

RESEARCH ARTICLE

## Whose Equality? Freedom of Religious Associations and *Gaum v. Van Rensburg*

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### Abstract

In *Gaum and Others v. Van Rensburg NO and Others*, the South African High Court held the view that a decision taken by the Synod of the Dutch Reformed Church, which included a condition of a life of celibacy for gays and lesbians in order to be ordained as ministers in the church, along with a prohibition against the solemnizing of same-sex civil unions by ministers in the church, resulted in a violation of the right to equality and that unfair discrimination based on sexual orientation had taken place. Consequently, the finding in *Gaum* postulated a specific view on the permissible boundaries regarding conduct related to sexual orientation that should apply to a religious association. In this regard, *Gaum* is of concern when considering that courts in democracies around the world generally refrain from getting involved in matters related to the central doctrines of a religious association. *Gaum*'s findings are disquieting not only for the effective protection of the right to freedom of religion (in both an individual and associational context) but also for the furtherance of diversity. It is argued in this article that *Gaum* exceeded its jurisdiction in adjudicating on matters related to conduct regarding sexual orientation, an argument that critically focuses on the concept of equality against the background of the importance of the protection of the autonomy of religious associations.

**Keywords:** Religion; equality; discrimination; diversity; belief

In *Gaum and Others v. Van Rensburg NO and Others*,<sup>1</sup> the South African High Court addressed the permissible boundaries of conduct regarding sexual orientation against the background of the right to practice religion in an associational context. Part of the remedy sought by the applicants was an order by the Court that a decision taken and adopted by the Synod of the Dutch Reformed Church during 2016, unfairly discriminates on the ground of sexual orientation.<sup>2</sup> *Gaum* viewed the 2016 decision as constitutive of unfair discrimination in accordance with one of the listed grounds under section 9(3) of the South African Constitution<sup>3</sup>

<sup>1</sup> (40819/17) [2019] ZAGPPHC 52 (South Africa) (hereafter referenced as *Gaum*).

<sup>2</sup> This specifically relates to prohibiting spiritual leaders from solemnizing marriages of same-sex couples and prohibiting those who are involved in a same-sex relationship from serving as spiritual leaders.

<sup>3</sup> Constitution of South Africa, 1996, § 9 (the “equality clause”), subsection 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.” Subsection 4 also prohibits unfair discrimination on the horizontal level stating that, “No



and section 1 of the Equality Act,<sup>4</sup> namely sexual orientation. *Gaum*'s involvement in the affairs of the church related to equality and the determination whether unfair discrimination had taken place, resulted in *Gaum* having adjudicated on a matter beyond its jurisdiction. The first part of this article focuses on the importance of the avoidance by the courts (in general) in addressing matters related to the essential doctrines of a religious association. This provides the setting for the second part of this article, which critically investigates *Gaum*'s involvement in matters related to the permissible bounds of conduct regarding sexual orientation against the background of equality. In this regard, it is argued that the autonomy of a religious association in matters involving claims based on unfair discrimination pertaining to permissible forms of conduct regarding sexual orientation should be protected.

### **Gaum and Others v. Van Rensburg NO and Others**

The General Synod of the Dutch Reformed Church took a decision in 2016 that reversed a decision adopted by the synod in 2015. The 2015 decision confirmed earlier decisions of the synod, namely that marriage constitutes the union between one man and one woman. However, the 2015 decision awarded recognition to the status of civil unions between persons of the same sex that are characterized by love and fidelity.<sup>5</sup> The 2015 decision, although not placing a positive duty on a minister, allowed a minister to solemnize such unions. The 2015 decision also removed the celibacy requirement for gay or lesbian persons to be ordained as ministers or elders in the Dutch Reformed Church.<sup>6</sup> According to the Church Order, the synod is entrusted with the competency to determine the church's communal identity (in terms of the Bible, creed, its constitution, mission, and policy).<sup>7</sup> The 2016 decision was to set aside the 2015 decision by placing the condition of a life of celibacy for gays and lesbians for being ordained as ministers in the church and prohibiting ministers from solemnizing same-sex civil unions.<sup>8</sup> The applicants approached the Court for a declaration that the 2016 decision was unlawful and invalid.<sup>9</sup> Consequently, two essential matters arose: the first was whether the 2016 decision was in accordance with the Church Order (the procedural aspect) and the second related to doctrinal matters (the aspect related

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person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds in terms of subsection 3." The remainder of section 9 reads as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken ... (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

<sup>4</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act (Act No. 4/2000) (South Africa) (hereafter the Equality Act). Section 1 of this Act includes the following: "(viii) '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." Equality Act § 1(1)(viii). Prohibited grounds are further defined in this section as follows: "(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)." Equality Act § 1(1)(xxii).

