibition on state acts that result in unfair discrimination and a list of the prohibited grounds of unfair discrimination.²⁸⁴ Section 9(5) enacts a rebuttable presumption of unfair discrimination where the listed grounds are concerned.²⁸⁵ Most importantly for the purposes of this discussion, the *Constitution* at section 9(4) provides for the horizontal application of the prohibitions set forth in sections 9(3) and 9(5), thus extending the test for assessing unfair discrimination to the relations of private actors *inter se*.²⁸⁶ Therefore, the constitutional prohibitions on unfair discrimination extend to interactions between the transgender individual and the religious association.

Given that unfair discrimination is prohibited even in the context of private actors, how would the courts go about determining the existence of such unfair discrimination? The *locus classicus* in this regard is *Harksen v Lane NO*, which articulated the test for unfair discrimination as follows:²⁸⁷

1(i) Does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not

& Goldblatt 2007:80. The relationship between dignity and equality also has implications in the context of the “doctrinal core” and “organic” approaches to unfair discrimination determinations in the context of religious associational identity as opposed to transgender identity; this is touched on briefly here but explored further in the following chapter.

²⁸³ *Constitution*:sec. 9: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

²⁸⁴ The *Constitution* does not define “unfair discrimination” but see the discussion of the *Harksen* test in this section; the *Equality Act* does define unfair discrimination, see section 3.2.2 below.

²⁸⁵ Albertyn & Goldblatt 2007:84; *Khosa and Others v Minister of Social Development and Others* 2004 (6) 505 (CC), 2004 (6) BCLR 569 (CC):par. 68: “If the differentiation is based on a ground listed in section 9(3) of the Constitution a rebuttable presumption that the discrimination is unfair is created by section 9(5).”

²⁸⁶ Albertyn & Goldblatt 2007:84; Woolman 2005:35-42.

²⁸⁷ *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC):par. 53. This judgement was rendered in the context of the Interim Constitution of 1994, yet it has remained the authoritative position and has found application in important cases post-1996, as in *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 15:par. 15.

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 specified ground, then unfairness will be presumed. If on an unspecified 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 this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3).

2. 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 limitations clause (s 36).

The *Harksen* test entails three main considerations: was there differentiation which amounted to discrimination; if so, was the discrimination unfair; and finally, if there was unfair discrimination (by the state), could this be justified in terms of a section 36 limitations analysis? The final element of this test may be discounted in the current context as it applies only to state actions and not to the conduct of private actors.²⁸⁸ Therefore, an unfair discrimination enquiry concerning private conduct consists mainly in the fairness elements of the test.²⁸⁹

Before elaborating any further on the *Harksen* test's application of the equality clause and how this could be applied in the context of transgender persons, a clarificatory note is due: the *Harksen* test is authoritative where recourse is had directly to section 9 of the *Constitution*, however, the *Equality Act*'s enactment in 2003 has rendered such direct recourse unlikely.²⁹⁰ Therefore, in more recent cases dealing with unfair discrimination claims between private actors, the provisions of the *Equality Act*, which essentially reproduce and expand on the *Harksen* test, have been applied instead of directly interpreting the *Constitution*. Nevertheless, seeing as this section deals with the equality clause and its application – and the *Harksen* test is integral to such application – it is necessary to consider the test despite the (*Equality*) *Act*.

Turning back to the *Harksen* test, certain notable developments follow. The first leg of this test requires the establishment of the fact of discriminatory conduct: if the complained conduct is

²⁸⁸ Woolman and Botha 2006:34-41. A further exception to this is where even the complained private conduct is regulated by law; this would necessitate a limitations analysis of the regulation which effectively “supports” unfair discrimination.

²⁸⁹ Albertyn & Goldblatt 2007:83.

²⁹⁰ The *Equality Act* is discussed in detail below at sections 3.2.2 and 3.2.3.

based on one of the grounds listed at section 9(3), discrimination is established; if not, it must be shown that the differential conduct relates to an attribute which is integral to human dignity. Dario Milo, Glenn Penfold & Anthony Stein speculated that the listed ground of “gender” in the equality clause might be interpreted to include “transgender”;²⁹¹ over a decade later and in no uncertain terms, Judge Fortuin rejected such an extensive interpretation of section 9 in *September*, opting to separate “gender identity”, specifically “transgender identity”, from the listed ground of “gender”.²⁹² Nevertheless, the Judge did, as discussed at the end of section 3.1.1 above, find that gender identity is closely tied to human dignity and thus established gender identity as an analogous ground.²⁹³ The first leg of the *Harksen* test in the case of transgender identity would be settled easily then. Equality Court judgments which regard transgender identity as an analogous prohibited ground now adorn the corpus of South African precedent, and the transgender person is in a more favourable position to secure this right, not only against the state but also against private actors such as religious associations.

The second leg of the *Harksen* test centres on the determination of unfairness of established discriminatory conduct. Albertyn and Goldblatt note that this portion of the test involves giving due regard to several factors: the position of the complainant; the nature and purpose of the offending provisions; and the impairment of the rights (especially to dignity) and interests of the complainant.²⁹⁴ Since private actors are considered in the context of this dissertation, the first two factors may be disregarded. Thus, the brunt of the *Harksen* test, if it were to apply in lieu of *Equality Act* provisions, would fall on scenario-specific questions concerning the impairment of the rights and/or interests of a transgender person *vis a vis* a religious association. Given that such a scenario involving a transgender person and a religious association has yet to appear before the Equality Court or the Constitutional Court, all one may do is draw from similar scenarios that have appeared before the courts and speculate thereon.

In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*, it was held that a religious association had unjustifiably impaired a gay man’s employment interests and his right to dignity by unfairly discriminating against him in dismissing him on basis of his sexual

²⁹¹ Milo *et al.* 2008:82 at fn. 402.

²⁹² *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 103.

²⁹³ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 122. See also the discussion at 3.2.2 regarding the potential inclusion of transgender within the listed ground of sexual orientation.

²⁹⁴ Albertyn & Goldblatt 2007: 75-80.

orientation.²⁹⁵ It is not difficult to speculate on how religious associations could in future similarly be said to discriminate against the transgender in a way that unfairly limits their employment interests or free expression rights, not to mention the right to dignity.²⁹⁶ The religious associations, cannot be expected to accommodate certain forms of conduct which a transgender person might claim is integral to their experience of human dignity. For instance, a transgender person should not expect to be employed in a role where they represent a traditional religious association or interact on its behalf with the public; as well, a transgender person cannot expect the members and officials of such an association to address them by their preferred names and pronouns, even though this is integral to the recognition of one's gender identity.²⁹⁷ In fact, the transgender phenomenon might in this respect prove to be a boon to religious associational autonomy jurisprudence. Threshold tests employed by courts thus far in their attempts to balance the rights and interests of religious associations and individuals, such as the doctrinal core approach, cannot account for the litany of issues stemming from a religious association's employment of a transgender person.²⁹⁸

For now, this point must be kept brief, as it is developed to its full extent in the following chapter. It would suffice to conclude this discussion on dignity and its relation to the fairness of discrimination as follows: gender identity and the expression thereof is integral to a transgender person's experience of human dignity, and therefore equality;²⁹⁹ it is also true of many religious associations that traditional notions of gender and sexuality are integral to their communal identity, and thus their members' experiences of human dignity and equality.³⁰⁰ If the two sides are to be measured up equally, then due regard should be given to the fullness of what constitutes each side's identity, dignity and experience of equal treatment under the law.

²⁹⁵ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par. 25. To follow the discourse on *Strydom*, see: Lenta 2009; Woolman 2009; Bilchitz 2011; De Freitas 2012; Bilchitz 2012; Lenta 2012; Woolman 2012; and Lenta 2013.

²⁹⁶ Refer to sections 3.1.2 and 3.2.3 for a discussion on free expression as it relates to the transgender; refer to section 3.1.1 for a similar discussion on dignity; also see section 4.3 generally with regards to the potential challenges in this vein.

²⁹⁷ The *Strydom* case at par. 25 dealt with a similar issue of the religious association's public impression, although the court dismissed arguments about the effects on the religious association's public representation; Lenta 2009:855 was the first to criticise *Strydom* in this respect.

²⁹⁸ See, for instance, Alvin J. Esau's critique of and answer to the doctrinal core approach in Esau 2000 and Esau 2009.

²⁹⁹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:paras. 121-122.

³⁰⁰ Benson 2013(b):108: "In virtually all religions, and certainly in all conservative traditions, sexual conduct is restricted to the married heterosexual state and sexual acts outside it condemned."

3.2 Legislation

The examination of legislation is crucial for several reasons and serves specific objectives. By analysing legislation that has been associated with similar rights disputes, such as the Equality Act and the Alteration Act, we gain insights into legal frameworks that have already addressed or triggered debates surrounding rights issues. Studying these laws allows us to understand the historical context, legal precedents, and the arguments put forth by different stakeholders, which can inform current discussions and help shape future legislation.

3.2.1 The Alteration Act

Recalling our analysis of the *September* case, it is evident that certain aspects of a transgender person's gender identity are recognised and afforded constitutional protection regardless of legal sex status. Nevertheless, the South African position does in certain crucial respects recognise a distinction between sex and gender:³⁰¹ many legal instruments and institutions (such as the *Marriage Act* and the correctional facilities in *September*) rely on the category of sex as opposed to gender, and the fact that a person merely identifies as a certain gender would not automatically see them treated accordingly where sex is concerned.³⁰² However, the egalitarian principles of the *Constitution*, most notably human dignity and substantive equality, combined with a societal push to give legal recognition to persons who identify with genders incongruous with their biological sex,³⁰³ have resulted in the *Alteration Act*'s promulgation.³⁰⁴ This Act's purposes are to "provide for the alteration of the sex description of certain individuals in certain circumstances" and related procedural matters, such as incidental alterations to the *Births and Deaths Registration Act*.³⁰⁵ In this way, the Act seems intended to create a situation in law where a person whose gender and sex are found to be incongruous may

³⁰¹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; par. 105: "Neither 'sex', nor 'gender' is defined in the *Equality Act*. It is safe to assume that there must be some distinction between the two, as each is listed as a separate ground." A distinction was also admitted by the Lesbian and Gay Equality Project at the then *Alteration Bill*'s hearings (Home Affairs Portfolio Committee, "Alteration of Sex Status and Sex Description Bill: Hearings, Lesbian and Gay Equality submission" 2003:7): "Gender identity is distinct from sex description."

³⁰² *Marriage Act* 25/1961; *September* par. 54.

³⁰³ Home Affairs Portfolio Committee 2003, South African Human Rights Commission "Submission: Alteration of Sex Description and Sex Status Bill [37 – 2003]": "The SAHRC bases the decision for its support of the legislation on the founding values of our democracy enshrined in our Constitution of human dignity, the achievement of equality and the advancement of human rights and freedom."

³⁰⁴ Visser & Picarra 2012:520-521. There is a larger context that warrants mention: the *Births, Marriages and Deaths Registration Act* 81/1963 had, until its amendment in 1992, provided for the alteration of a person's sex description; this did not have the effect, however, of changing a person's initial biological sex marker as the current legislation does.

³⁰⁵ Preamble to the *Alteration of Sex Description and Sex Status Act*.

be treated, from the moment of transition onward, as if that were not so – by the alteration of their legal sex description.³⁰⁶ The three-page *Alteration Act*'s central substantive provision appears at section 2(1):

2. (1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.³⁰⁷

Immediately, there emerge three categories of eligible persons: those whose sexual characteristics (and the Act includes both primary and secondary sexual characteristics, as well as gender characteristics, under this umbrella term)³⁰⁸ have been altered artificially to result in gender reassignment (as defined in the Act);³⁰⁹ those whose sexual characteristics have developed naturally to a point of gender reassignment; and intersex persons.³¹⁰ These categories are related logically to the accompanying requirements for eventual legal recognition. There is the general requirement to prove, by presentation of a birth certificate, that one indeed is legally recognised as a certain sex, the alteration of which is the ultimate object of this Act.³¹¹ If one would fall into the first or second categories above, one would further need to provide proof (in the form of a medical report) of either natural or medical alteration that has resulted in gender reassignment.³¹² Those in the first category (medical or surgical reassignment) would also need to furnish an additional medical report (compiled by a different medical practitioner than compiled the other report) detailing the means of

³⁰⁶ *Alteration of Sex Description and Sex Status Act*:sec. 3(3): “Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.” Thus, as Julia Sloth-Nielsen (2019:1) observed, “the altered sex description operates entirely prospectively.” Such alteration does not have retroactive legal effect, as confirmed in the case of *KOS v Minister of Home Affairs* 2017 (6) SA 588 (WCC).

³⁰⁷ *Alteration of Sex Description and Sex Status Act*:sec. 2(1).

³⁰⁸ *Alteration of Sex Description and Sex Status Act*:sec. 1: “‘gender characteristics’ means the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prosthesis or other means; ‘primary sexual characteristics’ means the form of the genitalia at birth; ‘secondary sexual characteristics’ means those which develop throughout life and which are dependent upon the hormonal base of the individual person; ‘sexual characteristics’ means the primary and secondary sexual characteristics or gender characteristics.”

³⁰⁹ *Alteration of Sex Description and Sex Status Act*:sec. 1: “‘gender reassignment’ means a process which is undertaken for the purpose of reassigning a person’s sex by changing physiological or other sexual characteristics, and includes any part of such a process.”

³¹⁰ *Alteration of Sex Description and Sex Status Act*:sec. 1: “‘intersexed’, with reference to a person, means a person whose congenital sexual differentiation is atypical, to whatever degree.”

³¹¹ *Alteration of Sex Description and Sex Status Act*:sec. 2(2)(a).

³¹² *Alteration of Sex Description and Sex Status Act*:sec. 2(2)(c).

alteration;³¹³ as it appears from the wording of the Act, surgery is not the sole route, and proof of hormone therapy might be sufficient to satisfy this requirement.³¹⁴ Intersex persons must present, along with their birth certificate, two separate reports: a medical report confirming their intersex condition and a report corroborating their sustained social transition in a specific gender role over a period of two years.³¹⁵

Upon examination of the *Alteration Act*'s requirements, it is apparent that each category of "certain persons" eligible for legal recognition of altered sex has been contemplated with regard to "certain circumstances", as per the Act's stated intent. Thus, each set of requirements is crafted with a different type of applicant in mind; this already implies that different yet contextually appropriate standards are to be applied to each category. This will inevitably result in disparities, which do not in of themselves indicate unfairness. The Act is aimed at allowing people to transition legally. To do this, it must first identify which classes of individuals are eligible for transition. The creation of these classes is based on necessity; not all transitioners transition for the same reason or out of the same circumstances. Some transitioners are intersex, others have elected to undergo surgery or hormone therapy to alter their sex. The Act treats these people differently – resulting in a necessary disparity – precisely because it assumes there are different thresholds to effective sex/gender transition. The Act acknowledges a reality where a male who has undergone puberty cannot – without warping reality by sheer willpower – become a female overnight. The disparity it creates thus should not automatically be suspect, since it is clearly and rationally linked to a legitimate aim, namely the establishment of legal certainty where legal alteration of sex status is concerned. Certain criticisms of the *Alteration Act* must therefore fail where they neglect or refuse to acknowledge the rational connection between the Act's criteria and its categories. Barnes, as one such critic, alleges that the two-year proof period required of intersex persons in terms of this Act "could amount to being onerous and degrading treatment" and offers a potential solution, notably, "to implement quick, transparent, and accessible mechanisms for legal gender and sex recognition procedures."³¹⁶ I

³¹³ *Alteration of Sex Description and Sex Status Act*:sec. 2(2)(b).

³¹⁴ This may be inferred from the wording at section 2(2)(b) of the Act: "In the case of a person whose sexual characteristics have been altered by surgical *or medical treatment* resulting in gender reassignment..." "Medical treatment" is not defined in the Act, but given that such treatment must result in gender reassignment, and given also that gender reassignment per the Act is understood to include "any part of such a process", we may reasonably conclude that "medical treatment" extends from hormone therapy to surgery. This puts us in agreement with Barnes (2020:122) and Sloth-Nielsen (2020:34).

³¹⁵ *Alteration of Sex Description and Sex Status Act*:sec. 2(d).

³¹⁶ Barnes 2020:124.

cannot on these grounds accept this elision of the Act's practical function, which is not only to provide the means for achieving its stated purpose but also, as any decent piece of legislation must do, to safeguard itself from abuse by potential bad actors.

Barnes' recommendation is the culmination of several misgivings about the Act, its categories of persons and its concomitant criteria for legal recognition. First, Barnes errs in stating that "there is no prerequisite time requirement for transgender individuals in the *Alteration Act*, but only for intersex individuals."³¹⁷ There may not be an explicit time period in this respect, but Barnes does not here account for the fact that transgender individuals, at least those of the first category, are required to undergo medical or surgical treatment to effect gender reassignment, which means they must bear the considerable burdens in time and costs associated with such treatment; this is not to mention the process of treatment itself, which may be taxing for other reasons.³¹⁸ Thus, transgender individuals do also face considerable temporal and financial burdens in terms of the Act's requirements. We may agree with Barnes, however, when he says that a startling lack of clarity accompanies the Act's provisions as they relate to "natural development"; indeed, the Act neglects to provide even a definition of natural development.³¹⁹ The only intention we might infer here is that this is meant to be a sort of "gap-filling" category for exceptional cases. This is because the other two categories (of persons medically altered and of persons with indeterminate or undifferentiated sexes) adequately cover the range of expected cases; if one has not been medically treated or is not some variety of intersex, then a specific, miraculous natural development, the likes of which might even puzzle the medical community, would have taken place, and the Act's "natural development" category seems aimed at anticipating such exceptions.³²⁰

Turning to our differences again, Barnes avers that "the Act holds a conflated understanding of intersexism by using terminology such as 'gender role'", and that, since intersexism refers to sex and not gender (which is true), the Act should be corrected to instead say "sex role" in

³¹⁷ Barnes 2020:124.

³¹⁸ With regard to the various medical and surgical procedures involved, see de Vries & Cohen-Kettenis 2012; with regard to the reported transitioning experiences of transgender and intersex persons in South Africa, see Husakouskaya 2013.

³¹⁹ Barnes 2020:122-123.

³²⁰ For an example of such exceptions, one might look to occurrences such as "guevedoces"; see: Money 1976 and Zucker 2006.

section 2(2)(d)(ii).³²¹ This again misses the mark. We may surmise the Act’s understanding of gender from its definition of “gender characteristics”: “the ways in which a person expresses his or her *social identity as a member of a particular sex* by using style of dressing, the wearing of prostheses or other means.”³²² Thus, we may take gender (at least for purposes of the Act) broadly to mean “one’s social identity as a member of a particular sex”, and the phrase “gender role” would correlate to this. If we look again to the section Barnes criticises, we might now see why the suggested replacement of “gender role” with “sex role” is at most tautologous, if not simply redundant. After all, what would a “sex role” refer to, if not to one’s behaviour according to a specific sex, and how is that not exactly what the Act intends by “gender role”? This error, along with the mistaken presumption that transgender persons suffer no time restraints in respect of the Act, negate Barnes’ accusation that the Act imposes an unfairly onerous process upon intersex persons, as well as his accompanying recommendation that the Act reformulate its criteria.

It would be appropriate, in the closing of our discussion on the *Alteration Act*, to note some interesting effects and questions arising therefrom which we may engage with in the following chapter. It should be reiterated that a successful application in terms of the Act would see the applicant being recognised in law with prospective effect as the requested sex. Such a change is reflected in all their identification documents (also in the accompanying identification number) and in the national population register. This person would still be the holder of all those rights and obligations accrued to them prior to the alteration, regardless of how this might conflict with other laws or regulations.³²³ The interesting questions arise not in terms conflicts regarding state regulations or laws, but rather in conflicts with the self-government of religious associations. It could be stated without prejudice that a certain understanding of sex – say, that it is immutable – might be integral to many a religious association’s communal identity. We could then imagine that a religious association might hire an employee whom it later discovers

³²¹ Barnes 2020:124. The section of the *Alteration Act* Barnes wishes to alter reads: “in the case of a person who is intersexed, be accompanied by- (ii) a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily, for an unbroken period of at least two years, in the *gender role* corresponding to the sex description under which he or she seeks to be registered.”

³²² *Alteration of Sex Description and Sex Status Act*:sec. 1.

³²³ The case of *KOS and Others v Minister of Home Affairs and Others* [2017] ZAWCHC 90 serves as a case study to this effect. As an interesting aside, Sloth-Nielsen senior (2019:13) has noted that *KOS* might “potentially obstruct any constitutional challenge to the underinclusivity of the Marriage Act to same-sex couples”, since the Judge opined that the *Civil Union Act* and the *Marriage Act* do not represent discriminatory parallel marriage systems.

is of medically and legally altered sex; or the scenario where an already-hired employee elects to undergo such medical and/or legal reassignments. It might not even be the fact of alteration itself that would cause conflict, but rather the consequences emanating from this fact: what if a position were only to be filled by a specific sex;³²⁴ or if a transgender employee, while performing their duties under the auspices of the association, requested others to address them by their preferred pronouns?³²⁵ These potential conflicts hint that the *Alteration Act*'s after-effects on religious associational autonomy have yet to be reckoned with.

3.2.2 Transgender identity and the Equality Act

The *Equality Act*, according to its opening text, is intended to give legislative effect to the letter and spirit of the *Constitution*'s equality clause (section 9), notably through prohibitions on unfair discrimination, hate speech and harassment.³²⁶ The *Equality Act*'s purpose is to “provide measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability.”³²⁷ It follows, according to the principle of subsidiarity (in a legislative context, not that of social spheres), that whenever equality claims come before the courts, the *Equality Act* would need to be considered before resorting directly to section 9.³²⁸ Therefore, when the provisions of the *Equality Act* are found to conflict with the spirit or provisions of the *Constitution*, or when conduct at issue falls beyond the scope of the *Equality Act* and is not regulated elsewhere in legislation or common law, only then can recourse be had directly to the *Constitution*.³²⁹

Bearing the above in mind, it is fair to say the *Equality Act* has formed and will continue to form, as long as its provisions remains in force, a substantial part of any dispute concerning harassment, hate speech and unfair treatment on basis of listed and in some cases (as in *September*) analogous grounds. Its provisions on gender and hate speech have been the subject

³²⁴ The ages-old question of the female priest, though this is unlikely. More likely you could see a youth pastor transition, and then see the association argue that the act of transitioning itself is a form of voluntary conduct which conflicts with the tenants of the religious association. This would present a situation analogous to that of the *Strydom* case, which will be addressed in the following chapter.

³²⁵ This is not an idle concern, given the *September* judgment's extension of gender identity expression to include the right to be called by one's preferred gender pronouns (as discussed above in section 3.1.1).

³²⁶ Preamble to the *Promotion of Equality and Prevention of unfair Discrimination Act*.

³²⁷ *Promotion of Equality and Prevention of unfair Discrimination Act*:sec. 2(c).