<sup>5</sup> *Gaum*, para. 2.

<sup>6</sup> *Gaum*, para. 2.

<sup>7</sup> *Gaum*, para. 1.

<sup>8</sup> *Gaum*, para. 3.

<sup>9</sup> *Gaum*, para. 4.

to substance).<sup>10</sup> In other words, the irregularity of the synod's decision was pled by the applicants; the applicants also having set out causes of action for the 2016 decision to be reviewed in that it "violates the right to equality, dignity, privacy and freedom of religion, belief and opinion, association and participation in cultural and religious communities."<sup>11</sup>

Regarding the procedural aspect,<sup>12</sup> the Court found that the Church Order, which makes provision for the amendment, review, or substitution of decisions must be followed and therefore it would constitute an irregular process if processes external to the Church Order were utilized.<sup>13</sup> According to the Court, none of the processes provided for in the Church Order were used to arrive at the 2016 decision.<sup>14</sup> Added to this, the Court was of the view that the 2015 decision was ignored by the 2016 decision in that the 2016 decision (contrary to all the other decisions pertaining to same-sex marriages, namely the 2004, 2007, 2013, and 2015 decisions) did not refer to the 2015 decision of same-sex unions, nor did it set aside, affirm, or confirm it.<sup>15</sup> In the words of the Court: "Simply put, the 2015 decision was just sidestepped as if the Appeal Process had set it aside. The problem is, that the 2015 decision did exist. The decision could be amended, substituted or overhauled and reviewed; this was not done, contrary to previous Church practise."<sup>16</sup>

Following on this, the Court directed its attention to the claim by the applicants that the 2016 decision discriminates due to its differentiation on the grounds of sexual orientation.<sup>17</sup> The applicants submitted that the 2016 decision disadvantaged the dignity of the members of the LGBTIQ+, because their relationships were prohibited from being solemnized in the church.<sup>18</sup> It was also argued that such discrimination led to a violation of their associational freedoms, right to freedom of religion, and right to practice their religion in community protected by sections 18, 15, and 31 of the Constitution, respectively.<sup>19</sup> The Court mentioned that the matter before it should end with a finding on the procedural grounds only. However, the Court was of the view that it would also pronounce on the substantive issues because of a request by all the parties to do so.<sup>20</sup> The Court averred that the right to equality needed to be interpreted contextually, which required clarity on the type of society that South Africa was, against the type of society that the Constitution directs itself at.<sup>21</sup> According to the Court, the LGBTIQ+ community suffered inequality not only before the heralding of a truly democratic South Africa in 1994, but also thereafter and into the present.<sup>22</sup> Furthermore, the discrimination complained about constituted, according to

<sup>10</sup> *Gaum*, para. 30.

<sup>11</sup> *Gaum*, para. 45.

<sup>12</sup> That the judiciary should involve itself in procedural matters pertaining to disputes arising from religious associations is supported (elaborated on below). Having said this, the focus of this article is not an analysis of *Gaum*'s finding that correct procedures were not followed by the Church; rather, the focus lies in *Gaum*'s finding related to the substantive matter before it, more specifically the finding by the Court that the 2016 decision constituted unfair discrimination based on sexual orientation.

<sup>13</sup> *Gaum*, para. 59.

<sup>14</sup> *Gaum*, para. 59. These processes constituted the following: appeals and objections; revision/review; and gravamen.

<sup>15</sup> *Gaum*, para. 59.

<sup>16</sup> *Gaum*, para. 59.

<sup>17</sup> *Gaum*, para. 62. The applicants hereby relying on § 9(3) of the Constitution and §1 of the Equality Act. For the content of these sections, see the descriptions of these clauses above in notes 3 and 4.

<sup>18</sup> *Gaum*, para. 62.

<sup>19</sup> *Gaum*, para. 62.

<sup>20</sup> *Gaum*, paras. 39, 61. Irrespective, and as I clarify below, justice would have been better served if the Court had rather refrained from deciding on the substantive issues placed before it.

<sup>21</sup> *Gaum*, para. 71.

<sup>22</sup> *Gaum*, para. 73.

the Court, a specified ground included in section 9(3) of the Constitution.<sup>23</sup> The Court found that the differentiation emanating from the 2016 decision inherently diminished the applicant's dignity, "because same-sex relationships are tainted as being unworthy of mainstream church ceremonies and persons in a same-sex relationship cannot be a Minister in the Church."<sup>24</sup> Although it was evident to the Court that the applicant's dignity was violated, the Court found that such violation need not be proven due to the discrimination founded on a listed ground.<sup>25</sup>

The Court then considered the nature of the 2016 decision and the purpose sought to be achieved by it. The nature of the said decision, the Court surmised, was that "[t]he Church was split in its interpretation of the Bible regarding same-sex marriages and spiritual leadership in the Church based on sexual orientation" and that the 2016 decision did not constitute "an umbrella view" pertaining to the aforementioned interpretations.<sup>26</sup> The Court was of the view that practically the church allowed the LGBTIQA+ community to be members of the church, but excluded them from positions of spiritual leadership and from a marriage ceremony.<sup>27</sup> Taking due cognizance of the importance of the autonomy to be awarded to religious associations (and their core religious functions and doctrine), the Court's view was that it would be wrong to utilize "religious sentiments of some as a guide to the constitutional rights of others" and that "[t]he sacred is forced into the secular when there is prejudice to basic rights."<sup>28</sup> The Court, more specifically, was of the view that, where there is "unfair discrimination with no supportive evidence of fairness," the Constitution is to be upheld.<sup>29</sup>

The Court also questioned the fact that the church refrained from presenting arguments as to why the 2016 decision served a "worthy and important societal goal."<sup>30</sup> According to the Court, the Constitution supports a substantive concept of equality as expressed in section 9(2)<sup>31</sup> of the Constitution and that the 2016 decision therefore denies the applicant the full and equal enjoyment of all the rights and freedoms of the church.<sup>32</sup> Also, the Court emphasized that there were no arguments or facts on the part of the church setting out that the overall impact of the 2016 decision furthered the constitutional goal of equality or that the exclusion created by the said decision was, in the context at hand, fair.<sup>33</sup>

According to *Gaum*, the inclusion in the 2016 decision of a condition of a life of celibacy for gays and lesbians for being ordained as ministers in the church and the prohibition against the solemnizing of same-sex civil unions by ministers diminished the applicants' dignity to such an extent that unfair discrimination had taken place. In other words, *Gaum* pronounced on matters related to the permissible boundaries of conduct regarding sexual orientation (and what should constitute unfair discrimination in this regard). Implied in this is a specific moral view taken by *Gaum* on equality in the context of matters related to conduct regarding sexual orientation, a moral view that finds itself applied to a religious association by the judiciary. In this regard, and as is argued below, *Gaum* exceeds the customary limits placed on the judiciary's jurisdiction regarding disputes emanating from religious associations related to substantive moral matters.

<sup>23</sup> *Gaum*, para. 73.

<sup>24</sup> *Gaum*, paras. 74, 62, 68.

<sup>25</sup> *Gaum*, para. 74.

<sup>26</sup> *Gaum*, para. 75.

<sup>27</sup> *Gaum*, para. 76.

<sup>28</sup> *Gaum*, para. 78.

<sup>29</sup> *Gaum*, para. 78.

<sup>30</sup> *Gaum*, para. 79.

<sup>31</sup> Equality Act § 9(2) ("Equality includes the full and equal enjoyment of all rights and freedoms.").

<sup>32</sup> *Gaum*, para. 80.

<sup>33</sup> *Gaum*, para. 81.

## Religious Associations and Equality

### *The Autonomy of Religious Associations*

The context for critiquing *Gaum's* approach to equality is the importance of the protection of the autonomy of religious associations and the way it relates to the protection of freedom of religion, the limits of the law, and the advancement of diversity.<sup>34</sup> This context is key to my arguments in support of an understanding of equality (and the consequent determination of whether unfair discrimination had taken place) as particularized through the lens of foundational beliefs on important moral matters such as the determination as to the permissible boundaries of conduct regarding sexual orientation. The South African Constitution protects the right to freedom of belief whether religious or nonreligious.<sup>35</sup> Coupled to this, is the Constitution's confirmation of the importance of the right to freedom of religious associations which signifies an extension of the individual's religious belief and which is comprised of a relational sharing of religious (and by implication, moral) interests.<sup>36</sup> The courts in many liberal democratic societies respect what is referred to in some jurisdictions as the "avoidance of doctrinal entanglement" principle.<sup>37</sup> This principle, from especially the South African context, relates to the right to self-determination of religious communities and the sphere sovereignty of religious institutions.<sup>38</sup> Challenges regarding the protection of the autonomy of religious

<sup>34</sup> For the purposes of this article, I use *diversity* to mean a practical arrangement in aspiring towards the peaceful coexistence of difference amongst the various interests held by individuals and groups of individuals sharing the same interests, for example the members of a religious association.