³²⁸ Currie & De Waal 2004:245.

³²⁹ Currie & De Waal 2004:245.

of academic critiques that are relevant to our discussions on transgenderism.³³⁰ In view of these criticisms, we shall investigate the *Equality Act* by questioning, first, whether transgenderism could be considered a listed or analogous ground upon application of the relevant case law, and second, how hate speech could be construed in relation to transgender persons.

In determinations of unfair discrimination, the *Equality Act* makes reference to “prohibited grounds”.³³¹ In defining these “prohibited grounds”, the *Equality Act* incorporates those grounds listed in section 9 of the *Constitution*, and this is vital to note, as it implies that judicial interpretations of section 9’s listed grounds would affect readings of the *Equality Act*’s listed grounds. The *Equality Act* goes on to prohibit unfair discrimination also in terms of analogous grounds, and it provides the criteria for their determination:

'[P]rohibited grounds' are

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);³³²

Both in respect of the *Equality Act* and the *Constitution*, the *September* Court held that “transgender” was not a listed ground, yet the Court still found that unfair discrimination had occurred on basis of an analogous ground, namely gender identity.³³³

In spite of the *Equality Act*’s criteria for considering analogous grounds and the courts’ liberal use thereof, dissent has sprung up around the topic of listed grounds. Authors like Johndré

³³⁰ Haigh 2006:195-203; Barnes 2020:112-113; Geldenhuys & Kelly-Louw 2020:6-7.

³³¹ *Promotion of Equality and Prevention of unfair Discrimination Act*:sec. 1: “ ‘discrimination’ means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;”

³³² *Promotion of Equality and Prevention of unfair Discrimination Act*:sec. 1.

³³³ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 122. “[T]ransgender’ is not a listed ground under the Constitution, nor the Equality Act...”

Barnes argue that the term “gender” in the *Equality Act* should be allowed a wider ambit so as to include “transgender”, given the Act’s international obligations and its implied non-exhaustive treatment of gender-related issues.³³⁴ Rachel Sloth-Nielsen criticises Justice Ackermann’s reading of “sexual orientation” as a listed ground (not in the *Equality Act* but in the *Constitution*) in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, claiming that the Justice had erred in his inclusion of “transsexual” within the category of “sexual orientation”.³³⁵ Sloth-Nielsen nevertheless recognises that Justice Ackermann’s reading, “albeit incorrect,” has the agreeable effect of guaranteeing transgender persons’ rights in this respect.³³⁶ It is submitted that Sloth-Nielsen wholly misunderstands the Justice’s meaning in this regard. This seems to be as a result of imputing to the judge a misunderstanding of the specific terminology which Sloth-Nielsen opts to employ, instead of attempting to understand what the Justice intended from his technical use of the terms available to him at the time. Indeed, in that author’s work, the Justice’s language was summarily dismissed as “incorrect” according to her reading; terms were taken “at face value” to mean what she took them to mean, regardless of context and without any deeper analysis. This must be remedied. Sloth-Nielsen ought not be too quick to accuse Justice Ackermann of making a virtuous error in his reading of the listed ground of sexual orientation. The Justice actually does explicitly note Edwin Cameron’s (who went on to become a Justice of the Court) definition of sexual orientation,³³⁷ and, in the following paragraph, he very clearly elaborates on the linguistic and textual exercise he undertakes in parsing the phrase:

The concept of ‘sexual orientation’ as used in s 9(3) of the Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.³³⁸

³³⁴ Barnes 2020:112-113.

³³⁵ Sloth-Nielsen 2020:28.

³³⁶ Sloth-Nielsen 2020:64.

³³⁷ *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15:par. 20: “As to ‘sexual orientation’, I adopt the following definition put forward by Cameron: ‘. . . sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.’” (footnotes omitted)

³³⁸ *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15:par. 21.

It is true that the contemporary, commonplace use of “sexual orientation” is as a descriptor of one’s sexual or romantic preferences, but Ackermann explicitly opts for a technical linguistic elaboration on the phrase: sex, in its adjectival form (*i.e.*, sexual), is capable of referring to various aspects connected to a person’s anatomical (or legal) sex, in this case functioning as a legal-linguistic reference point. Orientation can simply be taken to mean one’s social, behavioural or socio-behavioural relation to this reference point.³³⁹ In plain terms, Ackermann intends for “sexual orientation” to read “social or behavioural orientation toward sex”. Understanding this, one could then take “sexual orientation” to encompass the biological aspects of a sex (anatomical sex) considered in conjunction with legal sex status and the social roles commonly associated with a sex (*i.e.*, gender roles, from which gender identity is derived). These factors can be considered along with the behavioural aspect of sexual attraction towards a given anatomically/legally sexed person, in conjunction with their gender identity, in order to provide a complete picture of one’s orientation towards sex. Thus, Ackermann’s elaboration could contain far more than even merely homosexual, heterosexual or bisexual preferences, and his inclusion of transsexuality in this class would not be an error.

In fact, Justice Ackermann’s formulation could be taken even further to describe “gender-fluid” or “non-binary” persons, given his recognition that “sexual orientation” would also extend to even mutable or temporary states of sexuality (sexuality being widely defined, as we have stated, to include gendered expressions separate from anatomical sex, and not merely erotic or romantic preferences): “It applies equally to the orientation of persons... who might *on a single occasion* only be erotically attracted to a member of their own sex (emphasis added).”³⁴⁰ Fluidity is here described in the context of attraction, but given the wide ambit accorded to sexuality by Justice Ackermann (as evinced by his inclusion of “transsexual”), it should be understood to extend beyond fluctuating states of erotic attraction to include fluctuating states along various lines of sexual (widely defined) classification, thus including gender. Sloth-Nielsen’s criticism misses this by assuming the Justice’s interpretive exercise is borne of ignorance, whereas, in our analysis, Justice Ackermann’s interpretive exercise seems intentionally designed to extend the scope of equality clause protections to various (non-

³³⁹ *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15:par. 20: “According to the Shorter Oxford English Dictionary ‘orientation’ means ‘[a] person’s (*esp. political or psychological*) attitude or adjustment in relation to circumstances, ideas, etc; determination of one’s mental or emotional position (emphasis added).”

³⁴⁰ *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15:par. 21.

criminal) sexual-social categories. His broad interpretation of sexual orientation as a protected characteristic in the *Constitution* thus entails a comprehension of the category as including a wide range of social and behavioural factors classified in relation to sex.

Sloth Nielsen argues that the Justice misunderstood the meaning of “transsexual”, and that he erroneously added it, a sex (and in her view, a gender) description, into a category reserved for modes of erotic attraction.³⁴¹ She nevertheless avers that, taken at face value,³⁴² this mistake would technically mean the extension of the listed ground of sexual orientation to include “transsexual” and (again in her view) “transgender” identities. This view does not hold up to scrutiny. If Justice Ackermann did not attempt to expand the category of sexual orientation as per the above discussion, then indeed the only alternative would be that he misunderstood the term “transsexual”; his language cannot be read to betray a misunderstanding of sexual orientation, since he explicitly references Cameron’s definition thereof. But if the Justice understood sexual orientation to refer only to modes of erotic or romantic attraction and nevertheless inserted “transsexual” into this category, then (Sloth-Nielsen fails to note this) the only logically coherent conclusion would be that the Justice took “transsexual” to mean erotic or romantic attraction of, or toward, transsexual persons. This reading would not then, as Sloth-Nielsen contends, extend categorical protection to transsexual or transitioned transgender persons on basis of their gender or sex; instead, it would merely extend protection to another species of sexual attraction.

In summary, it seems that Justice Ackermann’s holding in this respect could either be understood to extend the semantics of sexual orientation as a listed ground (as argued above), which would see transgender identity included under this category; or, alternatively, the Justice’s holding could be understood as a semantic error. The latter is Sloth Nielsen’s position, although it would not, contrary to her argument, extend listed ground status to transsexual or transgender identity, but rather to an erotic or romantic attraction in respect of transsexual persons.

³⁴¹ Sloth-Nielsen 2020:28.

³⁴² Sloth-Nielsen 2020:64. We cannot take the Court’s use of the term “transsexual” at face value, as Sloth-Nielsen would have us, if this would mean discarding the Court’s meaning in favour of the author’s.

In conclusion, the debate surrounding the interpretation of the *Equality Act* and the inclusion of specific categories highlights differing perspectives. While some argue for a broader understanding of "gender" to include "transgender", others criticize the inclusion of "transsexual" under "sexual orientation" in the Constitution. A closer analysis reveals that the Constitutional Court's interpretation intended to extend the scope of equality protections. The Court's understanding of "sexual orientation" encompasses various aspects related to anatomical sex, legal sex status, and social roles, potentially including gender-fluid and non-binary individuals. The effects of such an interpretive result, however, remain to be seen.

3.2.3 Hate speech, the Equality Act and the Hate Speech Bill

The second and final issue we shall address with respect to the *Equality Act* is that of hate speech and how it could be construed in the context of transgender persons. Given the precedential and legislative developments in this area, our analysis must extend beyond just the *Equality Act* to include the *Hate Speech Bill*, as this Bill is to some degree an extension of the prohibition on hate speech found in the *Equality Act*.³⁴³ First, we should define hate speech. Our starting point already points towards controversy, since the definition of hate speech as found in section 10(1) of the *Equality Act* has recently been declared constitutionally invalid in *Qwelane*: "It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) of the Constitution and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech."³⁴⁴ The new definition, pending Parliamentary action, sees hate speech as the publishing, propagating, advocating or communicating of words, "based on one or more of the prohibited grounds,³⁴⁵ against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."³⁴⁶

³⁴³ Preamble to the *Prevention and Combatting of Hate Crimes and Hate Speech Bill B 9-2018*.

³⁴⁴ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 1(b).

³⁴⁵ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:paras. 125-134;145-146. It bears mentioning that the Court considered the constitutionality of the *Equality Act*'s extension of the *Constitution*'s prohibited grounds as they relate to hate speech; the *Constitution* employs separate sets of prohibited grounds for its equality and free expression clauses, unlike the *Equality Act*, which uses one set throughout. Sexual orientation is included in the equality clause (section 9) of the *Constitution*, but it is not included at section 16 (free expression), wherefrom the hate speech provisions of the *Equality Act* (and the *Hate Speech Bill*) draw their legitimacy. The Court nevertheless upheld the *Equality Act*'s amalgamation of prohibited grounds, and our analysis here accords to this.

³⁴⁶ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 1((d)).

As we have already shown, transgender identity has been identified as an analogous prohibited ground in terms of the *Equality Act* in *September*, and, because this seems insufficient to some commentators, it could further be argued to be included within the listed ground of sexual orientation, as we have shown above.³⁴⁷ Thus, hate speech, as defined in the *Equality Act*, could occur in respect of gender identity as a prohibited ground. No such proofs are required in terms of the *Hate Speech Bill*, however, because its latest definition of hate speech explicitly incorporates gender identity:

4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—
- (i) be harmful or to incite harm; or
 - (ii) promote or propagate hatred,
- based on one or more of the following grounds:
- ...(hh) gender or gender identity;
- ...is guilty of an offence of hate speech.³⁴⁸

The *Hate Speech Bill*'s definition may be wider, but the definition in the *Equality Act* is obviously still the authoritative one. It is in applying the *Equality Act*'s definition that we can anticipate how a charge of hate speech might be brought with transgender identity as the infringed prohibited ground.

³⁴⁷ Before the cases of *September* and *Qwelane*, there seemed to be less certainty on the topic of listed and analogous grounds, and on the relationship of *Constitutional* hate speech provisions to *Equality Act* provisions. Milo *et al.* (2008:82 at fn. 402) in “Constitutional Law of South Africa” suggested that gender as per section 9 of the *Constitution* might be read widely to include transgender, yet as we have seen, this was rejected in *September* in favour of the creation of an analogous ground *via* the *Equality Act*; Burns (1998:48-49) argued for a generous, purposive extension of the *Constitution*'s hate speech provision to include sexual orientation, yet this was shown to be unnecessary in *Qwelane* at par. 34, which held that the *Equality Act*'s “extended prohibited grounds are narrowly crafted to fulfil the purpose of the hate speech prohibition.”

³⁴⁸ *Prevention and Combating of Hate Crimes and Hate Speech Bill*:sec. 4(1)(a).

To demonstrate how charges of hate speech could arise in the context of transgender persons, we should consider the phenomena of “deadnaming”³⁴⁹ and “misgendering”.³⁵⁰ These terms are useful case studies since they have recently entered into the public consciousness as forms of expression deemed harmful to transgender persons.³⁵¹ Recalling the *Equality Act*’s definition of hate speech, we can already identify deadnaming and misgendering as forms of expression based on the analogous prohibited ground of gender identity; this satisfies the definitional criteria for hate speech as far as conduct and prohibited grounds go.

Next, it must be proven that such expressions “could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.”³⁵² Where Justice Majiedt dealt with these elements of hate speech in *Qwelane*, he held that the objective standard, the reasonable person test, be applied.³⁵³ Therefore, the question to ask would be what meaning the reasonable listener of ordinary intelligence would attach to a statement, giving due regard to the context of an exchange. The Justice further noted that:

On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on ‘a multiplicity of trivial actions by hypersensitive persons’. On the other hand, if it were based on the subjective intention of the speaker, the threshold for civil liability would be considerably higher than usual.³⁵⁴ (footnotes omitted)

Milo *et al.* have pointed out that disregarding the speaker’s intent is arguably a fault of section 10(1) of the *Equality Act*, and that the test to be applied is overly broad and vague even for such cases of civil liability.³⁵⁵ There are considerable difficulties in applying the reasonable person test to instances of hate speech, especially when this occurs between groups of people with radically different moral outlooks, though the Justice seems aware of this: “However, when plugging in an abstract reasonable person test in order to construe the meaning of alleged

³⁴⁹ Merriam-Webster.com Dictionary, “Deadname”, <https://www.merriam-webster.com/dictionary/deadname> (Accessed 19 Sep. 2022): “To speak of or address (someone) by their deadname (the name that a transgender person was given at birth and no longer uses upon transitioning).”

³⁵⁰ Merriam-Webster.com Dictionary, “Misgender”, <https://www.merriam-webster.com/dictionary/misgender> (Accessed 19 Sep. 2022): “To identify the gender of a person, such as a transsexual or transgender person, incorrectly (as by using an incorrect label or pronoun).”

³⁵¹ Matthyse *et al.* 2020:11.

³⁵² *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 1((d).

³⁵³ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 101.

³⁵⁴ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 99.

³⁵⁵ Milo *et al.* 2008:86-87.

hate speech, courts ought to be mindful of our diverse and dynamic society and not inadvertently reify prejudices.”³⁵⁶ This is an especially pertinent concern when dealing with transgender persons and religious associations, given that transgender persons could take serious offense at being “misgendered” or “deadnamed”; while the employees, members and officials of said associations might not understand why transgender persons react as they do. On the other hand, they might well understand and nevertheless disagree with the transgender person’s beliefs about gender, sex and the expression thereof. This is where judicial determinations relying on an “objective standard” could fall afoul of infringing on religious associational autonomy.

Imagine the reasonable person attends a sermon where a clergyman denies the existence of transgender persons and calls them mentally ill, and further calls for others to “deadname” and “misgender” transgender persons because to do otherwise would be sinful. It does not matter what the clergyman intended; what matters is whether the reasonable person took the clergyman’s message to intend harm towards transgenders or to incite harm and promote or propagate hatred toward them on basis of their transgender identity.

This brings us to the final element of the *Equality Act*’s definition of hate speech, the element of harm or harmfulness. The Court in *Qwelane* held: “On a plain reading, ‘harmful’ can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group (footnotes omitted).”³⁵⁷ The Court went on to evoke two varieties of harm enunciated in the Canadian case of *R v Keegstra*, namely harm done to a target group and harm done to society at large.³⁵⁸ Three similar classes of harm were derived by the Court in *Qwelane* from *Khumalo*:

First, ‘the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group’. Second, the type of harm experienced by the target group which includes ‘demoralisation and physiological hurt’ and ‘the harm caused from responding in kind thereby creating a spiral of invective back and

³⁵⁶ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 100.

³⁵⁷ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 154.

³⁵⁸ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 54; *R v Keegstra* [1990] 3 S.C.R. 697.

forth'. And third, 'harm to the social cohesion in South African society' which can undermine our nation building project.³⁵⁹

From this precedent, we may arrive at no certain, objective definition of harm. From the above statements, it would be fair to say harm is actually defined by the harmed. There is no consideration that bad actors might have a great interest in claiming to be harmed by expression with which they disagree; such scepticism is especially warranted when dealing with activist groups. Furthermore, the Court concluded there need be no causal link between an occurrence of observable harm and the hate speech complained of. In fact, there need not even be any tangible harm at all: "There may be expression which certain groups find hurtful and/or harmful which does not actually result in violence, but that does not take away from the fact that such expression would have been hate speech."³⁶⁰ *In casu*, Justice Majiedt went so far as to take absence of evidence for evidence of harm: "The difficulty in determining actual harm against the LGBT+ community is indicative of the hideous nature of hate speech committed against this target group."³⁶¹ If we refer now to our initial thought experiment with the clergyman and the reasonable person, we may ask again: would the reasonable person understand the clergyman's message to intend harm towards transgender persons or to incite harm and promote or propagate hatred toward them on basis of their transgender identity? The answer is not simple, and here the reasonable person test perhaps shows a flaw, one that endangers religious associational autonomy. The reasonable person's answer would not depend on the content of the message or the true intent of the clergyman; it would all come down to his (the reasonable person's) view of harm. The question is not whether the clergyman understands his message as intending harm;³⁶² the question is whether the reasonable person sees it so. Thus, if the reasonable person sees deadnaming and misgendering as terribly harmful and undignified things to do (and to encourage others to do), he might simply see the clergyman as intending to deadname and misgender. This would be correct; the clergyman intends exactly this, and if this is taken to be harmful, he indeed intends harm, and in preaching it he even incites harm. This is a fault in the objective standard of the reasonable person test: it cannot be objective in certain crucial respects. There are some things on which even *reasonable* people must be allowed to disagree; currently, gender identity is one such thing. As it stands, the *Equality Act*

³⁵⁹ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 154.

³⁶⁰ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 111.

³⁶¹ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22:par. 111.

³⁶² This would be a subjective test, which was emphatically rejected in *Qwelane*.

provides only for the incurrance of civil liability for offences of hate speech, and though this is not insignificant, it pales in comparison to the *Hate Speech Bill*, which would criminalise far more than the *Equality Act* would merely fine.

In examining the legislative developments surrounding transgender rights, particularly the *Alteration Act* and the *Equality Act*, it becomes clear that these laws are emblematic of a dangerous trend in the South African legal system. The *Alteration Act*, while recognising certain aspects of transgender identity, would, by the arguments of some academics, create a legal fiction by allowing any individual to alter his or her sex description without due regard to the legitimate purposes served by sex distinctions in society. This disregard for biological reality and the distinction between sex and gender is a dangerous departure from established norms. By attempting to erase the significance of biological sex in legal matters, such academics undermine the integrity of institutions like marriage and correctional facilities, which rely on the category of sex for practical purposes. The *Equality Act*, purportedly aimed at eradicating discrimination, reveals a troubling expansion of government power. By incorporating listed and analogous grounds of discrimination from the Constitution, the Act enables the courts to interpret and apply these grounds in ways that arguably go beyond its original intent. The inclusion of gender identity as an analogous ground not only blurs the line between biological sex and subjective gender identity but also opens the door for potential conflicts with religious beliefs and associational autonomy by potentially eliminating the possibility of ontological difference.

Furthermore, the *Hate Speech Bill*, an extension of the *Equality Act*, exemplifies the dangers of overly broad legislation. The current definition of hate speech in the *Equality Act* has been declared unconstitutional and invalid due to its inclusion of the term "hurtful." The *Hate Speech Bill*, an extension of the *Equality Act*, provides a broader definition that explicitly includes gender identity. Its definition of hate speech, including expressions that could reasonably be construed as intending harm or promoting hatred based on gender or gender identity, poses a significant threat to free speech. Instances of hate speech against transgender persons, such as deadnaming and misgendering, have raised concerns. Determining harm and the intention of harm in such cases is challenging, and the objective standard of the reasonable person test, flawed and subject to subjective interpretations of what constitutes harm, has been seen to allow for potential abuse and stifling of dissenting opinions. It is worth noting that the current civil

liability for hate speech offenses under the *Equality Act* falls short of the criminalization proposed in the *Hate Speech Bill*. While civil liability has its significance, the potential expansion of criminalization raises additional concerns.

It would not be overly cautious to have reservations regarding the impact of these legislative developments on traditional institutions and the preservation of societal cohesion. As discussions on transgender rights continue, it is crucial to critically assess the potential consequences and strike a balance between individual freedoms and the preservation of societal norms and values. These legislative developments reflect a trend of prioritizing subjective identity over objective reality and individual autonomy.

3.3 International human rights law and the Yogyakarta Principles

This chapter would be incomplete without considering the relevant international and foreign law pertaining to transgender persons' rights. The *Constitution's* interpretation clause, specifically at subsections 39(1)(b)-(c), requires that courts, when interpreting the Bill of Rights, *must* consider international law and *may* consider foreign law.³⁶³ Furthermore, section 233 of the *Constitution* states 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."³⁶⁴ As well, the Constitutional Court acknowledged in *Glenister v President of the Republic of South Africa and Others* a "manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law."³⁶⁵ From these provisions and remarks, it is clear that developments in international law (and to a lesser degree, foreign law) pertaining to transgender persons will not only inform South African courts' interpretations of the relevant rights, but also their interpretations of the relevant legislation, such as the *Equality Act*³⁶⁶ and the *Alteration Act*.³⁶⁷ The purpose of this section is therefore to draw insights from international

³⁶³ *Constitution*:secs. 39(1)(b-c).

³⁶⁴ *Constitution*:sec. 233.

³⁶⁵ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC):par. 202.

³⁶⁶ To this point, the *Equality Act*:sec. 3(2)(b) provides that: "(2) Any person interpreting this Act may be mindful of... (b) international law, particularly the international agreements referred to in section 2 and customary international law."

³⁶⁷ The Equality Court at *September* shows that this process is already underway; *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 90: "The rights of transgender persons had been at the centre of numerous constitutional matters litigated globally in different jurisdictions. I found it necessary to take account of these international views when deciding this application."

law on the topic of transgender persons' rights, and, as has been the practice throughout this chapter, to comment shortly on certain potential issues for religious associational autonomy that arise from these insights.

3.3.1 Overview of international human rights law relating to the transgender

It is a fact observed by international policy analysts and academics alike that there exists no legally binding international treaty or covenant explicitly dealing with the rights of transgender persons.³⁶⁸ However, this does not mean the rights of transgenders have not received significant attention in the international sphere.³⁶⁹ In lieu of the creation of a separate, legally binding document for transgender rights, the relevant treaty bodies of several important human rights instruments have insisted on interpreting these documents so as to extend the ambit of their protections to, for example, gender identity and the expression thereof. A brief discussion of these developments follows.