<sup>35</sup> Constitution of South Africa § 15(1): ("Everyone has the right to freedom of conscience, religion, thought, belief and opinion."). The Constitutional Court has made significant pronouncements on the importance of religion. See, for example, *Christian Education South Africa v. Minister of Education*, 2000 (4) SA 757 (CC) (South Africa) (hereafter *Christian Education*), paras. 33, 36; *Prince v. President, Cape Law Society and Others*, 2002 (2) SA 794 (CC) (South Africa), para. 160; and *Minister of Home Affairs and Another v. Fourie and Others, Lesbian and Gay Equality Project and Others v. Minister of Home Affairs*, 2006 (1) SA 524 (CC) (South Africa), paras. 89–90.

<sup>36</sup> Constitution of South Africa § 31(1): "Persons belonging to cultural, religious or linguistic communities may not be denied the right, with other members of that community—(a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."). In the Constitutional Court case of *MEC for Education, KZN and Others v. Pillay*, Justice Langa commented that "By including religion in section 31, the Constitution makes plain that when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group ... In the case of an associative practice, an individual is drawing meaning and identity from the shared or common practices of a group. The basis for these practices may be a shared religion, a shared language, or a shared history. Associative practices, which might well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character." 2008 (1) SA 474 (CC) (South Africa), para. 145.

<sup>37</sup> See *De Lange v. Presiding Bishop, Methodist Church of Southern Africa*, [2014] 1 SCA 106 (South Africa), paras. 33–38.

<sup>38</sup> For more on this see Johan van der Vyver, "Constitutional Protections and Limits to Religious Freedom," in *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law*, ed. W. Cole Durham, Jr. et al. (New York: Routledge, 2013), 105–22. The South African Constitutional Court has confirmed the importance of the protection of the autonomy of religious associations. See, for example, *Christian Education*, 2000 (4) SA 757, para. 33; *Pillay*, 2008 (1) SA 474, para. 145; and *Prince*, 2002 (2) SA 794, para. 42. Besides the Constitutional Court, the South African judiciary also has expressed a respectful approach towards the autonomy of religious associations. See, for example, *De Lange* [2014] 1 SCA 106, at paras. 30–33; *Mohamed v. Jassiem* [1996] 1 SCA 673 (South Africa), paras. 713–714E, 714D; *Kievits Kroon Country Estate v. Mmoledi*, [2013] 1 SCA 189 (South Africa), para. 27; *Ryland v. Edros*, [1997] 2 C 690 (South Africa), paras. 702F–703D. See also Patrick Lenta, "Taking Diversity Seriously: Religious Associations and Work-Related Discrimination," *South African Law Journal* 126, no. 4 (2009): 827–60; Patrick Lenta, "The Right of Religious Associations to Discriminate," *South African Journal on Human Rights* 28, no. 2 (2012): 231–57. The judiciary's support of the autonomy of religious associations constitutes common practice in a number of liberal democracies. See, for example, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford: Oxford University Press, 2013), 375–89, 425–26; Stephen L. Carter, *Culture of Disbelief: How American Law and Politics Trivializes Religious*

associations have frequently come into play where the courts were approached to review the validity of, for example, disciplinary steps taken by the leadership of a church against a member who contravened the church's internal rules and doctrine. Of relevance to the courts is whether there was the exercise of voluntary choice by a member to being bound to the doctrine and internal rules; whether the religious association has taken action against a member in accordance with its doctrine and internal rules; whether the action taken by the religious association in disciplining a member was not *ultra vires*; and whether such action was procedurally equitable and just.<sup>39</sup> The courts should also become involved in the internal affairs of a religious association in matters dealing with, for example, commercial agreements related to property; unfair labor practices; and inhumane, degrading, and cruel practices. As alluded to above, the South African Constitution explicitly provides for the protection of religious interests in an associational context.<sup>40</sup> The limitation to freedom of association that should be applied in exceptional instances accords with the view that liberal pluralism endeavors towards a policy of "*maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity,"<sup>41</sup> and in turn to an understanding of tolerance as "the virtue sustaining the social practices and political institutions that make expressive liberty possible."<sup>42</sup> In this regard, the importance of plurality is confirmed and the South African judiciary has undoubtedly assisted in expressing the importance of diversity<sup>43</sup> and tolerance.<sup>44</sup>

Accompanying the protection of substantive autonomy of religious associations, are insights related to the law itself having jurisdictional limits.<sup>45</sup> Iain Benson, referring to

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*Devotion* (New York: Basic Books, 1993), 39; W. Cole Durham, Jr., "Religion and Equality: Reconcilable Differences?," in *Religion and Equality: Law in Conflict*, ed. W. Cole Durham, Jr. and Donlu D. Thayer (New York: Routledge, 2016), 185–202, at 197–98.

<sup>39</sup> Equitable and just approaches are those which take into account "the right to know the case one has to answer; the right to representation; the right to test evidence through cross-examination; the right to an impartial tribunal; the clarity and transparency of offences and penalties; the right to an effective appeal; and the obligation on tribunals to give reasons for decisions." See Mark Hill, "Due Judicial Process as a Principle of Anglican Canon Law and in the Clergy Discipline Tribunals of the Church of England," in *The Right to Due Process in the Church: A Comparative Ecclesiastical Approach*, ed. Rik Torfs (Leuven: Peeters, 2014), 51–70.

<sup>40</sup> See above note 36.

<sup>41</sup> William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002), 20.

<sup>42</sup> Galston, *Liberal Pluralism*, 119.

<sup>43</sup> See Pillay, 2007 (1) SA 474, paras. 65, 75–76, 107; *Christian Education*, 2000 (4) 757, paras. 24–25; *Prince*, 2002 (2) SA 794, paras. 49, 79, 147; and *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, 1997 (4) SA 1176 (CC) (South Africa), paras. 146–47.

<sup>44</sup> In the words of Justice Sachs, in *Prince*:

Given our dictatorial past in which those in power sought incessantly to command the behaviour, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order. Some problems might by their very nature contain intractable elements. Thus, no amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest. Yet faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.

2002 (2) SA 794 (CC), para. 170.

<sup>45</sup> Iain T. Benson, "Foreword: The Limits of Law and the Liberty of Religious Associations," in *Religion, Liberty and the Jurisdictional Limits of Law*, ed. Iain T. Benson and Barry W. Bussey (Toronto: LexisNexis, 2017), xxi–xl, at xxii; see also xxii–iii.



AV Dicey states that “rights exist *prior* to law’s recognition and call us to consider matters that pre-exist law and should be, as far as possible, free from its restrictions and invigilation ... friendship and the family are among the categories, like ‘rights,’ that are not created or given by law but, and this is important, are *recognized* by law.”<sup>46</sup> This bodes especially true when reminded that the law is inherently comprised of ideas (concepts) and is a measure of value, which consequently overlaps with a moral dimension.<sup>47</sup> The law should be limited, and the importance of the protection and promotion of diversity should be aligned with an understanding of a liberal democracy as reflective of the view that important spheres of life resort wholly (or in part) outside the field of interest (or activity) of political power,<sup>48</sup> and the state should not be “an end in itself but rather a means to certain ends that enjoy an elevated status.”<sup>49</sup> Claims by political institutions regarding the common good coexist (and should be on equal footing) with claims by individuals and civil associations directed at the common good. Such claims by individuals and civil associations rest on specific views of the good for themselves or for humankind.<sup>50</sup> This includes religious associations whose members commit themselves to specified views on, for example, the meaning and purpose of life and what should be viewed as morally right and wrong, as well as individuals or groups of individuals sharing the same foundational nonreligious convictions regarding the meaning and purpose of life and what should be viewed as moral or immoral.