The argument for extending international human rights protections to transgender identity and its expression is not new or unique; it is exemplified in the activist motto: "Transgender rights are human rights."³⁷⁰ Van den Brink & Dunn have traced the rationale for supporting transgender rights in the international human rights context, noting that, in terms of international human rights treaties, it has its basis in the Universal Declaration of Human Rights' (hereinafter, UDHR) declaration that "All human beings are born free and equal in dignity and rights."³⁷¹ They further observe that this principle of equality (and its corollary, non-discrimination) is the only right explicitly mentioned in the United Nations' Charter,³⁷²

³⁶⁸ Van den Brink & Dunn 2018:8: "While no international human rights treaty document specifically acknowledges trans and intersex individuals, a growing number of human rights actors do refer to gender identity, gender expression and sex characteristics." Tozzi 2001:1: "[N]ot a single UN human rights treaty mentions sexual orientation, and repeated attempts to pass resolutions promoting broad homosexual rights has [sic] been repeatedly rejected by UN member states."

³⁶⁹ See the United Nations High Commissioner for Human Rights' publications on the topic: "Born Free and Equal" (2012, 2019) and "Living Free and Equal" (2016); see also the myriad other publications on the topic of transgender and other LGBT rights at <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/publications> (accessed 13 October 2022). For an international but euro-centric overview of sexual orientation and gender identity rights, see Kohler 2013 and Van den Brink & Dunn 2018.

³⁷⁰ Blake 2018:107 fn. 2. As Blake shows, previous formulations that swept with tremendous influence across the international human rights landscape were Hilary Clinton's 1995 "women's rights are human rights" speech at the United Nations Fourth World Conference on Women in Beijing and her 2011 "LGBT rights are human rights" address at Geneva for International Human Rights Day.

³⁷¹ Universal Declaration of Human Rights 1948:art. 1. This finding is supported by the OCHR's reference to this article in the foreword to "Born Free and Equal" (2012, 2019).

³⁷² Charter of the United Nations 1945:art. 1(3).

and this fact has seen it replicated in many major international human rights documents,³⁷³ such as the International Covenant on Civil and Political Rights (hereinafter, ICCPR)³⁷⁴ and the International Covenant on Economic, Social and Cultural Rights (hereinafter, ICESCR).³⁷⁵ All that needed to occur for transgender rights to be seen as human rights was for gender identity and its concomitants to be considered by the relevant parties as prohibited grounds of discrimination; following this, all international human rights instruments containing equality provisions could be construed to protect specific transgender rights. One can see that this has indeed occurred and has been facilitated by various treaty-bodies, not to mention the UN's own charter-bodies. One need simply point to the UN Human Rights Council's (hereinafter, HRC) various resolutions on sexual orientation and gender identity;³⁷⁶ its appointment in 2016 of an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity;³⁷⁷ and the influential reports of the UN High Commissioner for Human Rights (hereinafter, High Commissioner) on sexual orientation and gender identity.³⁷⁸

The same can be said of those bodies tasked with monitoring member states' compliance with the ICCPR and the ICESCR. The United Nations Human Rights Committee (hereinafter, UNHRC), established by the 1966 Optional Protocol to the ICCPR,³⁷⁹ commented in its *G v Australia* communication that “the prohibition against discrimination under article 26 [ICCPR]

³⁷³ Van den Brink & Dunn 2018:36.

³⁷⁴ International Covenant on Civil and Political Rights 1966:arts 2, 3 and 26.

³⁷⁵ International Covenant on Economic, Social and Cultural Rights 1967:arts. 2 and 3.

³⁷⁶ United Nations Human Rights Council, “Resolution 17/19 Human rights, sexual orientation and gender identity” (14 July 2011) UN Doc No. A/HRC/RES/17/19. According to Winer (2015:118), Resolution 17/19 “represents the first time that any organ of the U.N. has issued a resolution substantively addressing the rights of LGBT people as human rights UN Human Rights Council.” Other resolutions in this vein are noted: United Nations Human Rights Council “Resolution 27/32 Human rights, sexual orientation and gender identity” (2 October 2014) UN Doc No. A/HRC/RES/27/32; UN Human Rights Council, “Resolution 32/2 Protection against violence and discrimination based on sexual orientation and gender identity” (15 July 2016) A/HRC/RES/32/2.

³⁷⁷ UN Human Rights Council, “Resolution 32/2 Protection against violence and discrimination based on sexual orientation and gender identity” (15 July 2016) A/HRC/RES/32/2.

³⁷⁸ The two relevant reports of the High Commissioner were produced on request of the HRC following Resolution 17/19 (noted above): United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (17 Nov. 2011) UN Doc No. A/HRC/19/41; United Nations High Commissioner for Human Rights “Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law” (14 Sept. 2012) U.N. Doc. No. HR/PUB/12/06.

³⁷⁹ Optional Protocol to the International Covenant on Civil and Political Rights 1966. Winer 2015:112: “[T]he 1966 Optional Protocol to the ICCPR established a mechanism through which individual persons can claim to be victims of violations by their domestic governments of rights set forth in the ICCPR.” These claims and the opinions published by the UNHRC in response to them are called “communications.”

encompasses discrimination on the basis of... gender identity, including transgender status.”³⁸⁰ An interesting aside regarding this communication is that it noted how requiring divorce in order to obtain legal gender recognition would be out of step with the ICCPR;³⁸¹ the South African *KOS* case (discussed briefly above) reached a similar conclusion in its constitutionality analysis.³⁸² Turning now to the ICESCR and its monitoring body, the Committee on Economic, Social and Cultural Rights (hereinafter, CESCR), one sees an almost identical development.³⁸³ In its General Comment 20, the CESCR elaborates on the anti-discrimination clause (article 2(2)) of the ICESCR to say in part that: “‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation... In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations...”³⁸⁴ It is important to note that the CESCR’s General Comment here does not produce definitions of transgender and gender identity, opting rather to defer to the Yogyakarta Principles’ definitions.³⁸⁵ These “Principles” are not technically binding international law, but they need to be considered in the context of transgender persons’ rights in the international framework.

3.3.2 The Yogyakarta Principles

This section concludes with a discussion of “soft law” pertaining to transgender rights in the international human rights context, namely the Principles on the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity (hereinafter, Yogyakarta Principles)³⁸⁶ and the Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Compliment the Yogyakarta Principles (hereinafter, YP+10).³⁸⁷ These Principles are called soft law because they do not constitute

³⁸⁰ *G v Australia* Communication No. 2172/2012 (CCPR/C/119/D/2172/2012):par. 7.12.

³⁸¹ *G v Australia* Communication No. 2172/2012 (CCPR/C/119/D/2172/2012):par. 7.2.

³⁸² See section 3.2.1 above.

³⁸³ The CESCR was not established by its corresponding instrument, the ICESCR; it was created in terms of the Economic and Social Council’s Resolution 1985/17 of 28 May 1985.

³⁸⁴ CESCR General Comment 20/2009:par. 32.

³⁸⁵ CESCR General Comment 20/2009:par. 32 at fn. 25: “For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.”

³⁸⁶ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 2007.

³⁸⁷ Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Compliment the Yogyakarta Principles 2017.

binding international law:³⁸⁸ they were drafted by a panel of select experts acting on direction of several non-governmental organisations; they were not created under the auspices of the UN or through any of its processes, nor were they created according to any democratic process of engagement or negotiation with any state parties.

As discussed above, international human rights law has seen the development of the rights to gender identity and gender identity expression through treaty bodies' interpretation of the equality and non-discrimination provisions in various binding international documents. The initial Yogyakarta Principles document acknowledges this lineage by replicating the equality and non-discrimination clauses of important international human rights treaties at its preamble.³⁸⁹ According to Michael O'Flaherty, who negotiated and reported on the drafting of the original set of Principles in 2006, the Yogyakarta Principles were created exactly because the international human rights scheme related to sexual orientation and gender identity was being developed on a piecemeal basis, thus a coherent framework of application was needed in order to secure these rights.³⁹⁰ Therefore, the purpose of these non-binding guiding Principles is to effect a "consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity..."³⁹¹ These instruments propose to do this by collating and clarifying "State obligations under existing international human rights law."³⁹²

The Yogyakarta Principles may purport merely to describe a systematic framework of already existing rights, yet in their formulations and recommendations they clearly go beyond this. Many difficulties crop up as a result, and this is particularly evident in the context of religious associational autonomy. Upon examination, the early charge that the Principles "present an aspirational, radical social policy vision as a binding norm",³⁹³ seems to be well-founded. In the preamble to the Principles, for instance, it is stated that considerations of non-discrimination and equality require states, in terms of international human rights law, "to eliminate prejudices

³⁸⁸ O'Flaherty 2014:313: "The Principles have no binding force. They are neither a Treaty nor the finding of a judicial or quasi-judicial body."

³⁸⁹ Preamble to the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

³⁹⁰ O'Flaherty 2015:283. See also O'Flaherty & Fisher 2008:207 and O'Flaherty 2014:303-315 in Moeckli, Shah, Harris and Sivakumaran (eds.).

³⁹¹ Correa & Muntarbhorn 2007:7.

³⁹² Correa & Muntarbhorn 2007:7.

³⁹³ Tozzi 2007:1.

and customs based on... stereotyped roles for men and women.”³⁹⁴ What would this mean for the religious associations that perpetuate and reinforce such “stereotyped roles”? Can the Principles truly be said to view traditional cultures and religious communities without prejudice? This relates back to the ideas developed in chapter 2 of a false secular neutrality and the resulting illiberal and convergent interpretations of law. It is often assumed in the rights discourse around gender and sexuality, as exemplified by the Yogyakarta Principles, that traditional morals are oppressive and ultimately untenable. How can this be so if the international community truly values multiculturalism and diversity? Indeed, a huge proportion of the world still holds fast to traditional views of gender and sexuality. The Principles, drafted by academics and experts who purport to offer a neutral reading of international law, instead offer an interpretive framework that problematises any notions of gender and sexuality that do not accord with their own. In so doing, the Principles reduce the scope of reasonable disagreement even further: reasonable people may not, according to the Principles, differ or disagree on the mutability of gender, nor may reasonable minds object to non-traditional forms of sexuality.

Furthermore, the Yogyakarta Principles are predisposed to rights-interpretations that hold sexual orientation and gender identity as overriding considerations. Consider Principle 19, The right to freedom of opinion and expression:³⁹⁵

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

It is not necessarily the principle’s formulation that presents difficulties, but rather the action it requires of states. At 19(D) for example, states are required to “Ensure that notions of... public morality... are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion or expression that affirms diverse sexual orientations or gender

³⁹⁴ Preamble to the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

³⁹⁵ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: Principle 19.

identities.”³⁹⁶ In this chapter’s earlier section on free expression and transgender rights, it was noted how authors in favour of promulgating hate speech offences to curb negative opinions on sexual orientation and gender identity would rely on an axiomatic “state morality” to justify the fining and imprisonment of expressions that offend this “state morality”.³⁹⁷ Now, however, one sees that any expression positively related to gender identity or sexual orientation must be immune from discriminatory “public morality” considerations. Public discourse that promotes non-traditional views of sexuality and gender identity must, according to the Yogyakarta Principles, be free from discriminatory “public morality” regulations; whereas public discourse that opposes these non-traditional views of sexuality and gender identity may, according to certain constitutional scholars, be restricted according to the “state morality.”³⁹⁸ In response to such contradictory claims, one must recall the comments of the UNCHR on limiting expression on basis of public morals: “The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles *not deriving exclusively from a single tradition.*”³⁹⁹

The Yogyakarta Principles are intended to present a coherent framework for application of the international human rights framework concerning, among others, the rights to transgender identity and transgender identity expression. One might debate their content, yet their influence can be seen clear as day, not only in the international scene but also in South African transgender jurisprudence.⁴⁰⁰ The reasons for this are just as clear: the *Constitution* requires South African courts to consider international law, and though the Yogyakarta Principles are not themselves binding international law, they purport to offer a coherent framework for the application of international law where matters of sexual orientation and/or gender identity are at issue. The Principles, taken as a whole, are an effort to secure a certain reading of

³⁹⁶ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: Principle 19(D).

³⁹⁷ See section 3.2.3.

³⁹⁸ De Vos 2017:364: “freedom of expression’s protection depends to some extent at least on whether it advances, protects or reflects the values that form part of the ‘objective normative value system’ embodied in the South African Constitution.” Bilchitz 2011:248: “Allowing a private religious domain to continue in a manner at odds with the political morality of the state will ultimately undermine the vision of a new order enshrined in the Constitution.”

³⁹⁹ UNHRC General Comment 22:par. 8.

⁴⁰⁰ For the effects of the Yogyakarta Principles on international and foreign law, see Ettelbrick & Zeran 2010 and O’Flaherty 2015:287-294. For South Africa, see the discussions throughout this chapter on the *September* judgment. Also notable is the fact that Edwin Cameron, who was for many years a Justice of the Constitutional Court of South Africa, participated in the drafting of the initial set of Principles.

international human rights where sexual orientation and gender identity are concerned; seeing as they have been cited in everything from recent UN documents to domestic case law, this effort could be said to have borne fruit.⁴⁰¹ However, it should be reiterated that the Yogyakarta Principles, essentially being the creations of activist experts working on behalf of several non-governmental associations, cannot bind states to their interpretative framework. This would be a strange, undemocratic and illiberal method of skirting the normal procedures of nominally democratic international institutions such as the UN. The Yogyakarta Principles must be taken for what they are: guidelines set up according to the values of a select few in order to secure certain outcomes. It seems to be the case that the Principles, in fact, present a normatively-saturated interpretive framework which is explicitly intended (recall the preamble) to negate traditional cultural and religious opinions on sexuality and gender.⁴⁰² It is not at all obvious that these guidelines on their own, focused squarely on rights related to sexual orientation and gender identity, could lead one to a full appreciation of the nuances involved where gender identity and religious associational autonomy meet.

3.3.3 Foreign law positions on transgender legal recognition

It is to be expected that a community of democratic nations, although ostensibly sharing a commitment to certain rights they have identified as universal, should differ in their ability and willingness (be this due either to economic, social, cultural or religious reasons) to guarantee all interpretations of these rights. A nation agreeing to the idea that all human beings have intrinsic value does not immediately and automatically mean that that nation and its people agree with another nation's (or group of nations') interpretations of the rights and duties arising from an appreciation of that intrinsic value of human life. Thus, while some European and American nations have promulgated legislation interpreting various "trans rights" (such as the right to legal gender recognition) as essentially human rights, this does not, as many scholars would have it, necessarily mean such interpretations are suitable in other normative environments. The content of the recent sociological concept of "gender" (*e.g.*, whether or not it is mutable, malleable or even binary), is ontological in essence, and thus given to variability

⁴⁰¹ For an extensive treatment on the Principles' effects as of 2010, see the impact report prepared by Ettlbrick & Zeran 2010.

⁴⁰² Preamble to the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: "respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women... States must take measures to seek to eliminate prejudices and customs based on... stereotyped roles for men and women..."

within different ontological and normative contexts. Rights developments are normative developments, it should be remembered, and where norms dependent on alien ontologies are thrust upon a society without the collective consent of its people (*i.e.*, when the norms are not generated by or passed through a domestic legislature), then whichever activist or coloniser, commits such an imposition might attempt to legitimate their actions under the rubric of an unalloyed good, but this would still ultimately be undemocratic and lead in an illiberal direction. Keeping this well in mind, the following section reviews global trends in the establishment of “trans rights” (such as those variously discussed above) and connects these trends to the main themes developed throughout this dissertation. Especially relevant are the concepts of democratic process, normative pluralism and subsidiarity as factors legitimating legal and rights developments. By connecting various state-specific rights developments to key themes of liberal democratic theory, some insight may be gained into the question of how best to attain certainty on the rights of transgender persons, without this coming at the cost of a diversity of ways of life that is the true dynamism of liberal democracy.

Looking to Europe, several trends may be observed, but most notable is the significant development of transgender legal issues through judicial activism. The European Court of Human Rights (Hereinafter, ECtHR) is the body tasked with overseeing member states’ compliance with the European Covenant on Human Rights (Hereinafter, ECHR). The first instance of a case concerning what would now be called “transgender rights” that was submitted to the ECtHR was that of *Van Oosterwijk v. Belgium* in 1976.⁴⁰³ This case concerned an applicant who wished to change their legal sex status, but the case was declared inadmissible on grounds of the applicant not having exhausted domestic remedies. The 1986 case of *Rees v. the UK* is thus considered the first true case concerning transgender persons’ rights, since, unlike *Van Oosterwijk v. Belgium*, it was actually heard by the Court.⁴⁰⁴ *Rees v UK* dealt with similar facts (a transgender person wishing to affect legal change of their birth certificate to reflect their sex/gender choice), but it also saw the applicant, Rees, complaining that their right to respect for private life was being violated through non-recognition of their chosen gender. This case, the first of its kind to be heard by the ECtHR, was decided in favour of the UK. The Court held that, given the various legitimate purposes served by birth

⁴⁰³ *Van Oosterwijk v. Belgium*, Eur. Court H. R., decision of February 27, 1980, Series A, No. 40. For a list of ECtHR cases relevant to transgender developments up to 2020, see Van der Vleuten 2020:282-283.

⁴⁰⁴ *Rees v The United Kingdom* [1986] European Court of Human Rights Application 9532/81.

certificates as records, and given that allowing such alterations “would have important administrative consequences and would impose new duties on the rest of the population,”⁴⁰⁵ the UK was within its rights to decide that the individual’s right to private life was outweighed by the public interest.⁴⁰⁶

In subsequent years, however, the ECtHR began interpreting the ECHR in a manner more favourable to transgender persons, increasingly requiring states to alter their laws to adjust to the transgender phenomenon. The cases of *B v France* and *Goodwin v. UK* are touted by some as exemplars of this kind of judicial activism; Holzer, for instance, writes of these developments approvingly: “[B]oth France and the United Kingdom introduced the possibility of changing one’s legal gender only after having lost a case on this matter at the European Court of Human Rights.”⁴⁰⁷ In the first, *B v France*, the ECtHR ruled that Art. 8 of the ECHR obligated France to allow the applicant to alter their gender/sex marker on some official documents,⁴⁰⁸ but it was in *Goodwin v UK* that the ECtHR finally reversed their stance on the issues raised in *Rees* by ruling that, despite public interest arguments, a transgender person’s right to legal gender recognition was guaranteed by Art. 8 of the ECHR.⁴⁰⁹ These rulings were followed by *PV v Spain*,⁴¹⁰ *Identoba v Georgia*,⁴¹¹ *AP, Garon and Nicot v France* and many other landmark judgments which likewise expanded the rights guaranteed in the ECHR.⁴¹² In handing down these judgments, the ECtHR set precedent which interpreted the ECHR broadly so as to establish the recognition of transgender identity as an ECHR norm.⁴¹³ These developments were not limited to Europe, and, in time, the ECtHR’s rationale for legal gender

⁴⁰⁵ *Rees v The United Kingdom* [1986] European Court of Human Rights Application 9532/81 [42(a)].

⁴⁰⁶ Holzer 2022:8.

⁴⁰⁷ Holzer 2022:8.

⁴⁰⁸ Holzer 2022:9; Dunne 2017:41; and *B v France* [1992] European Court of Human Rights Application 13343/87.

⁴⁰⁹ Holzer 2022:9; Dunne 2017:41; and *Christine Goodwin v The United Kingdom* [2002] European Court of Human Rights Application 28957/95 para 91 ALSO NOTE: the ECtHR also held that Art. 12 of the ECHR, which concerns marriage, applied, affirming the applicant’s right to marry under the new gender.

⁴¹⁰ *PV v Spain* App No. 35159/09 (ECtHR, 30 November 2010), [30].

⁴¹¹ *Identoba and Others v Georgia* [2015] 39 BHRC 510, [96].

⁴¹² *AP, Garon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

⁴¹³ Dunne *et al.* 2017:40: “Through its landmark case law, the European Court of Human Rights has advanced international human rights approaches to gender identity. The Court has served as the catalyst for legal reforms throughout the 47 Member States and in jurisdictions beyond the CoE borders.”

recognition was adopted by the UNHRC⁴¹⁴ and the UN High Commissioner for Human Rights.⁴¹⁵

The establishment of gender identity recognition norms led to a host of legislative developments throughout Europe, and, as of May 2022, 39 states in the region have implemented measures aimed at the provision of legal gender recognition for transgender persons.⁴¹⁶ Of these, only 9 European states base legal gender recognition on the right to self-determination.⁴¹⁷ Twenty-eight European states require a mental health diagnosis as a precondition to legal gender recognition, much like the South African position.⁴¹⁸ Sixteen European states allow minors to obtain legal gender recognition,⁴¹⁹ and ten of these allow minors to obtain legal recognition of their preferred gender without regard to age.⁴²⁰ Nine states have medical procedures in place as preconditions for legal gender recognition in the case of transgender persons, medical procedures which often have potential to render these individuals sterile.⁴²¹

The last two sets of facts mentioned above, those regarding minors and medical procedures, seem to be the most recent arena in which transgender activists are doing battle with current legal norms. Briefly looking to the rhetoric and rights-challenges presented by trans activists, several glaring issues come to light. The aim of activists, if one looks to their arguments, is to remove any and all barriers to the legal recognition of a transgender person's preferred sex/gender, regardless of what legitimate purposes such barriers may serve.⁴²² The two most notable "barriers" often complained of are consent and medical treatment. The complaints around consent concern children who express the wish to transition and obtain legal recognition

⁴¹⁴ UNHRC 2008 'Concluding observations of the United Nations Human Rights Committee on report of Ireland' (30 July 2008) UN Doc CCPR/C/IRL/CO/03 [8].

⁴¹⁵ United Nations High Commissioner for Human Rights 2011, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) UN Doc No A/HRC/19/41, [84(h)].

⁴¹⁶ Transgender Europe "Trans Rights Map", <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023). Of these states, 37/46 are members of the Council of Europe; 25/17 are European Union Member States.

⁴¹⁷ Transgender Europe "Trans Rights Map", <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023).

⁴¹⁸ Transgender Europe "Trans Rights Map", <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023).

⁴¹⁹ Transgender Europe "Trans Rights Map", <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023).

⁴²⁰ Transgender Europe "Trans Rights Map", <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023).

⁴²¹ Transgender Europe "Trans Rights Map", <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023).

⁴²² See, for instance, Barnes 2020:147: "...best practices include having quick, accessible, and transparent mechanisms in place for legal gender recognition based on the self-declaration model." Also see the Position Paper on Legal Gender Recognition in South Africa by Matthyse *et al.* 2020. These sources, echoing and referencing many others with similar opinions, argue against the legitimacy of any kind of barrier to legal gender recognition.

of their transition (already the idea of a child being aware of and expressing concern about abstract legalities should seem suspect), but are unable to do so for various reasons relating to competence.⁴²³ Complaints around medical treatment concern the medical treatment and evaluation requirements that form part of many states' (including South Africa) legal gender recognition procedures.⁴²⁴ Upon closer examination, one realises these two issues are actually related, and that they are not simply unjust barriers to legal recognition of preferred sex/gender, but rather represent the quintessential disjunctions between the moral ontologies of trans activists and those who disagree with them.

In many countries with routes to legal recognition of gender/sex choice, those applying for legal alteration of their sex/gender status must first demonstrate that they have undertaken sufficient measures, usually including medical treatment, to alter their bodies in conformity with the characteristics of the desired sex. "Sufficient measures" could mean anything from receiving a gender-dysphoria diagnosis, undergoing hormone therapy and living as the preferred sex/gender for a set observation period, to undergoing various forms of gender reassignment surgery, including genital transformation surgeries and mastectomies. As detailed above at section 3.2.1, South Africa, like many other countries, requires a person to undergo medical treatment, such as hormone therapy, before permitting legal alteration of sex/gender status.⁴²⁵ This approach, often denigrated as the "medicalised approach," actually serves many legitimate purposes. It provides certainty in application and outcome, meaning that anyone can change their legal sex/gender if they first demonstrate their intention to live as the preferred sex/gender. After all, why else would a person seek legal recognition of their altered sex/gender status if not to live as the preferred sex/gender? This leads to the next point: medical requirements guard against bad actors. Any reasonably well put-together legislation must guard against those who would manipulate it in service of immoral and unjust ends, and exceptions should not be made – the law ought not knowingly make itself a tool for injustice –

⁴²³ An example of such complaints can be witnessed in Matthyse *et al.* 2020:43: "It stands to reason that if a child can and ought to be able to consent to certain medical and surgical procedures, it would seem that a less invasive process, such as a name and/or legal gender marker change, should not be limited or excluded by the requirement of parental consent. Moreover, in the same way as a child's HIV status may not be disclosed to any party other than the one who provided consent, in this case the child themselves, this principle of confidentiality would also apply to trans and gender diverse persons who embark on any process of socially, medically or surgically affirming their gender."

⁴²⁴ See the many discussions on "medicalisation" in van den Brink & Dunne 2018, Barnes 2020 and Matthyse *et al.* 2020, and "sterilisation" in Kohler 2013, Dunne 2017(a), Dunne 2017(b) and Holzer 2022.

⁴²⁵ Alteration of Sex Description and Sex Status Act:sec. 2.

just because an issue, such as transgender identity, is politically sensitive. This protects the mechanism of legal sex/gender reassignment from abuse by bad actors, who could, for instance, change their sex/gender legally (but not medically) to gain access to and prey on those in bathrooms, medical facilities, prisons and other sites intended as secure spaces for the opposite sex/gender.⁴²⁶ Anticipating the rejoinder that one is now assuming all trans people have ill-intent, one might in reply ask the following: are those who have their sex/gender legally changed only to perpetrate injustice truly transgender, or are they merely “cisgender” persons abusing the law (and in the process harming a populace’s perception of transgenders)? In this way, one might see medical requirements as also filtering out those with ulterior motives who falsely claim transgender identity; this ultimately benefits those who identify in a genuine sense as transgender. Lastly and most importantly, the medicalised approach, when paired with a protective legal concept such as consent, actually provides protection for minors by deterring irreversible medical intervention at inappropriate stages of physical and mental development.⁴²⁷

Scholars critical of the medicalised approach present several counterarguments, and these reveal to some extent a reliance on a moral ontology that sees sex and gender simultaneously as ultimately important and utterly negligible. A person’s right to legal gender recognition and state-sponsored medical transition are held by some to be of paramount importance, while

⁴²⁶ BBC “Pressure mounts on ministers in trans prisoner row”, <https://web.archive.org/web/20230129162542/https://www.bbc.com/news/uk-scotland-64444530> (Accessed 2 March 2023). There have already been instances in the UK of a convicted transgender rapist Isla Bryson and another inmate, Tiffany Scott (both of whom have not medically transitioned, and thus still possess fully functional sex organs and high testosterone levels) being assigned to women’s prisons.

⁴²⁷ This will be discussed shortly below, but for further reading on the topic from various angles (including authors for and against childhood medical and social transition), see: AH Grossman & AR D’augelli, 2008, *Transgender Youth*; E Meinvielle, 2009, *Transgender Children Clinical and Ethical Issues in Prepubertal Presentations*; S Price Minter, 2012, *Supporting Transgender Children New Legal Social and Medical Approaches*; K Sandberg, 2015, *The Rights of LGBTI Children under the Convention on the Rights of the Child*; AIR Van Der Miesen et al., 2016, *Gender dysphoria and autism spectrum disorder A narrative review*; AL Stone, 2017, *Gender panics about transgender children in religious right discourse*; L Marchiano, 2017, *Outbreak On Transgender Teens and Psychic Epidemics*; C Barron & M Capous-Desyllas, 2017, *Transgressing the Gendered Norms in Childhood Understanding Transgender Children and Their Families*; A Quennerstedt et al., 2018, *The UNCRC The Voice of Global Consensus on Children’s Rights*; CA Rubino, 2019, *Gender_Creative_Promise*; J Castle, 2019, *New fronts in the culture wars*; RT Anderson, 2019, *Understanding and Responding to Our Transgender Moment*; JM Cantor, 2020, *Transgender and Gender Diverse Children and Adolescents Fact Checking of AAP Policy*; C Paechter, 2021, *The rights and interests of trans and intersex children considerations conflicts and implications in relation to the UNCRC*; J Osserman & H Wallerstein, 2021, *Transgender Children From Controversy to Dialogue*; T Wiggins, 2021, *Listening for Trans Childism in Discursive Concern*; D Schwartz, 2021, *Clinical and Ethical Considerations in the Treatment of Gender Dysphoric Children and Adolescents When Doing Less Is Helping More*; Shonagh Dillon, 2021, *TURF, Bigot, Transphobe*; A Latham, 2022, *Puberty Blockers for Children Can They Consent*; SB Levine et al., 2022, *Reconsidering Informed Consent for Trans Identified Children Adolescents and Young Adults*.

simultaneously it is said by these same scholars that laws requiring medical diagnoses and medical transitions are abhorrent⁴²⁸ and that sex/gender is a negligible differentiation that will hopefully disappear as society evolves.⁴²⁹ Holzer and Dunne both argue in separate papers against what they see in the medicalised approach as the enforcement of “genito-centrism”⁴³⁰ and “heteronormativity.”⁴³¹ These concepts are often raised by scholars, even in the South African context, as supposedly insightful, postmodernist critiques of oppressive systems of law and government.⁴³² These scholars argue that the transgender person’s rights to private life, bodily integrity and of course equality, mean that transgenders should not be subject to laws or regulations which require them to medically alter their bodies as a route to legal recognition.⁴³³ These authors, borrowing from the ECtHR cases of *AP, Garçon and Nicot v France*⁴³⁴ and *X and Y v. Romania*⁴³⁵ (both cases concerned medical preconditions to legal gender recognition), have taken to rebranding the medicalised approach as one that enforces the “sterilisation” of transgender persons, and have thus phrased their arguments against reasonable medical requirements as arguments against the sterilisation of a minority group.⁴³⁶ Scholars argue in this vein against “...a presumption that only (legal) women are capable of giving birth to children and that (legal) men produce sperm.”⁴³⁷ Dunne connects these presumptions to his arguments so as to imply that the medicalised approach taken by many countries is, at least in part, motivated by a wish to sterilise transgender persons who upset the “heteronormative”

⁴²⁸ This is, in fact, a hotly debated topic amongst trans activists: on one aisle, there are those who believe medically-facilitated transition is essential to fulfilling one’s transgender identity and thus a basic human right (and some advocate this even for prepubertal children), whereas those on the opposing aisle argue against the idea of binarity in sex/gender and thus see the wish for medical transition as a manifestation of internalised cis-heteronormative transphobia. This increasingly prominent schism might lead one to consider more seriously the idea that the transgender phenomenon has grown from being a biologically centred issue to a much more societally led, even ideological, issue. All the more reason, then, to point out and delimit the ontological aspects of the transgender phenomenon.

⁴²⁹ Picard 2018:135: “As our understanding of gender identity grows, and the need to distinguish between genders lessens, the need for using gender as an identifier decreases... The PEI Commission is not alone in our recommendations. In discussions with other human rights commissions, we speculate that this may well be the direction of the future.”

⁴³⁰ Holzer 2022:9-10.

⁴³¹ Dunne 2017 (a):560; Holzer 2022:10.

⁴³² De Vos 2008:254-272; Visser & Piccara 2012:531; Barnes 2020:24; Sloth-Nielsen 2020:1.

⁴³³ It would also be prudent to note that the medicalised approach is entirely inconvenient for those who disagree on a conceptual basis with binary notions of gender (see Sloth Nielsen 2020), but that is beyond the scope of this discussion.

⁴³⁴ *AP, Garçon and Nicot v France* [2017] European Court of Human Rights Applications 79885/12, 52471/13, 52596/13.

⁴³⁵ *X et Y c Roumanie* [2021] Cour européenne des droits de l’homme Requêtes 2145/16 et 20607/16.

⁴³⁶ Dunne 2017(a):554–581; Dunne 2017(b):497-500; Holzer 2022:11.

⁴³⁷ Emens 2010: 207, 228.

order by inverting “traditional notions of gender.”⁴³⁸ Other scholars voice a desire to eradicate the idea of sex/gender in its entirety, calling it outdated, while simultaneously arguing that one’s right to legal recognition as the preferred gender/sex is sacrosanct.⁴³⁹ In simple terms, many of the scholars here cited assume that any barrier to transgender identity recognition is automatically suspect and then reverse engineer their arguments against such barriers. This is not the same as holding a presumption or expectation and then subjecting it to analysis while keeping one’s mind open to the possibility of having one’s expectations proven wrong. Perhaps this tendency to reverse engineer arguments is why many of these scholars inadvertently espouse moral ontologies that understand sex/gender as simultaneously innate yet elective, as natural yet socially constructed. Nevertheless, it is from this mix of seemingly (and perhaps actually) contradictory assumptions that the rhetoric against any kind of regulatory barrier has arisen.⁴⁴⁰

Trans activists and transgender rights scholars have long argued, borrowing from ECtHR case law as mentioned above, that the medicalised approach taken by many states is tantamount to sterilisation;⁴⁴¹ these same activists and scholars, preferring instead the “human rights approach” to legal recognition, have also argued, according to their human rights approach, that prepubertal children should as a right have unrestricted access to “puberty blockers” and transgender hormone therapy, both of which have serious effects on children’s reproductive capabilities.⁴⁴² Misrepresenting the medicalised approach in incendiary terms (referring in every possible instance to it as sterilisation), which has been done quite successfully if the legal developments in Europe are anything to go by, seems to have had the unintended effect of inciting scepticism about the medicalised transition of minors in European states. People are starting to connect the dots. After all, if any degree of medical gender/sex transition can be maligned as sterilisation, then should states not be more cautious about the medical transition

⁴³⁸ Dunne 2017(a):562: “Sterilisation requirements reinforce comprehensible, normatively desirable procreative standards. Indeed, given that the ‘politics and practices of reproduction have historically rested on one key certainty... that only women were the bearers of babies,’ post-transition reproductive threatens to invert ‘traditional notions of gender.’” (footnotes omitted).

⁴³⁹ A few good examples of these kinds of internally inconsistent arguments can be found throughout the above-cited article by Brenda Picard (Picard 2018).

⁴⁴⁰ Williams 2020:64-85.

⁴⁴¹ Dunne 2017(a):558-560; Barnes 2020:84; Sloth-Nielsen 2020:34; Holzer 2022:11.

⁴⁴² Dunne 2017(a):569-573; Barnes 2020:84: “...the UNCRC also grants the child the right to self-determination. This accords with the Yogyakarta Principles and Resolution 2048 that calls for the abolition of the requirement of utilising a medicalised approach in accessing legal gender recognition... The Yogyakarta Principles state that an individual’s self-defined gender identity is ‘integral to their personality’ and is a basic aspect of the right to self-determination, equality, freedom, and dignity.” (footnotes omitted); Holzer 2022:14.

or “sterilisation” of minors? If the medical approach is truly tantamount to the forced sterilisation of a minority group, then a fair bit of suspicion should follow any suggestion of untrammelled access to medical transition for minors.

Europe has been dealing with the issue of transgender identity for a long time: Sweden had adopted mechanisms enabling legal gender recognition as early as 1972; it was the first European state to do so.⁴⁴³ It was not the last, and, as mentioned before, there are now 39 European states which provide routes to legal gender recognition for transgender individuals. Europe’s experience with the transgender phenomenon has often meant that states in other world regions would look to it for guidance.⁴⁴⁴ In years past, the example set by Europe’s most experienced states in this regard was to loosen regulatory restraints around gender affirming treatments and legal gender recognition; such loosening occurred in the name of tolerance and empathy, and it was assumed that, once more research was conducted on the transgender phenomenon, such regulatory laxity would be scientifically justified. This was, however, not the case, and the most transgender-experienced European states are now reconsidering their positions, specifically with regards to minors.

Sweden, the first to enable legal recognition of altered gender/sex status, has also been the site of the first major pushback against rhetoric surrounding the medicalised gender/sex transition of minors. In February 2022, the Swedish National Board of Health and Welfare (Hereinafter, NBHW), mirroring the policy changes instituted by Sweden’s world-famous Karolinska Institute in 2021, altered its healthcare service guidelines to harshly restrict any medical gender/sex transition treatments for minors.⁴⁴⁵ The NBHW’s policy shifts were informed by, among others, the Karolinska Institute’s evidentiary evaluation of the medical data on gender/sex transitions in minors, and several key points were raised:

Following a comprehensive review of evidence, the NBHW concluded that the evidence base for hormonal interventions for gender-dysphoric youth is of low quality, and that hormonal treatments may carry risks. NBHW also concluded that the evidence for pediatric transition

⁴⁴³ Dunne 2017(a):555.

⁴⁴⁴ Sweileh 2018: Consider, for instance, that many of the world-leading researchers in transgender health, such as Gooren, Hage and Cohen-Kettenis, are based in Europe, and that the world-renowned “Dutch protocol / Dutch approach” which was, until recently, authoritative, was developed in European universities.

⁴⁴⁵ Socialstyrelsen National Board of Health and Welfare “Care of children and adolescents with gender dysphoria”, <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/kunskapsstod/2022-3-7799.pdf> (accessed on 13 February 2023).

comes from studies where the population was markedly different from the cases presenting for care today. In addition, NBHW noted increasing reports of detransition and transition-related regret among youth who transitioned in recent years.⁴⁴⁶

In simple terms, Sweden, upon review of the evidence, turned away from the idea that minors, except in the rarest cases, could be eligible for and thus entitled to gender/sex transition procedures, because the potential risks outweighed the potential benefits.⁴⁴⁷ This flies in the face of the recently popularised, though problematic, “affirmative approach” for treating gender-dysphoric minors (this approach is discussed in more detail at section 4.1 below). More importantly, Sweden’s turnaround on this issue is notable because it is one of the European states with the longest track records on transgender issues, and its experience seems to have led it in the opposite direction to some other European and South American states, such as Malta and Argentina, that are relatively inexperienced on transgender issues.⁴⁴⁸

Both Finland and the UK have taken a similar cautious stance toward the issues of gender/sex transition in minors, and have done so while, like Sweden, maintaining their commitment to protecting the rights of transgender individuals. Finland’s Council for Choices in Healthcare (the only Finnish national body assigned with the responsibility and competency to issue recommendations on healthcare technologies) has issued policy guidance on gender/sex transition in minors which held the following:

⁴⁴⁶ Society for Evidence Based Gender Medicine “Summary of Key Recommendations from the Swedish National Board of Health and Welfare”, <https://segm.org/segm-summary-sweden-prioritizes-therapy-curbs-hormones-for-gender-dysphoric-youth> (accessed on 13 February 2023).

⁴⁴⁷ Society for Evidence Based Gender Medicine “Summary of Key Recommendations from the Swedish National Board of Health and Welfare”, <https://segm.org/segm-summary-sweden-prioritizes-therapy-curbs-hormones-for-gender-dysphoric-youth> (accessed on 13 February 2023): “In light of above limitations in the evidence base, the ongoing identity formation in youth, and in view of the fact that gender transition has pervasive and lifelong consequences, the NBHW has concluded that, at present, the risks of hormonal interventions for gender dysphoric youth outweigh the potential benefits... As a result of this determination, the eligibility for pediatric gender transition with puberty blockers and cross-sex hormones in Sweden will be sharply curtailed.”

⁴⁴⁸ See, for instance, Malta’s 2015 Gender Identity, Gender Expression and Sex Characteristics Act, which employs a human rights based approach to gender recognition and contains questionable limits on legal gender recognition for minors (It also borrows many of its definitions from the Yogyakarta Principles); Barnes 2020:92 confirms this observation and further claims that this legislation was informed by an Amendment to Malta’s Constitution in 2014 (thus further confirming that the changes are due to a purely “human rights centred” approach): “In 2014, Malta became the first European country to enshrine protection from discrimination on the ground of gender identity in its Constitution. The amendment of the Maltese Constitution forms the cornerstone of the GIGESC Act and resulted in changing the Maltese legal position.” Prior to this amendment and legislation, the Maltese position was in line with the medicalised approach of many other European countries. See also the recent change in Argentina’s position as discussed in Giosa, Schiro & Dunne 2015.

In light of available evidence, *gender reassignment of minors is an experimental practice*. Based on studies examining gender identity in minors, hormonal interventions may be considered before reaching adulthood in those with firmly established transgender identities, *but it must be done with a great deal of caution, and no irreversible treatment should be initiated*. Information about the potential harms of hormone therapies is accumulating slowly and is not systematically reported. It is critical to obtain information on the benefits and risks of these treatments in rigorous research settings.⁴⁴⁹

The UK, on the other hand, has opted to close down the Tavistock, its only specialised “gender identity” clinic for children and young people, following an independent review commissioned by the UK’s National Health Service. The Cass Review, headed by Hilary Cass, the former President of the Royal College of Paediatrics and Child Health, is still in progress as of the writing of this paper, but its February 2022 interim report raises the same concerns as those noted in Sweden and Finland, namely that the risks associated with transitioning minors outweigh the anticipated benefits due to the limited national and international evidence base.⁴⁵⁰ Those supporting the Tavistock clinic’s work tend to cite the fact that the interim report recommended the Tavistock close down so that many other clinics like it could be set up instead, so as to deal with the backlog in cases and long waiting lists which the Tavistock was experiencing.⁴⁵¹ However, while it is true that one of the interim report’s concerns was the Tavistock’s lacking service capacity, that was not its only – or even its most damning – criticism. The interim report also noted a lack of evidence-based practice;⁴⁵² the Tavistock’s non-compliance with international standards and best practices, as well as non-compliance with national ethical guidelines;⁴⁵³ and a mismatch between what service users expected and what

⁴⁴⁹ Palveluvalikoima “Recommendation of the Council for Choices in Health Care in Finland: Medical Treatment Methods for Dysphoria Related to Gender Variance In Minors”, https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Unofficial%20Translation.pdf (accessed 13 February 2023). The official Finnish version is available at COHERE Finland’s website: https://palveluvalikoima.fi/documents/1237350/22895008/Alaik%C3%A4iset_suositus.pdf/c987a74c-dfac-d82f-2142-684f8ddead64/Alaik%C3%A4iset_suositus.pdf?t=1592317701000 (emphasis added)

⁴⁵⁰ Independent review of gender identity services for children and young people (Cass Review): Interim report 2022:1.23: “Evidence on the appropriate management of children and young people with gender incongruence and dysphoria is inconclusive both nationally and internationally.”

⁴⁵¹ Andersson & Rhoden-Paul “NHS to close Tavistock child gender identity clinic”, <https://www.bbc.com/news/uk-62335665> (accessed 25 February 2023); Gregory “NHS to close Tavistock gender identity clinic for children”, <https://www.theguardian.com/society/2022/jul/28/nhs-closing-down-london-gender-identity-clinic-for-children> (accessed 25 February 2023); Baska “Why the Tavistock gender clinic is actually closing – and what it means for young trans people”, <https://www.thepinknews.com/2023/02/22/tavistock-trans-gender-youth-clinic-closing/> (accessed 25 February 2023).

⁴⁵² Cass Review: Interim report 2022:1.14;1.16-18.

⁴⁵³ Cass Review: Interim report 2022:1.20-22;1.31.

the clinic was ethically allowed to provide.⁴⁵⁴ A truly notable and recurring concern of the interim report was the Tavistock’s marked bias towards the gender-affirmative approach, which seemed to override other mental health considerations:

Primary and secondary care staff have told us that they feel under pressure to adopt an unquestioning affirmative approach and that this is at odds with the standard process of clinical assessment and diagnosis that they have been trained to undertake in all other clinical encounters...⁴⁵⁵

Another significant issue raised with us is one of diagnostic overshadowing – many of the children and young people presenting have complex needs, but once they are identified as having gender-related distress, other important healthcare issues that would normally be managed by local services can sometimes be overlooked.⁴⁵⁶

Both the Swedish and Finnish communications mirror this concern that the social zeal accompanying the affirmative approach tends to result in biased diagnostic overshadowing of co-occurring mental health issues.⁴⁵⁷

In conclusion, it is crucial to critically analyse the implications of this trajectory. Examining international law, it is evident that while there is no specific treaty addressing transgender rights, various human rights instruments have been interpreted to extend protections to gender identity and expression. The principle of subsidiarity, which underscores the importance of decision-making at the most localized and accountable levels, is undermined as international bodies assume the authority to redefine and expand rights without due consideration for national contexts and democratic procedures. Democratic process, which emphasises the importance of open and inclusive deliberation, seems to be circumvented in this case, as significant developments occur through judicial and interpretive means rather than through a collective decision-making process involving elected representatives. The Yogyakarta Principles, although not legally binding, have played a significant role in shaping the

⁴⁵⁴ Cass Review: Interim report 2022:1.30-31.

⁴⁵⁵ Cass Review: Interim report 2022:1.14.

⁴⁵⁶ Cass Review: Interim report 2022:1.16.

⁴⁵⁷ Palveluvalikoima “Recommendation of the Council for Choices in Health Care in Finland: Medical Treatment Methods for Dysphoria Related to Gender Variance In Minors”, https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Unofficial%20Translation.pdf (accessed 13 February 2023): “Clinical experience reveals that autistic spectrum disorders (ASD) are overrepresented among adolescents suffering from gender dysphoria; even if such adolescents are presenting with gender dysphoria, rehabilitative interventions for ASD must be properly addressed.” For a larger discussion on this topic, see: Van Der Miesen et al., 2016, “Gender dysphoria and autism spectrum disorder: A narrative review.”

interpretation of international human rights law in this context. However, their prioritization of gender identity has raised concerns about potential limitations on the freedom of expression for religious associations. It is crucial to recognize the cultural and religious differences among democratic nations in their recognition of transgender rights. While Europe has made significant strides in legal gender recognition, recent debates surrounding minors and medical procedures have led to policy changes and a reconsideration of positions.