The common good comprises the totality of social conditions, which allow individuals and groups of individuals sharing the same foundational interests to attain fulfilment easier and more fully, and the governing authorities should defend and promote such an idea of the common good.<sup>51</sup> Support of only universal meanings of the common good in democratic societies is flawed as each community has its own take on what the common good should be “even if all are ultimately facets of the common good that embraces all others.”<sup>52</sup> Bearing this in mind, *Gaum’s* questioning of the church’s having refrained from presenting arguments to the Court, after having been requested to do so by the Court, as to why the 2016 decision served a “worthy and important societal goal”<sup>53</sup> is unfortunate. Important societal goals also relate to the understanding that ideas about the common good also belong to ideas harbored by religious associations on what should constitute important societal goals or views about what should resort under the common good. To uphold the freedom of communities and individuals to enjoy their own meanings of the common good and of societal goals furthers equality among communities and individuals regarding the harboring of meanings of *the common good*. Rogers Smith comments that “the only approach that is genuinely compatible with equal treatment ... is treating claims of religious and secular

<sup>46</sup> Benson, “Foreword: The Limits of Law and the Liberty of Religious Associations,” xxvii (emphasis Benson’s).

<sup>47</sup> Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 557.

<sup>48</sup> Galston, *The Practice of Liberal Pluralism*, 1.

<sup>49</sup> Galston, 68. See also Galston, 40.

<sup>50</sup> Galston, 65.

<sup>51</sup> Iain T. Benson, “What Divides, What Decides and Who Joins? Diversity, the Common Good and Limited Law,” *Journal for Juridical Science* 39, no. 1 (2014): 97–114, at 102.

<sup>52</sup> Ryan T. Anderson and Robert P. George, “The Baby and the Bathwater,” *National Affairs* (Fall 2019): 172–84, at 182. Anderson and George add, “political authority shouldn’t undertake managerial direction of religious institutions, and it shouldn’t coerce religious acts (though it may and should coercively forbid certain acts that may happen to be religious, such as the slaughter of children). This is because the political common good does not *directly* concern personal holiness or heavenly beatitude.” Anderson and George, “The Baby and the Bathwater,” 181.

<sup>53</sup> *Gaum*, para. 79.

moral consciences the same.”<sup>54</sup> This is consistent with a meaning of *equality* that promotes diversity. For example, Justice Sachs, in the South African Constitutional Court judgment of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, succinctly elaborates on the interplay between equality and diversity: “Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference ... Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference.”<sup>55</sup>

Sachs’s view implies the courts’ duty to avoid matters that lend themselves to a variety of differing and contentious moral positions and certainly not least on the list of such positions are views on matters related to the parameters of permissible forms of conduct regarding sexual orientation. Johan van der Vyver is of the view that compelling a religious association to justify its internal laws before a secular tribunal constitutes a substantive degree of totalitarianism.<sup>56</sup> Stephen Carter comments, “When the state tries to block that process of discernment in a faith community, it is acting tyrannically by removing potential sources of authority and meaning different from itself.”<sup>57</sup> This also applies to pronouncements by the judiciary on doctrinal matters in the context of religious associations, such as matters pertaining to the permissible bounds of conduct regarding sexual orientation. Justice Van der Westhuizen, in the South African Constitutional Court’s judgment in *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, comments that “it is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people’s private lives and personal preferences. Courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association.”<sup>58</sup> He adds that “[t]he Constitution is more than law, however. It is the legal and moral framework within which we have agreed to live. It also not only leaves, *but guarantees space to exercise our diverse cultures and religions* and express freely our likes, dislikes and choices, as equals with human dignity. In this sense one could perhaps talk about a ‘constitutionally permitted free space.’ This is quite different from contending that certain areas in a constitutional democracy are beyond the reach of the Constitution, or ‘constitution-free.’”<sup>59</sup>

Consequently, the inference drawn from Justice Van der Westhuizen’s intimation that the Constitution “indeed reaches even into the most intimate spaces” is that the Constitution is also involved and relevant even in the most intimate of spaces, hereby including a religious association such as a church, to the degree that such involvement is accompanied by the Constitution’s staunch support of the awarding of a high level of autonomy to such spaces (also bearing in mind the need to apply constitutional scrutiny where, for example, substantive harm may have taken place). This autonomy to be awarded to religious associations is aligned with the courts’ adherence to the principle of avoidance of doctrinal entanglement explained above, a principle that remains applicable to *Gaum* even though the church was divided in its interpretation of the Bible regarding matters related to conduct regarding sexual orientation (as reflected in both the 2015 and 2016 decisions). That the

<sup>54</sup> Rogers M. Smith, “‘Equal’ Treatment? A Liberal Separationist View,” in *Equal Treatment of Religion in a Pluralistic Society*, ed. Stephen V. Monsma and J. Christopher Soper (Grand Rapids: Eerdmans, 1998), 179–99, at 193 (quoted approvingly by Galston, *The Practice of Liberal Pluralism*, 68).