In conclusion, the purpose of this section has been to present an understanding of how the transgender phenomenon has affected rights developments in foreign and international contexts, and in this way to contribute to an understanding of the – arguably illiberal – roots of certain “trans rights”. Revealing the illiberal origins and development of these “rights” should serve to signal their current (in)compatibility with the pluralistic liberal framework underlying religious associational autonomy. The observations and insights gathered throughout this analysis reveal a concerning trend wherein the transgender phenomenon has influenced policies in many countries through what can be seen as undemocratic and illiberal means. Judicial activism, exemplified by the European Court of Human Rights, has played a significant role in shaping legal gender recognition. Additionally, the non-binding Yogyakarta Principles have had a disproportionate impact, potentially limiting the freedom of expression for religious associations. Moreover, the debates surrounding health issues related to minors have added another layer of complexity to the discourse. Policy changes and reconsideration of positions have occurred as countries grapple with the potential risks and benefits of medical gender transition treatments for minors. Recent policy shifts in Sweden, Finland, and the United Kingdom highlight a cautious stance, emphasizing the need for robust evidence-based practice and acknowledging the potential long-term consequences of irreversible treatments. These deliberations prompt us to critically examine the mechanisms through which decisions are made, ensuring that they are ethically and scientifically grounded, and prioritize the well-being and best interests of minors. By doing so, democratic societies can safeguard their integrity in the face of the transgender phenomenon, addressing the complex challenges arising from both legal gender recognition and health issues related to minors.

3.4 Conclusion

In this chapter, we have aimed to establish a comprehensive understanding of the legal framework surrounding transgender persons' rights, considering the importance of recognising their identity without compromising religious communities' identities.

First, this chapter focused on human rights, highlighting constitutional provisions on human dignity and equality as central to the discourse. The concept of human dignity, although complex and controversial, is recognized as inherent in every individual, and the state has a duty to respect and protect it. By exploring the constitutional significance of dignity as a substantive right and a fundamental value, we gain insights into how dignity intersects with transgender persons within the context of religious associations. Categorisations proposed by Stu Woolman, such as dignity as a rule-generating right, a rule-informing right, a correlative right, and a fundamental value, provide a framework for understanding this intersection.

Moving further, we examined the right to gender identity as an unenumerated right connected to the rights of free expression and equality in the South African context. While the understanding of free expression in South Africa is broad, it is not unlimited, and legitimate limitations exist to safeguard important societal values. The positive formulation of the right to free expression, exemplified by the *September* Court's precedent, requires positive affirmation of gender-affirming language and pronouns. However, this raises questions about the extent of state intervention and regulation, particularly in the context of religious associational autonomy. The inconsistent application of these principles in cases involving unfair discrimination or hate speech has contributed to uncertainty and debate.

The examination of legislation surrounding transgender rights has raised significant concerns. The *Alteration Act*, which allows for the alteration of legal sex description, and the *Equality Act*, designed to eradicate unfair discrimination, hate speech, and harassment, have triggered debates on rights issues. While the *Alteration Act* may be seen as a step towards inclusivity, its potential impact on institutions and legal frameworks that rely on the category of sex cannot be overlooked. Similarly, criticisms have been raised regarding the provisions on gender and hate speech in the *Equality Act*, particularly in cases related to transgender rights where transgenderism is not explicitly listed as a ground for unfair discrimination. Addressing hate

speech, both the *Equality Act* and the pending *Hate Speech Bill* are relevant. The current definition of hate speech in the *Equality Act* has been declared unconstitutional and invalid due to its inclusion of the term "hurtful." The *Hate Speech Bill* provides a broader definition explicitly including gender identity. Instances of hate speech against transgender individuals, such as deadnaming and misgendering, have raised concerns about determining harm and intention. The application of the reasonable person test, while an objective standard, can lead to subjective interpretations and potential encroachments on religious associational autonomy. It is worth noting that the expansion of criminalization proposed in the *Hate Speech Bill* raises additional concerns, as civil liability under the *Equality Act* falls short of criminalization.

Moreover, we have explored how the transgender phenomenon has influenced policies in many countries through what can be seen as undemocratic and illiberal means. Judicial activism, exemplified by the European Court of Human Rights, has played a significant role in shaping legal gender recognition. The non-binding Yogyakarta Principles have had a disproportionate impact, potentially limiting the freedom of expression for religious associations. Debates surrounding health issues related to minors have added complexity to the discourse, with policy changes and reconsideration of positions occurring. Sweden, Finland, and the United Kingdom have exemplified a cautious stance, emphasizing evidence-based practice and the consideration of long-term consequences.

Looking ahead, the next chapter will delve into the challenges that arise at the intersection of gender identity and religious associational autonomy. By exploring these challenges, we will further illuminate the complexities surrounding the recognition of transgender rights while safeguarding the autonomy of religious associations.

CHAPTER 4

GENDER IDENTITY: SOME CHALLENGES FOR RELIGIOUS ASSOCIATIONAL AUTONOMY

4.1(Trans)gender identity as a religious freedom issue⁴⁵⁸

When “gay rights” issues came to popular attention in the mid-20th century, the big question was not “do gays exist,” but rather “is it right to be gay,” or in clearer terms, “is it morally acceptable to engage in homosexual conduct?” The issue, as far as the state and law attached, was one of morality, yet the tendency has persisted to mis-portray such moral issues as matters of settled scientific, objective fact, on which there can be no disagreement. Again, using the progression of gay rights as an example, the contemporary popular attitude in many western states can be summed up in the common saying: “Gay people are simply born that way.” Scientifically proven or not, this statement does not answer moral questions about the rightness or “sinfulness” of homosexual conduct, which individuals and religious associations within pluralistic democracies ought to be able to differ on.⁴⁵⁹ And yet, this supposedly objective statement is taken by many to constitute an axiomatic truth, one that, by a series of implicit extensions,⁴⁶⁰ precludes certain moral questions related to sexuality.⁴⁶¹

Looking to the transgender phenomenon of the 21st century, the major issues it presents (to the religious and non-religious) also ultimately concern questions of ontological morality, although

⁴⁵⁸ Parkinson 2019:1. This heading refers to Patrick Parkinson’s paper: “Is Gender Identity Discrimination a Religious Freedom Issue?”

⁴⁵⁹ Note the use of “sinfulness” as opposed to “wrongfulness”; though these words are in some contexts synonymous, in others they are not. In the context of morality, especially religious morality, wrongfulness can be equated with sinfulness, thus conduct that is morally wrong is religiously sinful.

⁴⁶⁰ For example, homosexuality is natural, therefore homosexual conduct contains no fault (notice the *non sequitur* – an inclination being natural does not necessarily render it faultless), and if there is no fault, the law should not punish it or allow punishment through unfair discrimination.

⁴⁶¹ Bussey 2018:356: “The growing consensus within the legal profession is that there can be no tolerance for religious views or practices that offend sexual equality claims.” Bussey writes here in reference to the Supreme Court of Canada’s 2018 rulings in the cases of *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 and *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33. In summary, these cases effectively halted the establishment of what would have been the first and only Christian law school in Canada, on the basis that LGBT students would not have equal access to the school because of the religious conduct requirements set forth in the school’s Community Covenant.

these questions are often disguised as matters of settled objective fact.⁴⁶² For example, it is often taken as a matter of fact that the concepts of sex and gender ought to be compartmentalised and separated, and that these categories are mutable and subject to varying degrees of personal choice.⁴⁶³ Yet neither of these statements truly belong to the realm of objective fact; they are theoretical, philosophical and normative claims that have been come to be perceived as objective facts. To demonstrate this point, one need simply look to the emergence of these ideas in the 1950's and how that led up to what could essentially be called their propagandisation in modern culture.⁴⁶⁴

The man widely credited as the first to distinguish between sex as biological reality and gender as social construct in the modern mode was New Zealand psychologist John Money,⁴⁶⁵ who in his work on intersex children (children with indeterminate genitalia – to be distinguished from children with gender dysphoria) theorised that socialisation into a “gender role” and not biological sex was the main determining factor in the establishment of adult “gender identity.”⁴⁶⁶ Money applied his theories in an experimental fashion to the raising of intersex babies, with varying levels of success.⁴⁶⁷ The results of his experiments were quite controversial – some failed experiments famously resulted in patients’ eventual suicide – but this did not deter him, nor later feminist scholars, from continuing to employ this theoretical gender-sex distinction.⁴⁶⁸

⁴⁶² This is not to say that the medical literature on transgender-related phenomena has no role to play in answering moral questions; in fact, clinical insights may go some way in informing moral arguments around the major transgender issues. What is being warned against here is the tendency to confuse factors which may inform moral argument (such as scientific insights) with ontological claims about the concepts of sex, gender and sexuality. For instance, moral arguments for or against the medical treatment of gender dysphoric prepubescents may be legitimately informed by scientific data; however, the question of whether a person can actually ever “become” another sex or gender is ultimately an ontological one, since one must first determine the meaning of sex categories and so on.

⁴⁶³ See the discussion on John Money, Judith Butler, and the impact of post-structuralism and post-structural feminism that follows.

⁴⁶⁴ See: Ellul 1973.

⁴⁶⁵ J Williams 2020; Tamar Klein ‘Who decides whose gender? Medico legal classification of sex and gender and their impact on transgendered South African family rights’ (2012) 14(2) *Ethnoscripts* 12 at 19.; Robert J. Stoller *Sex and Gender: on the Development of Masculinity and Femininity* (1968).

⁴⁶⁶ J Williams 2020:4; Hodson (2019) ‘Sex Development: Beyond Binaries, Beyond Spectrums’ in *Inventing Transgender Children and Young People*.

⁴⁶⁷ Williams 2020:4; Gaetano 2017:11-15.

⁴⁶⁸ Gaetano, Phil, ‘David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case’. *Embryo Project Encyclopedia* (2017-11-15). Marchiano, L. (2019) ‘Transgender Children: The Making of a Modern Hysteria’ in *Inventing Transgender Children and Young People*.

As Joanna Williams puts it: “Money’s experiments help locate the emergence of a transgender identity within the medical profession.”⁴⁶⁹ Williams goes on to quote Hodson, who in the following terms relays how the emergence of the distinction between sex and gender was enabled by new medical techniques:

It became possible to conceptualise ‘gender identity’ as dislocated from biological sex when new medical technologies for the first time made it possible for doctors to change the bodies of those born with indeterminate genitals and to assign them to a sex... the availability of the treatment appears to have essentially created the demand.⁴⁷⁰

In this way, it can be seen how the emergence of the distinction between sex and gender was enabled by new medical capabilities. However, the advent of this distinction would eventually, largely through second- and third-wave feminist writings from the 1970’s and onwards, take on a life of its own, eventually creating the orthodoxy experienced today.⁴⁷¹ Here Jacques Ellul’s idea of the domination of Technique (in this case medical advancement) over man bears mention, and especially relevant is the following passage: “Psycho-sociological techniques result in the modification of men in order to render them happily subordinate to their new environment, and *by no means imply any kind of human domination over Technique.*” The theoretical distinction between sex and gender that originated in the clinical treatment of intersex conditions has thus opened the floodgates for what commentators would come to call “gender ideology.”⁴⁷²

The early distinction between sex and gender first employed by Money in the 1950’s was popularised in the 1970’s by leading second-wave feminists.⁴⁷³ These feminists in turn used the distinction between sex as a biological reality and gender (or in this case, specifically “gendered role”) as a social construct to critique the imposition of what they assumed were man-made and socially enforced gendered expectations on females.⁴⁷⁴ It is important to

⁴⁶⁹ Williams 2020:4.

⁴⁷⁰ Hodson 2019:108.

⁴⁷¹ Klein 2012:12; Williams 2020:5.

⁴⁷² Dialogo del Santo Padre con i Vescovi della Polonia (Kraków, 27 luglio 2016), 02.08.2016: Pope Francis himself has remarked: “And one of these – I will call it clearly by its name – is [the ideology of] ‘gender’. Today children – children! – are taught in school that everyone can choose his or her sex.” See also: Pluckrose & Lindsay 2020 “Cynical Theories” and Murray 2019 “The Madness of Crowds.”

⁴⁷³ Klein 2012:12; Williams 2020:5.

⁴⁷⁴ Williams 2020:6. See, for instance, the most influential book of second-wave feminist, Germaine Greer: Greer 1970 “The Female Eunuch.” As an aside, one might note that Greer has become somewhat of a pariah in recent years following her (and many other feminists’) questioning attitudes towards the transgender phenomenon.

reiterate that “‘gender role’ as invented and imposed construct” was then – and is still now – not an objective observation, but a critical-theoretical presumption intended for use in criticising sex stereotypes. Then came third-wave feminism and post-structural feminism (drawing from post-structuralism), which advocated the abandonment of certainty relating not only to gender but also biological sex.⁴⁷⁵ Building on the post-structuralist foundations laid out by the likes of Jacques Derrida and Michel Foucault, post-structural feminists such as Helene Cixous and, most prominently, Judith Butler, developed the body of ideas that constitute the basis of contemporary “gender ideology.”⁴⁷⁶ Butler’s works, *Gender Trouble: Feminism and the Subversion of Identity*⁴⁷⁷ and *Bodies That Matter: On the Discursive Limits of Sex*,⁴⁷⁸ are widely recognised as the foundations of contemporary theories on the deconstruction of sex and gender.⁴⁷⁹ Butler’s theory of “gender performativity” attempts to do away with the objective status of biological sex as opposed to socially constructed gender by arguing that biological sex itself is socially constructed, and that sex is thus not pre-discursive to gender.⁴⁸⁰ Butler’s theory is of a nature that many legal scholars dealing with proximal issues either agree with or opt rather not to engage with the theory’s arguments.⁴⁸¹ So it happened that the distinction between biological sex and social gender, developed in the 1950’s for the treatment of intersex conditions, came in the 1970’s to popular attention through the critical works of second-wave feminists. Finally, from the 1980’s and onwards, third-wave feminists argued against this distinction but in the opposite direction: before Money, sex and gender were both presumed to relate to a biological reality, yet, after Butler, both sex and gender are now said to be socially constructed.

If one is still not convinced that certain ideas related to gender that underlie the transgender phenomenon are more philosophical than scientific, then one might consider the state of the medical scientific discourse on the transgender phenomenon. A useful case study would be to

⁴⁷⁵ Klein 2012:12; Williams 2020:5-6.

⁴⁷⁶ See Derridas, Foucault’s, then Cixous and Butler’s works, and the critique of these in *Cynical Theories*.

⁴⁷⁷ Butler 1990.

⁴⁷⁸ Butler 1996.

⁴⁷⁹ Klein 2012:13.

⁴⁸⁰ Butler 1990:17.

⁴⁸¹ Such as De Vos (2008), Visser and Picarra (2012), and Sloth Nielsen (2019), who all agree as starting points with Butler’s theories, and then there’s Barnes (2020), who opts rather to address the law than engage gender theory extensively. Nevertheless, as has been pointed out in the *September* judgment: as a matter of law in South Africa, there is still an important distinction between sex and gender; although looking at recent scholarship on the legal issues related to transgenders, many legal scholars (such as those just cited) are pushing for the distinction between sex and gender to be abandoned.

look at the very recent politicisation and culturalization of gender identity, and the seemingly simultaneous (although not explicitly causally related) breaking up of consensus on clinical approaches to “gender-diverse” children and adolescents. Waleed Sweileh’s 2018 bibliometric study of the peer-reviewed literature on transgender health presents a good starting point. In that study, it was observed that over 58% of the articles published on transgender health from 1900-2017 were published in the period of 2005-2017;⁴⁸² this is a good indicator of the exponential growth of interest in transgender persons that has occurred in the last two decades, at least insofar as the medical profession is concerned. This might also be related to the increase in the amount of people identifying as transgender, since, as Kenneth Zucker notes, more recent studies on transgender health tend to define “transgender” much more loosely than in the past:

The recent studies using a broader definition of ‘caseness’ (i.e. self-identification as transgender or gender non-conforming) are, perhaps, the most remarkable development over the past decade; this may be an even more telling social marker of a greater societal acceptance of individuals who reject as a social identity the traditional male–female gender binary. If ~1 in 200 adults in the US, for example, self-identify as transgender, this would hardly qualify as rare or uncommon – the percentage is similar to the percentage of US adults who are vegans.⁴⁸³

An interesting addition to this is Zucker’s observation that there is a need to research the long-term stability of self-identified (as opposed to clinically diagnosed) transgender identity, given that: “Some recent data on sexual identity fluidity suggest that this becomes less common in older adults, so it might be reasonable to predict that fluctuations in gender-variant identities will be more common in both adolescents and young adults.”⁴⁸⁴

Annelou de Vries and Peggy Cohen-Kettenis,⁴⁸⁵ both noted authorities on transgender health from the Vrije Universiteit Amsterdam Medical Centre (itself a world-leading institution in the field of transgender health),⁴⁸⁶ wrote as recently as 2012 that: “In children with gender dysphoria only [the diagnosis leading transgender identity], *the general recommendation is*

⁴⁸² Sweileh 2018:18-19.

⁴⁸³ Zucker 2017:F (footnotes omitted).

⁴⁸⁴ Zucker 2017:F (footnotes omitted).

⁴⁸⁵ Cohen-Kettenis, for instance, is identified in Sweileh’s (2018:23) bibliometry as the 6th most prolific writer globally on the topic of transgender health.

⁴⁸⁶ Sweileh 2018:23. Also note de Vries & Cohen-Kettenis’ (2012:303) comments in this regard: “Especially with regard to the clinical management of gender dysphoria in adolescents, the Netherlands has pioneered and played a leading role internationally. The ‘Dutch protocol’ has become proverbial in this field.”

watchful waiting and carefully observing how gender dysphoria develops in the first stages of puberty.⁴⁸⁷ This is because, as de Vries and Cohen-Kettenis caution:

Follow-up studies have demonstrated that *only a small proportion of gender dysphoric children become transsexual at a later age*, that a much larger proportion have a homosexual sexual orientation without any gender dysphoria, and that a small proportion of these children develop into heterosexual adults... This implies that gender variant children, even those who meet the criteria for GID [gender identity disorder] prior to puberty, for the most part are not gender dysphoric at a later age. *To date, we do not yet know exactly when and how gender dysphoria disappears or desists. Clinical experience has shown that this most often takes place right before or right after the onset of puberty.* This is also confirmed by youths in a qualitative study in whom the gender dysphoria disappeared after puberty.⁴⁸⁸

Furthermore, these authors warn not only against prepubescent hormonal treatment, but even against prepubescent social transition.⁴⁸⁹ The study by de Vries and Cohen-Kettenis is hardly an outlier in its recognition that gender dysphoria tends to desist after puberty for the majority of young people. James Cantor, in his critical review of the medical literature in this regard, found that: “[E]very follow-up study of GD [gender dysphoric] children, without exception, found the same thing: Over puberty, the majority of GD children cease to want to transition.”⁴⁹⁰ Even John Money’s later research confirmed the prevalence of gender dysphoria desistence after puberty.⁴⁹¹

The watchful waiting approach for prepubescents was the recommended approach in the 7th edition of the World Professional Association for Transgender Health’s Standards of Care (hereinafter, Standards of Care):

⁴⁸⁷ De Vries & Cohen-Kettenis 2012:301.

⁴⁸⁸ De Vries & Cohen-Kettenis 2012:305-306. (emphasis added)

⁴⁸⁹ De Vries & Cohen-Kettenis 2012:307-308: “Because most gender dysphoric children will not remain gender dysphoric through adolescence (Wallien & Cohen-Kettenis, 2008), we recommend that young children not yet make a complete social transition... before the very early stages of puberty. In making this recommendation, we aim to prevent youths with non-persisting gender dysphoria from having to make a complex change back to the role of their natal gender (Steensma & Cohen-Kettenis, 2011)... Another reason we recommend against early transitions is that some children who have done so (sometimes as preschoolers) barely realize that they are of the other natal sex. They develop a sense of reality so different from their physical reality that acceptance of the multiple and protracted treatments they will later need is made unnecessarily difficult. Parents, too, who go along with this, often do not realize that they contribute to their child’s lack of awareness of these consequences.”

⁴⁹⁰ Cantor 2020:307 (emphasis in the original). See also the relevant studies cited in Cantor: Lebovitz 1972:1283–1289; Zuger 1978:363–369; Money & Russo 1979:29–41; Zuger 1984:90–97; Davenport 1986:511–517; Green 1987; Kosky 1987:565–569; Wallien & Cohen-Kettenis 2008:1413–1423; Drummond, Bradley, Badali-Peterson & Zucker 2008:34–45; Singh 2012; Steensma, McGuire, Kreukels, Beekman & Cohen-Kettenis 2013:582–590.

⁴⁹¹ Money & Russo 1979:29–41.

Some children state that they want to make a social transition to a different gender role long before puberty... This is a controversial issue, and divergent views are held by health professionals. The current evidence base is insufficient to predict the long-term outcomes of completing a gender role transition during early childhood. Outcomes research with children who completed early social transitions would greatly inform future clinical recommendations.⁴⁹²

However, in recent years the “gender affirming/affirmative” approach, which promotes the medical and social transition of prepubertal children, has spiked in popularity. In a 2018 policy statement, for instance, the American Academy of Pediatrics (hereinafter, AAP) rejected the watchful waiting approach as tantamount to “conversion therapy” and instead endorsed the “gender affirmative” approach as the only acceptable one.⁴⁹³ The citations and quotations used in the policy statement were analysed and criticised by Cantor, who came to the following conclusion:

[The] AAP is advocating for something far in excess of mainstream practice and medical consensus... The problems with Rafferty, however, do not constitute merely a misquote, a misinterpretation of an ambiguous statement, or a missing reference or two. Rather, AAP’s statement is a systematic exclusion and misrepresentation of entire literatures. Not only did AAP fail to provide compelling evidence, it failed to provide the evidence at all. Indeed, AAP’s recommendations are despite the existing evidence.⁴⁹⁴

Nevertheless, in September of 2022, the 8th edition of the Standards of Care was published, and, unlike the 7th edition, the 8th edition sees an overwhelming focus on and promotion of this approach. The 8th edition of the Standards of Care does not base the preference for the gender affirmative approach on evidence, since, as has been demonstrated, the evidence seems to be overwhelmingly in favour of the watchful waiting approach; in fact, the 8th edition explicitly relies on narrative over evidence, stating:

Despite the slowly growing body of evidence supporting the effectiveness of early medical intervention, the number of studies is still low, and there are few outcome studies that follow

⁴⁹² Coleman *et al.* 2012:17.

⁴⁹³ Rafferty 2018:2165. For a rebuttal of “watch and wait is equal to conversion therapy” from a legal perspective, see Parkinson’s articles: Parkinson 2021:409-411; 2021:734-744.

⁴⁹⁴ Cantor 2020:312.

youth into adulthood. Therefore, a systematic review regarding outcomes of treatment in adolescents is not possible. *A short narrative review is provided instead.*⁴⁹⁵

In contrast to the medical consensus witnessed less than a decade earlier that recommended desisting from medical and even social transition before puberty, the latest version of the Standards of Care argues that, “allowing irreversible puberty to progress in adolescents who experience gender incongruence is not a neutral act given that it may have immediate and lifelong harmful effects for the transgender young person.”⁴⁹⁶ Citing Amnesty International, the 2022 Standards of Care states that: “From a human rights perspective, *considering gender diversity as a normal and expected variation within the broader diversity of the human experience*, it is an adolescent’s right to participate in their own decision-making process about their health and lives, including access to gender health services.”⁴⁹⁷ This last statement, it should be made clear, is not a statement of objective fact; it is a normative argument, one that assumes certain ideas about human nature, namely those Butlerian ideas already enumerated on the unreality and non-binarity of sex/gender.

Thus, appeals to objective or scientific certainty as the basis for one’s perspectives on sex or gender are misguided. A better approach would be to see these matters in terms of different beliefs about the nature of being as it relates to sex/gender; a better approach would see these claims for what they are: as ontological, not empirical scientific, claims.

In order to understand the inclusive, *modus vivendi*-type approach to transgender persons in the religious associational context, it must be clearly brought to the fore just how quickly notions of sex/gender and sexuality have changed, and how these changes have been informed not by hard, scientific fact, but rather by certain social and political theories. This was the purpose of the preceding paragraphs. Only then might one understand why it can be said with confidence that any individual or communal claim concerning the nature of sex and the purposes of conduct relating to one’s sex is not a matter of fact, but a matter of ontology and concomitant morality. As Patrick Parkinson has pointed out:

⁴⁹⁵ Coleman *et al.* 2022:546. (emphasis added)

⁴⁹⁶ Coleman *et al.* 2022:548.

⁴⁹⁷ Coleman *et al.* 2022:548; (emphasis added) Amnesty International 2020 “Amnesty International UK and Liberty joint statement on puberty blockers” <https://www.amnesty.org.uk/press-releases/amnesty-international-uk-and-liberty-joint-statement-puberty-blockers> (accessed on 5 December 2022).

Rather than claiming a solid foundation in medical science, the transgender movement appears to be based upon two main beliefs. The first is that gender is not innate but “assigned at birth” and that such an assignment, based upon observation of the genitalia, is at best provisional. It follows from this that the idea that one’s “real” gender is a matter of subjective identification rather than biological reality. The second belief is that gender is fluid and gender identity may change over time.

These are not scientific claims. In their nature, they are incapable of either validation or falsification by science...

It is important, therefore, to identify the beliefs and values that may underlie people’s viewpoints, and to distinguish them from agreed scientific facts.⁴⁹⁸

Therefore, claims related to the mutability of sex/gender (those claims underlying the transgender phenomenon), such as “Gender and sex are completely unrelated,” “Biological sex is irrelevant,” or “Gender can be fluid and is a choice,” are not statements of objective, indisputable fact but claims about the nature and meaning of sex/gender (ontological claims).⁴⁹⁹

The problem with misunderstanding this state of affairs is that it creates a situation where disagreements with supposedly “objective” views on matters of sexuality and gender are presumptively disqualified from the realm of reasonability, implying that any disagreement on these issues is “objectively” unreasonable, even if such disagreement is actually founded on moral grounds. The endpoint of this line of reasoning is that the state would not need to accommodate objections to the *status quo* “objective” ideas around transgender identity; the logical corollary being that traditional religious objections to transgender identity (since these are most likely to be at odds with postmodern ideas of gender and sex) and the religious associational autonomy sustaining such objections, would also not need to be accommodated by the state. As Benson has pointed out, the danger of such reasoning is ever-present and especially visible in religious employment discrimination cases.⁵⁰⁰

To quote Parkinson again:

If the law provides only that people who have a gender identity different to their natal sex should not suffer ill-treatment or discrimination as a consequence, then there is no legitimate religious

⁴⁹⁸ Parkinson 2019:19 (emphasis added).

⁴⁹⁹ Parkinson 2019:23: “While doctors may hold these beliefs, some are, in their nature political, ideological, ethical or value-based. They are not to be given additional weight merely because some medical professionals hold them.”

⁵⁰⁰ Benson 2013(b):130.

objection to such a law... The position is different though, if the law requires me to act against my beliefs and values; in other words, if another person's self-identification imposes upon me obligations that I cannot, in all good conscience, fulfil.⁵⁰¹

It is in this manner that the phenomenon of transgender identity, by virtue of its problematic portrayal as objective fact rather than distinct ontological claim, presents a very real, very present threat to religious associational autonomy and the accommodation of difference in a pluralistic democracy. Given that the domain of religious associations is the formation and preservation of distinct religious ontological moralities, and given that the pluralistic liberal state must by definition accommodate different moral communities (implying an accommodation of different ontologically derived moral views on sexuality and gender), it follows that such pre-emptive elimination of dissent on matters of sexuality and gender is manifestly illiberal and anti-pluralistic.

4.2 Blind-spots in the doctrinal core approach

The *Strydom* case involved a dispute between the Dutch Reformed Church (hereinafter, the Church) and a music teacher, Mr Strydom, working as an independent contractor in the church's arts academy.⁵⁰² Mr Strydom was dismissed by the church on account of him being involved in a homosexual relationship. Mr Strydom claimed that the Church, by dismissing him for this reason, had discriminated unfairly against him on grounds of his sexual orientation. The Church in reply claimed that Mr Strydom was in a position of leadership within the Church (as a teacher in its arts academy) and that such a position required him to behave in accordance with the Church's core doctrine (a pertinent requirement of said doctrine being that homosexuals not participate in same-sex relationships) and as a role model of the Christian lifestyle for his students (*i.e.*, not engaging in same-sex relations).⁵⁰³ Another notable aspect of the Church's claim was that, by failing to dismiss Mr Strydom, the Church would be signalling to the public that it approved of homosexual relationships – a state-coerced message which stands in direct opposition to the Church's doctrines.⁵⁰⁴ In its claims, the Church relied mainly

⁵⁰¹ Parkinson 2019:27.

⁵⁰² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par. 1.

⁵⁰³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par. 15-16.

⁵⁰⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 23-24.

on the right to freedom of religion guaranteed in sec. 15 of the *Constitution*.⁵⁰⁵ Rejecting both of the Church's above claims, the Equality Court ruled against the Church and in favour of Mr Strydom, concluding that, in the given circumstances, the right to be free from unfair discrimination of Mr Strydom should trump the right to freedom of religion of the Church, so that it would not be exempt from anti-discrimination legislative provisions.⁵⁰⁶ Accordingly, the Equality Court awarded Mr Strydom not only the remaining amount due in terms of his contract with the church, but also damages for the impairment of dignity and emotional and psychological suffering; an apology from the church was also ordered.⁵⁰⁷

A proliferation of scholarly debate on the limits of religious associational rights, specifically in relation to non-discrimination, followed this judgement, and the relevant insights should be noted. In 2008, Pierre de Vos wrote approvingly of the *Strydom* judgment in his blog:

A person employed as a typist, a gardener (or a music teacher for that matter) does not give religious instruction and forcing a church to employ such a person in no way forces the church to espouse views or practices that its religion frowns upon or even abhor(s)... In a country where we are building a culture of respect for diversity and difference churches can therefore not get a free pass... We respect different belief systems and do not give preference to the bigoted and homophobic views held by some.⁵⁰⁸

However, according to Patrick Lenta, such a limited view of associational freedom espoused by de Vos and witnessed in the *Strydom ratio* actually affords insufficient respect to the concept of diversity.⁵⁰⁹ In his 2009 article on the topic, Lenta agrees with the Court's ultimate finding in *Strydom*, but questions several aspects of the Court's reasoning. He preliminarily agrees with

⁵⁰⁵ *The Constitution*:sec 15(1) "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

⁵⁰⁶ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 32 and 41.

⁵⁰⁷ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 37-39 and 41.

⁵⁰⁸ De Vos "On freedom of religion and the gay music teacher" <https://constitutionallyspeaking.co.za/on-freedom-of-religion-and-the-gay-music-teacher/> (accessed 08 August 2021).

⁵⁰⁹ Lenta 2009:893. Lenta is hardly alone in holding such an opinion, see Benson 2014 "What divides, what joins and who decides? Diversity, the common good and limited law." *Journal for Juridical Science* 39(1):97-114; De Freitas 2014 "Religious Associational Rights and Sexual Conduct in South Africa: Towards the Furtherance of the Accommodation of a Diversity of Beliefs." *Brigham Young University Law Review* 2013(3):421-456; and Woolman 2012 "Seek justice elsewhere: An egalitarian pluralist's reply to David Bilchitz on the distinction between differentiation and domination." *South African Journal on Human Rights* 28:258-272.

the Court's decision to follow the "doctrinal core" approach to religious employment exemptions,⁵¹⁰ which entails an evaluation of whether the job in question and its related functions are sufficiently close or relevant to the doctrinal core of the religious association.⁵¹¹ Lenta however challenges the Court's point that Mr Strydom's teaching position was not sufficiently close to the doctrinal core of the church and its affiliated arts academy, arguing that, given that the purpose of the academy was not only to teach artistic skills but also to inculcate the church's values in its students, Mr Strydom was *de facto* in a position of spiritual leadership, which in turn would require him to act as an example through his lifestyle (though Lenta cedes that the church erred in not making Mr Strydom aware of this *implicit* duty beforehand through a written contract).⁵¹² Lenta shows support for this interpretation in several foreign cases, most notable is the Canadian case of *Caldwell v St Thomas Aquinas High School*,⁵¹³ (hereafter, *Caldwell*) which the Court in *Strydom* acknowledges and differentiates its case from.⁵¹⁴ Lenta challenges this differentiation.

Caldwell dealt with a faith-based (Catholic) school's refusal to re-employ a teacher upon her engaging in a relationship that conflicted with the doctrine of the school.⁵¹⁵ The Canadian Supreme Court in *Caldwell* found in favour of the school, reasoning that the school was justified in discriminating against a teacher who did not act in accordance with its religious doctrine, as it was an important aspect of the school's purpose to inculcate Catholic values in its students. The Court in *Strydom* differentiated itself from *Caldwell* in that it formed part of Mrs Caldwell's employment contract to teach doctrine and adhere to the school's doctrinal standards, whereas Mr Strydom was not employed under such terms (*i.e.*, to formally teach doctrine), and that this was the duty of ecclesiastics of the church in *Strydom*.⁵¹⁶ As Lenta points

⁵¹⁰ Benson 2013(B):130. Religious employer exemptions are largely where the rights of religious associations in their various forms (from churches to faith-based schools to care homes, to name a few) are tested, thus the need for an extended discussion on the topic.

⁵¹¹ Esau 2000:720; Benson 2013(b):146. De Freitas 2012:267. The "doctrinal core" approach Lenta refers to, and which the Court in *Strydom* applies, is informed partly by Canadian jurisprudence, where it is variously termed the "BFOR (*bona fide* operational requirement)" test, the "instrumental" approach or the "job-parsing" approach. These various terms, used synonymously, have also been employed in South African jurisprudence (in this vein, note Benson's reference to "job-parsing/doctrinal core," vs "permeated ethos/organic" approaches; De Freitas' mention of the "instrumental" vs "organic" approaches; and, of course, Lenta's use of "doctrinal core" to describe the Court's analysis).

⁵¹² Lenta 2009:850.

⁵¹³ *Caldwell v St Thomas Aquinas High School* [1984] 2 SCR.

⁵¹⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 27-29.

⁵¹⁵ *Caldwell v St Thomas Aquinas High School* [1984] 2 SCR:para. 603: Mrs Caldwell married a divorced Methodist man, which goes against Catholic doctrine concerning divorce.

⁵¹⁶ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par. 28.

out, however, Mrs Caldwell also only taught technical subjects and was not involved in any formal religious instruction, as was the case with Mr Strydom, and this does not differentiate the cases.⁵¹⁷ The point which Lenta affirms actually does differentiate the cases, and here he agrees with the logic in *Strydom*, is that it was not expressly part of Mr Strydom’s job description (since there was no written contract to that effect) to act as a role model for Christian values, whereas Mrs Caldwell’s contract expressly contained such a provision.⁵¹⁸

Lenta refers to the Canadian decisions of *Parks v Christian Horizons*⁵¹⁹ and *Heintz v Christian Horizons*.⁵²⁰ *Parks v Christian Horizons* concerned a worker at a care home, where a “lifestyle requirement” was not included in the contract of employment, thus negating the employer’s ability to discriminate, as was the case in *Strydom*.⁵²¹ In *Heintz v Christian Horizons* however, the same employer *did* include lifestyle requirements into the employment contract, but the relevant tribunal nevertheless held that the discrimination was wrongful, because the employer could not justify such a requirement as a reasonable qualification for a worker in a care home (whereas such a qualification was held to be reasonable in faith schools).⁵²² Thus, if South African courts continue to follow the *Strydom* judgment’s application of the doctrinal *core/bona fide* operational requirement test, it is not a given that the express inclusion of a lifestyle requirement in a written contract would always be sufficient protection from anti-discrimination claims; the inclusion of such a lifestyle requirement in an employment contract would also need to be legitimated by some reasonable connection to the purpose or mission of the institution in question. A general problem with this development is that it normalises the application of legal tests – tests originally developed to distinguish between roles in faith-schools – to a broad range of arguably unsuitable contexts.⁵²³

⁵¹⁷ Lenta 2009:848-849.

⁵¹⁸ Lenta 2009:857: “The church might well have thought (it is not clear from the judgment) that it was an implied term of his contract that Strydom would conduct himself according to the tenets of the church. But this is insufficient: it should have been included as an express term. Assuming that the court is correct that it was not made clear to Strydom that it was part of his job description to comport himself in accordance with the beliefs of the church... its finding against the church... is correct.”

⁵¹⁹ *Parks v Christian Horizons* (1991) 16 Canadian Human Rights Reporter D/40 (Ontario Board of Enquiry).

⁵²⁰ *Heintz v Christian Horizons* (2008) 65 CCEL (3d) 218 (Human Rights Tribunal of Ontario).

⁵²¹ Lenta 2009:857: In *Parks*... the main reason the court found in favour of the teacher was that the lifestyle requirement had not been clearly imposed by the church in advance, and did not appear in the employment contract.” Benson 2013(b):146.

⁵²² Lenta 2009:850.

⁵²³ Benson 2013(b):146; Esau 2009:400-406.

The doctrinal core test, as initially developed in Canadian human rights jurisprudence in the 1970's,⁵²⁴ was borne out of a necessity to distinguish between employment roles in a faith-school by looking at the functions performed by a teacher (aside from teaching, a teacher was initially understood to also function as a role model for students, thus a lifestyle requirement was not unfounded) as opposed to a secretary (a secretary was understood only to perform clerical work and answer enquiries). The problem with seeking such distinctions in non-educational contexts is obvious: the distinctions made in the initial tests are based on the assumption that the institution in question has faith-based education as its main mission. Where employment is unrelated to teaching doctrine, as in both *Christisan Horizons* cases, the test's assumptions do not hold; the mission of a faith-based care home, for example, is not faith-based education but care founded on a Christian morality.⁵²⁵

According to the version of the doctrinal core approach elucidated by Lenta, teachers in a faith-based school may be expected to act as role models, thus even teachers of secular subjects can be expected to be bound by doctrine (if this is made explicit in contract).⁵²⁶ However, as Esau and Benson argue in their criticisms of how the *Christian Horizons* cases developed the doctrinal core approach, such distinctions could not, and should not, be applied outside of the educational context.⁵²⁷ The problem these authors identify is that the purpose of a faith-based care home, unlike a faith-based school, is not to teach, so one cannot distinguish by subject taught or duty to act as a role model; instead, one must ask whether a caretaker who rejects the faith-based care institution's doctrine can reasonably be expected to be able to provide full, faith-guided care to those in their charge. Is it unreasonable to assume that recipients of care in a Christian care home would be receiving a lesser standard of care if their caretakers are unwilling or unable to be part of the community of believers which the care home purports to

⁵²⁴ Benson 2013(b):146-148.

⁵²⁵ Esau 2009:403-404.

⁵²⁶ Lenta 2009 makes this point. Even scholars who disagree with the application of the doctrinal core approach nevertheless recognise that when it (as well as the permeated ethos/organic approach discussed later) is applied: "...in either case, a failure to point out the requirement to the employee ahead of time can be fatal to the successful claim for exemption by the religious employer." Benson (2013(b):146).

⁵²⁷ Benson 2013(b):148. Esau 2009:407: "Perhaps the work of some employees is not sufficiently related to the expression of the religious views of the organization, or to the need to maintain a religious ethos. But to suggest that a religious organization doing mission work in the public square has no BFOR [*bona fide* operational requirement] defence with respect to any and all employees, even those who are centrally involved in giving the organization its religious character, is absurd. *Such an organization would no longer be a religious organization.* It could not be motivated by religion, or have a method of doing its work that was based on religion, or convey a religious message as part of its mission. *The benefits of having a religious organization participating in the public square, rather than only non-religious organizations, would be wiped out.*" (emphasis added).

provide? Furthermore, as Parkinson has noted, there are clearly instances where a care provider's beliefs (for instance, about the nature of sex/gender) inform their provision of care.⁵²⁸ Shortly put, adherents of the Roman Catholic Christian faith cannot, according to doctrine, blindly affirm transgender identities, and would not see that as providing care. Similarly, a care home with a mission to provide care in accordance with the Roman Catholic faith should not be expected to employ non-Roman Catholic caretakers who *could* affirm ideas about sex/gender that are contrary to doctrine, as this would be seen as leading someone into sin; in such an institution's eyes (and here Benson's *oculus* idea is useful), such affirmation would not constitute care. Clearly, there is a blind spot in the doctrinal core test, and as Benson points out: "This has diminished the respect for religious associations as a whole, subjecting non-educational projects to a test suitable only in an educational setting."⁵²⁹

Lenta's acceptance of the Court's final judgment is thus based on the technical requirement, as pointed out in other cases where the doctrinal core approach found application, that a lifestyle requirement should be clearly communicated to potential employees and included in their contracts of employment.⁵³⁰ He maintains, however, that the Court in *Strydom* did not afford sufficient weight to the undue burden placed on the church in respect to employing Mr Strydom, because the role of a teacher was (in his view) sufficiently close to the doctrinal core of the church's academy and because the church would accordingly be seen to be contradicting its own doctrine by condoning the homosexual behaviour of an individual in such an important role.⁵³¹

Lenta's position favours the doctrinal core approach to religious employer exemption, although he admits to a wider scope than some with regards to what may constitute a position sufficiently

⁵²⁸ Parkinson 2019:23. "Differences of belief and assessment of medical risks explain two almost irreconcilable views about what it means to fulfil the first of the obligations of a medical practitioner – to avoid harm." Also see Wren 2019:203-222 on the effect of medical professionals' beliefs on their methods of treatment.

⁵²⁹ Benson 2013(b):148.

⁵³⁰ Lenta 2009:857. "The church might well have thought (it is not clear from the judgment) that it was an implied term of his contract that Strydom would conduct himself according to the tenets of the church. But this is insufficient: it should have been included as an express term."

⁵³¹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par: 24. The Court's response to this was that the church "could have stated that it was required by the Constitution that they not discriminate on the basis of a person's sexual orientation when concluding a contract of work." As Lenta (2009:855-856), De Freitas (2012:260) and Woolman (2009:292) have noted, this response not only reveals a foregone conclusion on the Court's part regarding the validity of religious associations' ability to discriminate, but it also seems to assume a hierarchy of rights, of equality as a trump to religious and associational freedom.

proximate and important in role and function to the doctrinal core of an organisation.⁵³² Bilchitz and de Vos, in contradistinction to Lenta, are in complete agreement with the reasoning in *Strydom*. Bilchitz, in his reply to Lenta, even argues for a more limited scope of application of the doctrinal core approach, one that would go so far as to disallow discrimination even in religious associations' appointments to sacerdotal office.⁵³³ However, such an overly strict interpretation of the doctrinal core approach has been rejected as an "absolutist" position by prominent academics,⁵³⁴ both by those in favour of the doctrinal approach (such as Lenta) and by those who are critical of the doctrinal approach in principle.⁵³⁵

The doctrinal core approach is not the only approach applied by courts in evaluating religious employer exemption claims.⁵³⁶ The "permeated ethos" or "organic" approach is favoured by scholars who view the doctrinal core approach as not affording sufficient respect to the nature and purpose of religious associations, the goods they provide (to their members and society at large) or the important role they play in facilitating a truly diverse society by constituting varied conceptions of the good life.⁵³⁷ Benson summarises this approach as follows:

Here the evaluation is not based on the job duties per se, (the "job parsing" or "doctrinal core" approach as above), but *on the nature of the organization or the workplace itself*. In this

⁵³² Lenta's 2009 article in the South African Journal on Human Rights elicited a range of replies. This underscores the disagreement on approaches to religious employer exemption: See Bilchitz 2011 and Woolman 2009 for the first round of rebuttals, then Lenta's reply in Lenta 2012, followed by another round of rebuttals in Bilchitz 2012 and De Freitas 2012, ending with Lenta's closing reply in Lenta 2013.

⁵³³ Bilchitz, 2011:246.

⁵³⁴ N Rosenblum 2000 (cited in Lenta 2012:254): "this absolutist position, which declines to weigh the public interest in antidiscrimination against free exercise claims, is morally and constitutionally indefensible."

⁵³⁵ Lenta 2012:256. Bilchitz' stance earned him the title "equal opportunity absolutist" from Lenta, and this was noted with approval by Benson (Benson 2013(b):142).

⁵³⁶ Scholars refer to Canadian and American cases in addition to South African precedent supporting this interpretation (the organic approach), among them *Schroen v Steinbach Bible College* (1999) 35 C.H.R.R. D/1, (D.R. Knight, Q.C. Board of Adjudication, July 26, 1999) and *Amos v Corporation of the Presiding Bishop* 594 F Supp 791 (Utah 1984) although *Amos* is more often relied on to show the rationale for non-interference in internal affairs of religious associations; also, to a lesser extent, *Boy Scouts v Dale* 530 U S 640 (2000) since it did not deal with a religious association exactly, though it does provide some insight into the application of exemptions (albeit in an American context), specifically in the context of the importance of a pre-existing moral stance. This, in turn, is relevant in the case of transgenderism as some churches may not have an explicit stance in this regard like they have with homosexuality. The judge in *Strydom* did not question whether the church had a pre-existing moral stance on homosexuality, but notwithstanding South African courts' avoidance of doctrinal entanglement, would this be the case in a claim concerning transgenderism?

⁵³⁷ Benson 2013(b):155; De Freitas 267-268; also see Esau 2000 "Islands of Exclusivity: Religious Organizations and Employment Discrimination" and Esau 2009 "Islands of Exclusivity Revisited: Religious Organizations, Employment Discrimination and *Heintz v. Christian Horizons*." To this point, Benson states: "Amongst academic writing in this area, I am aware of only Alvin Esau who has consistently argued for an "organic" approach to understanding religious associations... In South Africa, Shaun de Freitas has endorsed Esau's approach."

approach, which I have termed a “permeated ethos” or has been called elsewhere an “organic” approach, what one examines is *whether or not the organization is one in which religious practice permeates the organization*. If there is permeation then it is unnecessary to examine specific job duties.⁵³⁸

The organic approach differs from the doctrinal core approach in many obvious aspects, but most importantly it fundamentally differs in how it requires one to view and evaluate associations: not from a primarily individualistic perspective, but also from a communal perspective.⁵³⁹ According to the doctrinal core approach, a religious association may be segmented into religious and non-religious individuals, into members and non-members who all constitute the religious association and contribute to its functioning; this understanding sees a religious association primarily as an employer with a largely religious purpose; one comprised partly of a religious community and partly of non-religious (or not necessarily religious) administrators, maintenance workers and so on. The organic approach, on the other hand, sees a religious association as an employer, yes, but recognises that it is a community of religious believers first, and that employment positions such as gardener, secretary, teacher and pastor all arise out of the need to enrich and sustain such a community of believers.⁵⁴⁰ The organic approach assumes that the primary end of a religious association is to constitute a community of believers who, regardless of their station and through their shared beliefs and communal interactions, enliven in each other a sense of deep meaning that informs their identity and is integral to their experience of human dignity.⁵⁴¹

This approach seems more in line with the idea that groups, be they linguistic, cultural or religious, should be allowed a substantive degree of autonomy and self-determination, especially in determining matters of membership.⁵⁴² After all, the Court in *Strydom* held that

⁵³⁸ Benson 2013(b):145. (emphasis added)

⁵³⁹ Aroney 2018:181-182. Aroney remarks on the right to freedom of religion that “there is a general consensus among specialist scholars in the field that the right must necessarily have individual, associational *and communal* dimensions (emphasis supplied).”

⁵⁴⁰ Benson 2013(b):149. “In the case of the religious employer, therefore, it is the identity of the religious employees and their group beliefs in co-operation that provides the rationale for protecting religious freedom in group practice.”

⁵⁴¹ Esau 2000:734. “Under the organic approach as applied to religious organizations, the workplace itself constitutes a community of believers where relationships are as important, if not more so, than narrowly defined role tasks. To a degree, the religious workplace is a church where people worship together, not just at work, but through work.”

⁵⁴² A recent American case, *Demkovich v. St. Andrew the Apostle Parish*, No. 19-2142 (7th Cir.2021), concerning claims of workplace discrimination on basis of sexuality, and subsequently, harassment on basis of disability were dismissed by 7th Circuit of the Appellate Court, which held that: “The work environment of a minister thus differs

Mr Strydom, though engaged as a teacher at a faith-based academy (a position which the Court also held was *not* sufficiently related to the church’s doctrinal core) was *not* a member of the religious association in question. Thus, a position the church deemed a leadership role (again, the Court rejected this) presumably could be filled by a non-member of the church. Phrased differently, in applying the doctrinal core approach, the *faith group* in question was not seen to possess the ability to define for itself what constituted a leadership position, nor was it allowed to assume that such a position implied membership in the group.⁵⁴³ This was due in part to the absence of a written contract expressly setting out such requirements, though as foreign case law suggests, the *Strydom* Court might still have held that such written contractual requirements were not *bona fide* operational requirements for the teaching position, especially since the Court held that the position did not involve formal doctrinal instruction.⁵⁴⁴

As I have discussed above, such a limited understanding of the membership and roles of religious associations, in this instance of instructors in faith-based schools, does not afford sufficient respect to the special nature and aim of religious associations.⁵⁴⁵ This is not an issue limited to faith schools. As Esau and Benson have stated, the doctrinal core approach not only has the danger of being misapplied outside of a religious educational context, but also presents the larger threat of inviting value judgements from adjudicators into the self-understanding of religious associations.⁵⁴⁶ The literature seems to indicate – and here specific reference is made

from the work environment of any other employee... Religion permeates the ministerial workplace in ways it does not in other workplaces.” (Page 14).

⁵⁴³ Benson 2013(b):150: To this point, Benson admits that: “To a large extent religious groups have traditionally relied heavily on a *common understanding of employment expectations concerning conformity with the religious faith* in personal behaviour. These understandings may not be common anymore (emphasis supplied).”

⁵⁴⁴ Esau 2009. Benson 2013(b):150. In this regard, I refer to the case of *Heintz v Christian Horizons* 2008, the potential negative consequences of which have been thoroughly examined by Esau, but also note Benson’s pessimism after that case was appealed: “...post *Christian Horizons*, any religious rules in relation to sexual orientation outside of education and proselytizing are likely to be challenged.”

⁵⁴⁵ Woolman (2009:294) sums up the importance of these aspects as follows: “Because the membership policies and the organisation of internal affairs are often critical to an association’s identity, one must be aware that laws which force a change in these policies may alter the essential character of that association. So, if one believes that political pluralism, cultural diversity, individual autonomy and social upliftment may be threatened by forced changes in an association’s membership criteria... then one might want to give associations the power to police their boundaries and thereby prevent the capture of the association by individuals or groups who might wish to change the association’s aims.”

⁵⁴⁶ Benson 2014; Bussey 2018 and Esau 2000 & 2009 are not in favour of “values,” however defined, being the basis of judicial decisions. Bussey refers to two dissenting Canadian Justices: “Cote and Brown JJ critiqued ‘Charter values’ as ‘the product of the idiosyncrasies of the judicial mind that pronounces them to be so.’ Such ‘values’ are amorphous, undefined and may become mere rhetorical devices for moral judgements.” This could also be understood as the State overextending its reach into the realm of meaning-making reserved for belief groups such as religious associations. As Woolman (2009:298) noted, this potential for overreach in judicial discretion was a problem USSC Justice Brennan foresaw in *Amos*: “Professor Lenta apparently believes that it is okay for courts to delve (carefully) into questions of core tenets of belief – and decide which beliefs are trumps

to the Canadian legal situation where the consequences of favouring the doctrinal core approach have played out to some degree – that there exists a significant risk to religious freedom, especially as it is fulfilled through associational freedom, where the law (often in the form of equality claims) allows itself to exert undue influence on the internal affairs of religious associations.⁵⁴⁷

4.3 Hypotheticals

Recalling the discussions above concerning religious employer exemption, let us consider the following theoretical scenarios that may help to illustrate potential issues. First, imagine that the *Strydom*-case involved a transgender female (*i.e.*, someone born male who identifies as and chooses to transition into a female) engaged in a relationship with a cisgender male. Assume the church at the time of hiring was under the impression that the transgender female, let's call her Ms A, was a heterosexual (or celibate homosexual), cisgender male, because at the time of hiring, Ms A was then Mr A. Further assume that Ms A (at hiring, Mr A) had not yet been aware of nor affirmed her transgender identity and thus was not misleading the church. Now, what issues would arise if Mr A, after being hired, affirms his identity as Ms A, and the church then finds out about Ms A's transgender identity and her relationship with a man and subsequently, following correct internal procedure, dismisses her for reasons similar to those in *Strydom*?⁵⁴⁸

First, consider that, in *Strydom*, the Court accepted that the church had an established moral and doctrinal position against homosexual conduct. If the church in this theoretical case similarly claims that established doctrine prohibits transgender conduct and does not allow for the recognition of extra-cisgender identities (thus rendering Ms A male in the church's view; male and engaged in homosexual conduct), would the Court accept this as readily as it did in

and which beliefs are not. Brennan is alive to that problem and alerts his readers to the dangers of according the courts such powers." In this regard, note De Freitas (2016:9 at fn. 46) citing Justice Ngcobo's minority opinion in *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) 2002: "as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the doctrine."

⁵⁴⁷ Bussey 2018:559-560. Esau 2009:434. Bussey: "The law on religious accommodation in Canada has been dramatically altered—to the detriment of religious freedom and diversity... It is bound to lead to unintended, negative consequences for liberal democratic pluralism." Esau: "To drive these organizations out of service, or to strip them of religion as a condition of service, so as to achieve the equality demanded by law's religion, is itself a rather illiberal approach in a pluralist society."

⁵⁴⁸ These reasons have been touched on above, but briefly rehearsed they include: the church's position against homosexual conduct; the church's view that the position occupied is one of leadership; and that further employment would be seen as the church's implicit endorsement of positions contrary to established doctrine.

Strydom? This might not be an issue, as South African courts have demonstrated their (Constitutionally-founded) unwillingness to engage in churches' internal determinations regarding matters of doctrine,⁵⁴⁹ otherwise referred to as the "avoidance of doctrinal entanglement by the judiciary."⁵⁵⁰ Nevertheless, even if the Court accepts this, it still likely would follow the reasoning it did in *Strydom* in finding that the position of a music teacher is not sufficiently proximate to the doctrinal core of the church to allow an exemption from non-discrimination legislation, and in finding that the teacher was not made explicitly aware of any "role model" requirements in a written employment contract.⁵⁵¹ However, there is one aspect considered in the *Strydom* judgment that, when viewed from this theoretical standpoint, demonstrates what the respective literature (especially that in support of the doctrinal approach) might be overlooking, specifically in determinations of what constitutes an "undue burden."

The Court in *Strydom* held, for the many reasons discussed above, that continuing to employ Mr Strydom would have imposed a minimal burden on the church's religious liberty.⁵⁵² Some scholars disagree specifically with this aspect of the Court's finding.⁵⁵³ Nevertheless, even some of these dissenting scholars' arguments may encounter difficulty when adapted to the context of the hypothetical case considered above. Recall how Lenta argued that a teacher's role in a faith school could credibly be considered sufficiently close to the doctrinal core to

⁵⁴⁹ Such determinations including whether or not transgender identity and conduct is recognised and allowed in doctrine.

⁵⁵⁰ De Freitas 2016:10 (at fn. 53). De Freitas refers to Justice Ponnán's recognition (in *Ecclesia de Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] 151 (ZASCA) at para. 33) of this principle with reference to the case of *Taylor v Kurtstag* 2005 1 SA 362 (W). Ponnán also referred to *Taylor v Kurtstag* in stating that this principle, the avoidance of doctrinal entanglement, was a Constitutional development; before the Constitution, courts could have decided on doctrinal matters if legal or proprietary rights were involved.

⁵⁵¹ It is less clear how such a case would develop where an employment contract for such a position (teacher in a faith school) includes such explicit requirements, and a transgender person concludes it before being aware of their transgender identity, subsequently affirming a different gender and coming into conflict with the provisions of the contract. It is submitting that this could go either way: SA courts could follow *Strydom*'s determination that such a position in any regard is not sufficiently proximate to the association's doctrinal core, which follows (and according to Lenta 2009:848-850, goes a bit further than) the current Canadian position (as per, for instance, *Heintz v Christian Horizons*); or our courts could follow the organic approach, which might lead away from the current Canadian position (which is decried by some mentioned above as overly restrictive of religious rights).

⁵⁵² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par. 25.

⁵⁵³ Lenta 2009:852-853. "The Equality Court nevertheless underestimates the reasons for thinking that the burden placed on a church by the anti-discrimination legislation may be substantial."

warrant unfair discrimination, but that a janitor⁵⁵⁴ or secretary's role could not.⁵⁵⁵ Thus, he contended, it would impose a substantial burden on the church to continue employing Mr Strydom, as the church would be viewed as condoning behaviour in contradiction to their doctrine. Now imagine the situation where the church (or an affiliated school) appoints not a transgender teacher, but a transgender janitor or secretary (though some of these points could apply in such a case as well).

First, the secretary: If the *September* understanding of gender identity's relation to human dignity stands, then those interacting with this secretary (let us call her Ms B) – whether ecclesiastics, other members of the church or outsiders – would be required to address her according to her preferred gender identity or otherwise offend her human dignity.⁵⁵⁶ In each case this would present difficulties: must ecclesiastics and members admit something that is contrary to their beliefs when addressing this person? Would outsiders coming into contact with this secretary, while performing functions as a representative of the church, assume (incorrectly) that the church approves of transgender identity? It should be noted again that neither party, not the church nor the transgender secretary, need be acting maliciously for a situation to arise where the church may understandably face a substantial burden in terms of both the public representation of its doctrine and its self-understanding, and thus have to terminate Ms B's employment.⁵⁵⁷

Secondly, the janitor: following the above points about human dignity, a transgender janitor (call her Ms C) would reasonably be expected to clean bathrooms. However, would a Catholic church or faith school be expected by the courts to allow Ms C, formerly Mr C, to enter and

⁵⁵⁴ Lenta refers to the US case of *Amos* but disagrees with the US Supreme Court's ruling in favour of a church's ability to unfairly discriminate in appointing janitors to its gymnasium. It was held in this ruling that, in an ideal world, courts should be able to discern between religious and non-religious appointments, but that, in practice, this would have chilling effects on the free exercise of religion in these associations, since they might possibly order their internal affairs so as to avoid litigation. In Woolman 2009:298, Woolman questions whether Lenta fully appreciates the rationale in *Amos* and further contends that, except where it involves children or those incapable of managing their affairs, the "constitutional right to free exercise of religion - buttressed by the freedom to associate - is rightly deemed stronger than a right to a particular form of employment."

⁵⁵⁵ Lenta 2009:854. Lenta refers to the Canadian case of *Caldwell*, where the unreported case of *Bonnie Gore v The Ottawa Roman Catholic Separate School Board* (unreported Dec. 7, 1971), involving a secretary in a Catholic school, is cited and discussed.

⁵⁵⁶ Again, I assume (as we did above) that Ms B was appointed prior to full realisation and affirmation of her gender identity, with no misrepresentation occurring when the contract was concluded.

⁵⁵⁷ Vatican, Congregation for Catholic Education 2019. "'Male and Female He Created Them: ' Towards a path of dialogue on the question of gender theory in education.'" The Catholic church, for one, has explicitly stated that it does not recognise transgender identity, and it has decried in official documents the teaching of "gender ideology" of which it sees transgenderism to be a part.

work within the bathroom of her professed gender, even though the religious association in question and its members – who likely will be among those using the bathroom – do not recognise her new gender identity? Again, it would not require ill-intent from either party for a religious association in such a position to understand itself as either needing to eliminate Ms C’s services or having her behave in a way contrary to her gender identity (*i.e.*, require her to present as male).

Lastly, both of the aforementioned cases also implicitly beg the question of general bathroom usage for employees of a religious association. If we restrict ourselves again to a Catholic church or faith school, the options are either to require the transgender employee to use a bathroom of the gender they do not identify with; to construct or designate a space which may operate as a bathroom specially for this employee;⁵⁵⁸ or some other measure which might impose a significant impediment to the employee’s duties, such as having to use another premises’ bathroom or go without for the duration of their workday.

In all these scenarios, the doctrinal core approach does not seem to provide the necessary framework for addressing the burden placed on the given religious associations. Regardless of whether the secretary or janitor’s roles are “sufficiently proximate to the doctrinal core,” the issues raised by their continued employment would seem either to place an undue burden on the religious association or to deny some aspect of the transgender person’s human dignity.

In conclusion, the doctrinal core approach focuses primarily on parsing out that which is seen by courts to constitute the internal religious doctrines and core beliefs of a religious organization. However, as argued above, this approach fails to consider the holistic nature of religious associations (especially the importance of a shared communal identity to each individual believer) and their cultural significance.⁵⁵⁹ This failure to understand religious organisations as “communities of believers” leads courts to err in making judgements regarding what constitutes an undue burden on the constitutive moral identity of such communities. In

⁵⁵⁸ This seems to be the best route given the considerations involved, but such a space could not be marked a “transgender” or “intersex” bathroom (which would imply recognition). Such a space could be marked as a shared bathroom, since this would not imply recognition by the church of something against its doctrine. In mentioning “intersex” it should be noted that some scholars, like Botha (2018:2) and Visser & Picarra (2012:508-510) tend to use the term interchangeably with “transgender,” while others, such as Barnes (2020:22-23) note distinct differences between the terms.

⁵⁵⁹ Benson 2013(b):157.

the *Strydom* case, for instance, it was held that the church, by continuing to employ someone as a teacher who openly contradicted its tenets, would experience no undue burden; the argument that the church would experience adverse effects in relation to its public identity as a community of believers with traditional morals was not afforded any real weight.⁵⁶⁰ In answer to this, the organic or permeated ethos approach provides a more holistic and nuanced framework for addressing the tensions between religious freedom and competing rights. By considering the nature of religious organizations and promoting deep ontological diversity, the organic / permeated ethos approach introduces a degree of nuance that actually protects the autonomy of religious associations while still upholding individual rights. Arguably, this addresses the shortcomings of the doctrinal core approach by offering a more comprehensive understanding of religious liberty and its role in a diverse society.

⁵⁶⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 32 and 41.

CHAPTER 5

CONCLUSION

This final chapter provides the reader with a concise, yet sufficiently detailed, overview of the main arguments developed throughout the body of this dissertation, and to synthesise these arguments in answer to the central questions raised at the outset.

The overarching aim of this dissertation is to investigate how a pluralistic, liberal and democratic state might best maintain its lifeblood of meaningful diversity when confronted by the duty to protect the identity of individuals and groups with fundamentally irreconcilable worldviews. In this regard, the focus is narrowed down to the intersection of transgender identity and religious associational identity, and here the question is: how might a pluralistic, liberal state maintain the lifeblood of meaningful diversity when confronted by its duties concerning the transgender individual and the religious association? From this central question, several important subordinate questions arise involving the interrelations of the state, religious associations and transgender persons.

The first set of subordinate questions arise out of the need to define one's terms. This was identified early on in this work as already presenting some difficulty, given the current state of the discourse on religious rights where key terms are often misunderstood and misapplied. The difficulty with diversity as a concept is a good example. One's definition and understanding of diversity within a liberal democratic framework can range from simply, "Diversity means the widest range of races and genders should receive protection from the state (and this raises the question of what it means for the state to "protect" an identity)," which leaves open the question of why the state should be interested in protecting diversity in the first place;⁵⁶¹ to the more complex, "Diversity means that the state must not interfere with various ways of living and various conceptions of the good life, except where the common good and public mores (both of which are products of the cooperation of various ways of life and conceptions of the good

⁵⁶¹ Often the Constitution is cited in answer to this question, but such a purely formalistic answer as, "The Constitution says so," is hardly satisfactory; rather take one step further and ask: "Why does the Constitution say so?" The answer cannot be the frustratingly circular, "Because diversity is important," or the pretentiously virtuous, "Because of our history, so diversity is important."

life) are endangered and violated by a certain way of life, given that all ways of life (including the dangerous and violating) are able to participate fairly in negotiating the limits of intervention.” More often than not, diversity in a pluralistic democracy is understood in terms of the first, empty definition, and this is the case with many other key concepts in religious rights discourse.

It is for this reason that, instead of providing definitions at the outset, say in chapter 1, this dissertation has grappled extensively with the definitions of key concepts as they came to bear at the relevant chapters. Therefore, it was not in chapter 1’s general introduction but rather in chapter 2 that the religious association was defined, since a simple definition would have been counterintuitive, eliding much of the purpose and scope of religious associations within a pluralistic democracy. Similarly, because the concept of the transgender has become so convoluted and entwined in gender theory as to be largely unwieldy and unstable (definitions of gender and sex fluctuate at such a pace that many legal theorists are often out of step with the newest iterations), the chapter dealing with transgender persons’ rights focused largely on definitions found in the legislation and conventions surrounding the phenomenon in South Africa and internationally, instead of relying on definitions grounded in gender theory (bearing in mind that some legislation and conventions nevertheless draw from gender theory).

Chapter 2, the first substantive chapter of this dissertation, concentrated on understanding the purpose of religious associations within the liberal state, and on the role religious associations play in constituting and continually re-constituting such a state. In reference to the main research question, chapter 2 was aimed at answering sub-questions about the pluralistic state’s commitment to diversity and how the religious association, properly understood, is integral to such diversity. First, the chapter set out the legal framework surrounding religious rights, specifically those bearing on religious associational autonomy, by examining both domestic and international legal developments.⁵⁶² This framework grounded an understanding of how religious associations are generally understood and approached by legislators, academics and courts. The chapter then went on to address several flaws that permeate the academic discourse on religious associations and influence courts’ approaches to cases involving religious autonomy issues.⁵⁶³

⁵⁶² See heading 2.2.

⁵⁶³ See headings 2.3-2.5.

The following implicit and explicit claims were rebutted throughout the chapter. Firstly, there is the assumption that anything labelled "secular" inherently lacks any motivated foundational belief or conviction.⁵⁶⁴ Secondly, it is often assumed that the state and public sphere, as neutral entities, should automatically be characterized by secularity-as-irreligiosity, meaning they should be devoid only of religious beliefs and opinions.⁵⁶⁵ Thirdly, religious rights are often construed in an individualistic manner, thereby relegating their exercise to the private sphere rather than the "neutral", "secular" public sphere.⁵⁶⁶ Fourthly, it is implied -and sometimes claimed outright- that a form of public, state pseudo-morality exists that operates independently of religiously-informed morals, and that it can be imposed upon religious associations that propagate such morals.⁵⁶⁷ The culmination of these misassumptions is revealed in the claim that contemporary democratic ideals of equality and diversity should be understood exclusively within the context of a state-imposed pseudo-morality, which curtails equality in public belief, undermines the existence of diverse ways of life and associated insights, and ultimately excludes a plurality of moral opinions within the public sphere.

In chapter 3, the focus shifted to transgender persons. The purpose of this chapter was to analyse various rights relating to the transgender and to offer a nuanced understanding, building on the conceptual clarifications in chapter 2, of how these rights relate, and ought to relate, to religious associations.

The chapter recounted how gender identity was found not to enjoy listed ground status under either the *Bill of Rights* or the *Equality Act*, and that, rather, the right to gender identity was established in South African precedent as an extension of the right to dignity in the case of *September v Soobramoney*.⁵⁶⁸ This right to gender identity has also been explicitly linked to the rights of free expression and equality, as evidenced in the *September* judgment.⁵⁶⁹

⁵⁶⁴ See heading 2.3.

⁵⁶⁵ See heading 2.3.

⁵⁶⁶ See heading 2.4.

⁵⁶⁷ See heading 2.5.

⁵⁶⁸ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 122. "[E]ven though "transgender" is not a listed ground under the Constitution, nor the Equality Act... In my view, the right of dignity includes the applicant's right to her gender identity."

⁵⁶⁹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:par. 114. "The infringement of the right to freedom of expression is particularly severe when it is connected to another constitutional right... In this case, it is linked to the rights to dignity and equality."

After recognising these rights developments, the chapter discussed how the rights to dignity, equality and free expression should be interpreted so as to avoid overextending the state’s interventive powers into inappropriate spheres of meaning-making properly reserved for religious associations.⁵⁷⁰ It was concluded that gender identity and its expression hold profound significance in the realm of human dignity for transgender individuals.⁵⁷¹ Simultaneously, it was acknowledged that within various religious associations, the traditional understanding of gender and sexuality occupies a central position in shaping their communal identity and, consequently, their adherents’ experiences of human dignity.⁵⁷² With regards to the state’s protective responsibilities, it was found that in order to assess both perspectives on equal footing, it would be imperative to afford due consideration to the entirety of what constitutes the identity and dignity of each side.⁵⁷³ Such due consideration would realise in courts favouring the “organic” or “permeated ethos” approach over the “doctrinal core” approach when dealing with rights conflicts involving religious associations and transgender individuals, especially given the risk of courts erasing ontological differences concerning understandings of gender in such a case.⁵⁷⁴

A further risk of erasing ontological diversity was identified in the *Hate Speech Bill*, which is aimed at extending the *Equality Act*’s hate speech provisions.⁵⁷⁵ The *Hate Speech Bill* is problematic where it proposes to create offences related to “not respecting” an individual’s gender identity.⁵⁷⁶ Such provisions, it was argued, would through misapplication of the reasonable person test in effect criminalise the expression of non-state-endorsed understandings of gender, thus extending the state’s regulatory purview into the ontological domain.⁵⁷⁷ If these provisions would be passed into law, it would chip away at the right to self-

⁵⁷⁰ See headings 3.1-3.1.3.

⁵⁷¹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4:paras. 121-122.

⁵⁷² Benson 2013(b):108: “In virtually all religions, and certainly in all conservative traditions, sexual conduct is restricted to the married heterosexual state and sexual acts outside it condemned.”

⁵⁷³ See the conclusion to heading 3.1.3.

⁵⁷⁴ See headings 4.2 and 4.3.

⁵⁷⁵ See headings 3.2.2. and 3.2.3. See also the preamble to the *Prevention and Combatting of Hate Crimes and Hate Speech Bill* B 9-2018.

⁵⁷⁶ *Prevention and Combating of Hate Crimes and Hate Speech Bill*:sec. 4(1)(a) “Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to— (i) be harmful or to incite harm; or (ii) promote or propagate hatred, based on one or more of the following grounds: ... (hh) gender or gender identity; ... is guilty of an offence of hate speech.”

⁵⁷⁷ See the critique of the *Qwelane* case and the reasonable person test in relation to hate speech at heading 3.2.3.

determination of religious associations by creating opportunities for further state scrutiny into the domain of religious communal life.

Chapter 3 then shifted its focus to international legal developments relating to the transgender phenomenon. In examining the current landscape of international human rights and the evolving understanding of "transgender rights," it became increasingly evident that the judicial and interpretive developments in this realm diverged from the fundamental principles of liberal democracy, namely democratic process, subsidiarity, and normative pluralism. This is because, while it is an acknowledged reality both by international policy analysts and academics, that there is no binding international treaty explicitly addressing the rights of transgender persons, efforts have been made by the relevant treaty bodies of significant human rights instruments to broaden the scope of protection through interpretive measures.⁵⁷⁸ This entailed interpretive extension of the existing provisions to encompass gender identity and its expression.

In this part of chapter 3, it was recognised that the rationale for advocating transgender rights in the international human rights context finds its roots in the Universal Declaration of Human Rights (UDHR), which proclaims the equality and dignity of all human beings.⁵⁷⁹ The principle of equality, as enshrined in the UDHR and echoed in various international human rights documents,⁵⁸⁰ serves as a foundation for transgender rights arguments.⁵⁸¹ By considering gender identity and its associated aspects as prohibited grounds of discrimination, it can be argued that existing international human rights instruments containing equality provisions can be construed to safeguard specific transgender rights. This perspective has been facilitated by treaty bodies such as the United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the UN's Human Rights Council.⁵⁸²

In light of these observations, it is essential to pause and critically reflect on the current direction of "transgender rights" development within the international scene. While the aim to protect and promote the rights of transgender individuals is commendable, the manner in which

⁵⁷⁸ Van den Brink & Dunn 2018:8.

⁵⁷⁹ Universal Declaration of Human Rights 1948:art. 1. This finding is supported by the OCHR's reference to this article in the foreword to "Born Free and Equal" (2012, 2019).

⁵⁸⁰ Such as the International Covenant on Civil and Political Rights (Arts 2, 3 and 26) and the International Covenant on Economic, Social and Cultural Rights (Arts. 2 and 3).

⁵⁸¹ Van den Brink & Dunn 2018:36.

⁵⁸² See heading 3.3.1.

it is being pursued raises concerns regarding the compatibility with foundational principles of liberal democracy. Balancing the recognition of individual rights with democratic processes, subsidiarity, and normative pluralism becomes imperative to ensure a holistic and inclusive approach that respects the principles upon which liberal democracies are built.

In scrutinizing the Yogyakarta Principles, it was found that they may claim to be a mere exposition of and interpretive guide to established rights, but in reality extend far beyond this.⁵⁸³ Building on chapter 2's critique of the secular neutrality presumption, it was argued that these principles suffer from a flawed and disingenuous secular neutrality, which results in illiberal and convergent interpretations of the law. Despite their ostensible commitment to multiculturalism and diversity, the Yogyakarta Principles presuppose that traditional morals are oppressive and untenable, particularly with regard to gender and sexuality.⁵⁸⁴

It is worth noting again that these principles were drafted by academics and experts who professed to offer a neutral interpretation of international law. However, their interpretive framework effectively problematises any notions of gender and sexuality that do not align with their own ontological presuppositions.⁵⁸⁵ As a consequence, the Yogyakarta Principles severely restrict the scope of reasonable disagreement: any dissenting opinions on the mutability of gender or non-traditional forms of sexuality are effectively invalidated. The principles seem to privilege sexual orientation and gender identity as overriding considerations, to the detriment of other fundamental rights.⁵⁸⁶ In fact, these principles exhibit a normatively laden interpretive framework, designed specifically to negate traditional cultural and religious perspectives on sexuality and gender.⁵⁸⁷

In sum, it was found that the Yogyakarta Principles are rife with difficulties and biases that render them incompatible with the principles of multiculturalism and diversity that they purport

⁵⁸³ See heading 3.3.2.

⁵⁸⁴ In the preamble to the first set of Yogyakarta Principles, for instance, it is stated that considerations of non-discrimination and equality require states, in terms of international human rights law, "to eliminate prejudices and customs based on... stereotyped roles for men and women."

⁵⁸⁵ Tozzi 2007:1.

⁵⁸⁶ See the discussion under heading 3.3.2 on Principle 19(D), for instance.

⁵⁸⁷ The following extract from the Yogyakarta Principles' preamble bears repeating: "respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women... States must take measures to seek to eliminate prejudices and customs based on... stereotyped roles for men and women..."

to uphold. Their one-sided approach to rights interpretation undermines the very ideals of freedom and democracy that they claim to champion. It is imperative that jurists, amongst others, exercise a more critical and nuanced evaluation of these principles that recognises their implicit ontological claims regarding gender/sex and sexuality, and the danger of erasing diversity by imposing such ontologies onto religious communities with diverse moral ontologies.

Chapter 3 concluded with an overview of the development of transgender legal issues in foreign countries, the varying approaches to legal gender recognition, and the ongoing debates surrounding the medicalised approach and its implications, particularly for minors.⁵⁸⁸ The section on foreign law opened with a discussion on the development of transgender legal issues in Europe, focusing on the role of the European Court of Human Rights (ECtHR) in shaping transgender rights through judicial activism. It looked at key cases such as *Rees v. UK*⁵⁸⁹ and *Goodwin v. UK* which dealt with the issue of legal gender recognition, and it highlighted the shift in the ECtHR's interpretation of the European Covenant on Human Rights (ECHR) in favour of transgender persons.⁵⁹⁰ This last development was seen as leading to the recognition of transgender identity as an ECHR norm.⁵⁹¹ This section further treated legislative developments in European countries regarding legal gender recognition. As of May 2022, thirty-nine European states have implemented measures for legal gender recognition, with varying requirements and procedures.⁵⁹² Some countries now base legal gender recognition on self-determination, while others require a mental health diagnosis or medical procedures as preconditions.⁵⁹³

The focus is then shifted to outline the perspectives of scholars critical of the "medicalised approach" to legal gender recognition. These scholars argue against legal gender recognition requirements that include medical treatments and diagnoses, perceiving them as undue barriers

⁵⁸⁸ See heading 3.3.3.

⁵⁸⁹ *Rees v The United Kingdom* [1986] European Court of Human Rights Application 9532/81.

⁵⁹⁰ *Christine Goodwin v The United Kingdom* [2002] European Court of Human Rights Application 28957/95 par. 91.

⁵⁹¹ Holzer 2022:8: “[B]oth France and the United Kingdom introduced the possibility of changing one’s legal gender only after having lost a case on this matter at the European Court of Human Rights.”

⁵⁹² Transgender Europe “Trans Rights Map”, <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023). Of these states, 37/46 are members of the Council of Europe; 25/17 are European Union Member States.

⁵⁹³ Transgender Europe “Trans Rights Map”, <https://transrightsmap.tgeu.org/> (Accessed on 13 February 2023).

to transgender individuals' rights.⁵⁹⁴ They also raise concerns about the potential sterilization effects of certain medical interventions. However, some scholars go too far by mis-portraying legitimate medicalised transition requirements as tantamount to state-mandated sterilisation.⁵⁹⁵ At this juncture it is pointed out that the same scholars who advocate for a self-declaration/determination model of legal gender recognition – and who portray *any* medical transition as tantamount to sterilisation – are also simultaneously in support of early medical interventions in cases of transgender-identifying minors.⁵⁹⁶ In response to these scholars, counterarguments are raised that deny sterilisation rhetoric and support the medicalised approach, emphasizing the legal certainty that medical requirements create in law and how they safeguard minors from irreversible physical alterations by preventing the possibility of medicalised intervention in most cases.⁵⁹⁷ The last issue this chapter treats is the pushback against the medicalised transition of minors in some European countries, such as Sweden, Finland and the UK.⁵⁹⁸ These countries have re-evaluated their positions, restricting or adopting cautious stances on medical gender/sex transition treatments for minors. The policy shifts are informed by studies, recommendations from national medical institutions and independently conducted reviews that raise concerns about the low quality of evidence for hormonal interventions, potential risks, and reports of detransition and regret among youth who have transitioned.

In chapter 4, the final substantive chapter of this dissertation, the focus was not on religious associations nor the transgender individual, but rather on identifying and understanding the ontological issues that crop at their meeting. By this point, the dissertation had already identified – or otherwise hinted at – myriad issues touching on religious associational autonomy, but what this chapter aimed to do was clearly set out the case for why human rights claims based on transgender identity are unavoidably and essentially ontological. Building on this, the chapter sought to explain and demonstrate through hypothetical scenarios why the currently dominant “doctrinal core” approach to religious employment exemptions fails to sufficiently accommodate deep, ontological diversity when it comes to matters of individual and communal identity.

⁵⁹⁴ See the many discussions on “medicalisation” in van den Brink & Dunne 2018, Barnes 2020 and Matthyse *et al.* 2020, and “sterilisation” in Kohler 2013, Dunne 2017(a), Dunne 2017(b) and Holzer 2022.

⁵⁹⁵ Dunne 2017(a):554–581; Dunne 2017(b):497-500; Holzer 2022:11.

⁵⁹⁶ Dunne 2017(a):558-560; Barnes 2020:84; Sloth-Nielsen 2020:34; Holzer 2022:11.

⁵⁹⁷ See heading 3.3.3.

⁵⁹⁸ See again heading 3.3.3.

The first section of chapter 4 recounted how the emergence of the transgender phenomenon has raised ontological and moral questions, often disguised as settled objective facts.⁵⁹⁹ For instance, the compartmentalization of sex and gender, as well as the belief in their mutability, are theoretical and normative claims that have been erroneously perceived as objective truths. These ideas originated in the 1950s and were further propagated through medical advancements and feminist writings, eventually forming the basis of contemporary "gender ideology."⁶⁰⁰ The distinction between sex as a biological reality and gender as a social construct was popularized by second-wave feminists in the 1970s.⁶⁰¹ Subsequently, third-wave and post-structural feminists, drawing from post-structuralist thinkers like Jacques Derrida and Michel Foucault, expanded upon this distinction, arguing that both sex and gender are socially constructed.⁶⁰² Judith Butler's works, in particular, provided the foundation for contemporary theories on the deconstruction of sex and gender, challenging the objective status of biological sex.⁶⁰³

The chapter went on to explain that examining the medical scientific discourse on the transgender phenomenon reveals its philosophical rather than scientific underpinnings.⁶⁰⁴ The exponential growth of interest in transgender persons, as reflected in published literature, suggests a societal acceptance of gender diversity.⁶⁰⁵ However, studies show that gender dysphoria tends to desist after puberty for the majority of young people, cautioning against prepubescent hormonal treatment or social transition.⁶⁰⁶ Despite this evidence, a "gender affirmative" approach has gained popularity, rejecting the previously recommended "watchful waiting" approach.⁶⁰⁷

⁵⁹⁹ See heading 4.1.

⁶⁰⁰ Pluckrose & Lindsay 2020.

⁶⁰¹ Klein 2012:12; Williams 2020:5.

⁶⁰² See Derridas', Foucault's, then Cicoux and Butler's works, and the critique of these in Pluckrose & Lindsay 2020.

⁶⁰³ Butler 1990; Butler 1996.

⁶⁰⁴ See heading 4.1.

⁶⁰⁵ Sweileh 2018:18-19. In this study, it was observed that over 58% of the articles published on transgender health from 1900-2017 were published in the period of 2005-2017.

⁶⁰⁶ De Vries & Cohen-Kettenis 2012:305-306; Cantor 2020:307: "[E]very follow-up study of GD [gender dysphoric] children, without exception, found the same thing: Over puberty, the majority of GD children cease to want to transition." See also the relevant studies cited in Cantor: Lebovitz 1972:1283-1289; Zuger 1978:363-369; Money & Russo 1979:29-41; Zuger 1984:90-97; Davenport 1986:511-517; Green 1987; Kosky 1987:565-569; Wallien & Cohen-Kettenis 2008:1413-1423; Drummond, Bradley, Badali-Peterson & Zucker 2008:34-45; Singh 2012; Steensma, McGuire, Kreukels, Beekman & Cohen-Kettenis 2013:582-590.

⁶⁰⁷ Cantor 2020:312.

It was pointed out that the recent shift towards the "gender affirmative" approach is not supported by medical consensus or evidence. The 8th edition of the World Professional Association for Transgender Health's Standards of Care relies more on narrative than evidence, emphasizing the potential harm of allowing puberty to progress for gender incongruent adolescents.⁶⁰⁸ This approach is based on normative arguments and assumes certain beliefs about the nature of sex and gender, rather than objective facts. Thus, claims about sex and gender should be understood as ontological and moral rather than empirical scientific claims. The chapter thus contended that the transgender movement is influenced by beliefs rather than scientific claims. These beliefs include the notion that gender is assigned at birth and subject to subjective identification rather than biological reality. Additionally, the belief in the fluidity of gender and the potential for gender identity to change over time is prevalent. These beliefs are inherently unverifiable by science and should be distinguished from agreed scientific facts. It is essential to recognize the underlying beliefs and values that shape perspectives on sex and gender.

In its second section, chapter 4 argued against the doctrinal core approach in favour of the organic or permeated ethos approach to religious employment exemptions.⁶⁰⁹ The *Strydom* case, which involved the dismissal of a music teacher by the Dutch Reformed Church due to his homosexual relationship, serves as a backdrop for the arguments. The Church claimed that the teacher's dismissal was justified because his position required him to adhere to the Church's core doctrine and serve as a role model for Christian values.⁶¹⁰ They argued that failure to dismiss him would imply approval of same-sex relationships, contradicting their religious beliefs.⁶¹¹ The Church relied on the right to freedom of religion as a defence. However, the Equality Court ruled against the Church, emphasizing the right of the teacher to be free from

⁶⁰⁸ Coleman *et al.* 2022:546: "Despite the slowly growing body of evidence supporting the effectiveness of early medical intervention, the number of studies is still low, and there are few outcome studies that follow youth into adulthood. Therefore, a systematic review regarding outcomes of treatment in adolescents is not possible. A short narrative review is provided instead."

⁶⁰⁹ See heading 4.2.

⁶¹⁰ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:par. 15-16.

⁶¹¹ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 23-24.

unfair discrimination.⁶¹² The court awarded damages to the teacher, highlighting the importance of anti-discrimination provisions over the Church's claim to religious freedom.⁶¹³

Scholars engaged in a debate following this judgment: de Vos and Bilchitz supported the court's decision and its application of the doctrinal core approach, arguing that churches cannot discriminate freely.⁶¹⁴ Lenta, on the other hand, questioned the court's reasoning in its application of the doctrinal core approach.⁶¹⁵ He believed that the teacher's position in the church's arts academy made him a spiritual leader, necessitating adherence to the church's values. Benson, de Freitas and Esau, critical of the doctrinal core approach, emphasized that the evaluation should focus on whether religious practice permeates the organization as a whole, rather than specific job duties.⁶¹⁶ They argued that religious associations should be seen as communities of believers first, with employment positions arising to enrich and sustain that community.

Building on these critiques, this section noted that the organic or permeated ethos approach acknowledges the communal perspective and the substantive autonomy of religious associations.⁶¹⁷ This approach recognizes that the primary goal of religious associations is to constitute a community of believers and that employment positions serve that purpose. The section concludes that the doctrinal core approach fails to respect the communal nature and ontology-preserving purpose of religious associations. By failing to afford sufficient weight to the element of communal identity, the doctrinal core approach invites value judgments into matters that constitute the moral and ontological identity of religious associations, and it thereby limits their autonomy. In contrast, the organic or permeated ethos approach better aligns with the idea of allowing groups autonomy and self-determination in matters of membership and identity.

⁶¹² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 32 and 41.

⁶¹³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2008 ZAGPHC 269, ZAEQC 1:paras. 37-39 and 41.

⁶¹⁴ De Vos “On freedom of religion and the gay music teacher” <https://constitutionallyspeaking.co.za/on-freedom-of-religion-and-the-gay-music-teacher/> (accessed 08 August 2021).

⁶¹⁵ Lenta 2009:893.

⁶¹⁶ Esau 2000:720; De Freitas 2012:267; Benson 2013(b):146.

⁶¹⁷ See heading 4.2.

The final section of chapter 4 explores hypothetical scenarios to highlight the inadequacy of the doctrinal core approach in dealing with issues related to religious exemptions and discrimination.⁶¹⁸ The scenarios involve a transgender individual working for a church who later affirms their gender identity, resulting in potential conflicts with the church's doctrine. This part of the chapter questions whether courts would accept a church's claim that transgender conduct is prohibited based on established doctrine, similar to the acceptance of a church's position against homosexual conduct in the *Strydom* case. It goes on to argue that even if the court accepts this claim, it would likely follow the reasoning from the *Strydom* case, which found that certain positions within the church are not sufficiently connected to the doctrinal core to warrant an exemption from non-discrimination legislation. It highlights an aspect often overlooked by proponents of the doctrinal approach, specifically regarding what constitutes an "undue burden." It notes that some scholars disagree with the court's finding that continuing to employ a person who contradicts the church's doctrine imposes a minimal burden on religious liberty, but avers some faults in even their arguments may be shown when the doctrinal core approach is applied to hypothetical scenarios involving transgender janitors or secretaries.⁶¹⁹

In the case of a transgender secretary, interactions with this individual would require addressing them according to their preferred gender identity to avoid offending their human dignity. This could pose difficulties for ecclesiastics, members of the church, or outsiders who may assume that the church approves of transgender identity, potentially burdening the church's public representation of its doctrine. For a transgender janitor, there may be a question of whether the church should allow them to use the bathroom that aligns with their gender identity, despite the church not recognizing this new gender identity. This could lead to the church perceiving a burden in either having to eliminate the janitor's services or requiring them to present as the original gender/sex while working. Furthermore, these scenarios raise the broader question of bathroom usage for transgender employees in religious associations. Options include requiring the employee to use a bathroom of the gender/sex they do not identify with, creating a separate bathroom space, or implementing measures that may – as a consequence – hinder the employee's duties.

⁶¹⁸ See heading 4.3.

⁶¹⁹ The scholarship referred to are Lenta 2009 and Woolman 2009.

In sum, chapter 4 argues that the doctrinal core approach appears insufficient in addressing the burden placed on religious associations in both real and hypothetical scenarios. Either an undue burden is placed on the religious association, or some aspect of the transgender person's human dignity is denied, indicating the limitations of the doctrinal approach in dealing with these complex issues.

In this dissertation, we have embarked on a comprehensive exploration of the intricate interplay between a pluralistic, liberal, and democratic state's duty to preserve meaningful diversity while also safeguarding the identities of individuals and groups with irreconcilable worldviews. By narrowing our focus to the intersection of transgender identity and religious associational identity, we sought to address the central question of how a pluralistic, liberal state can effectively uphold diversity amidst its responsibilities concerning transgender individuals and religious associations. Throughout the dissertation, we grappled with the complexities of defining key concepts in the realm of religious rights and diversity within a liberal democracy. By delving into the definitions of religious associations and the evolving understanding of transgender rights, we aimed to shed light on the nuanced nature of these subjects and their implications for the state's protective responsibilities. In our exploration, we critically examined the flaws inherent in the prevailing discourse on religious associations, which often assumes a secular neutrality that disregards the intrinsic role of religion in shaping communal identity. Similarly, we navigated the intricate landscape of transgender rights, acknowledging the significance of gender identity for transgender individuals while recognizing the traditional understanding of gender and sexuality within religious associations. Drawing on international legal developments, we discerned the tension between advocating transgender rights and preserving the foundational principles of liberal democracy. The Yogyakarta Principles, although purportedly upholding diversity, were found to be biased and inconsistent, potentially infringing upon the rights of religious communities with differing moral ontologies. Furthermore, we underscored the ontological nature of claims based on transgender identity, distinguishing them from empirical scientific facts. By critically analysing the doctrinal core approach to religious employment exemptions, we argued in favour of the organic or permeated ethos approach, which acknowledges the communal perspective and substantive autonomy of religious associations. Finally, through hypothetical scenarios, we demonstrated the inadequacy of the doctrinal core approach in addressing issues related to religious exemptions and discrimination concerning transgender individuals. We highlighted the potential burdens

and conflicts that may arise in various scenarios, further emphasising the limitations of the doctrinal approach in addressing the complexities of these issues.

In conclusion, this dissertation has provided a comprehensive examination of the challenges faced by a pluralistic, liberal, and democratic state in preserving meaningful diversity while navigating the rights and identities of transgender individuals and religious associations. This analysis has shed light on the complexities and tensions inherent in this intersection, ultimately advocating for an approach that respects the communal nature and ontology-preserving purpose of religious associations. As we move forward, it is imperative to adopt an inclusive and nuanced approach that upholds the ideals of freedom, democracy, and diversity, while ensuring that the rights and identities of all individuals and groups are safeguarded within our pluralistic society.

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