<sup>55</sup> 1998 (1) SA 6 (CC) (South Africa), para. 132.

<sup>56</sup> Van der Vyver, “Constitutional Protections and Limits to Religious Freedom,” 122.

<sup>57</sup> Carter, *Culture of Disbelief*, 142.

<sup>58</sup> *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, 2015 SA 35 (CC) (South Africa), para. 79 (my emphasis).

<sup>59</sup> *De Lange*, 2015 SA 35, para. 83 (my emphasis).



South African Constitutional Court is supportive towards the protection of autonomy of religious associations more specifically, the protection of the permissible parameters of conduct regarding sexual orientation set by the central tenets of a religious association, is confirmed by Justice Sachs' reference, in *Fourie*, to Justice Cameron's view in the Supreme Court of Appeal's judgment of *Fourie*<sup>60</sup> namely, that the legal extension of the common-law definition of marriage does not compel religious associations or the leadership of such associations to approve or perform same-sex marriages.<sup>61</sup>

It therefore stands to reason that the protection of the autonomy of religious associations enjoys support in the principle of avoidance of doctrinal entanglement, which in turn accords with both the importance of the right to freedom of religion in an associational context and the furtherance of diversity. Implied in all of this are the law's limitations. How the autonomy of religious associations relates to determinations regarding equality and unfair discrimination is investigated next, also against the background of a critical analysis of *Gaum's* approach in this regard.

### Equality as a Religious Right

Robert Fastiggi comments that, "The principles of equality and non-discrimination have become more complex in recent years because they are being extended to *behaviors* and *lifestyles* and not merely to persons."<sup>62</sup> These behaviors and lifestyles, such as conduct regarding sexual orientation, constitute matters of fundamental moral importance and the grave concern here is that equality is too readily initiated to refute religious convictions on these matters. Carter comments, "Religions are in effect independent centers of power, with bona fide claims on the allegiance of their members, claims that exist alongside, are not identical to, and will sometimes trump the claims to obedience that the state makes. A religion speaks to its members in a voice different from that of the state, and when that voice moves the faithful to action, a religion may act as a counterweight to the authority of the state."<sup>63</sup>

This "voice" that Carter refers to also applies to views on equality in matters related to permissible bounds of conduct regarding sexual orientation. Determinations on whether the right to equality has been violated span a wide range of moral assessments. In this regard, John Inazu points to the example of the integration of transgender students at a school with reference to the sharing of bathrooms and inclusion in sports teams, which gives rise to the following questions: Would the exclusion of transgender students from athletic teams result in unequal treatment of those students or would their inclusion be to the disadvantage of the

<sup>60</sup> *Fourie and Another v. Minister of Home Affairs and Another*, [2004] 3 SCA 429 (South Africa).

<sup>61</sup> *Fourie*, 2006 (1) SA 524, para. 20. Implied in this is the understanding that the views of the religious regarding acceptable forms of conduct regarding sexual orientation (and views on marriage) that differ from other views should not be labeled in a derogatory manner. In this regard, Justice Sachs refers to Justice Ackermann's view in *National Coalition for Gay and Lesbian Equality*, where Justice Ackermann writes: "The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law." *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 (1) SA 6 (CC) (South Africa), para. 38. See also Justice Sachs's comment in *Fourie*, 2006 (1) SA 524 (CC), para. 98. For a similar view, see Justice Kennedy's comment in *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015).

<sup>62</sup> Robert L. Fastiggi, "Human Equality and Non-discrimination in Light of Catholic Theology and Magisterial Teachings," in *Equality and Non-discrimination: Catholic Roots, Current Challenges*, ed. Jane F. Adolphe, Robert L. Fastiggi, and Michael A. Vacca (Eugene: Pickwick, 2019), 1–11, at 5 (my emphasis).

<sup>63</sup> Carter, *Culture of Disbelief*, 35.

other student athletes? Would the establishment of a separate bathroom for transgender students provide sufficient accommodation or would allowing transgender students in all bathrooms be more aligned with equality? Would allowing transgender students in all bathrooms constitute equal treatment of a conservative Muslim student who chose the school mainly for the security of an all-women's environment?<sup>64</sup> Calling upon an unspecified notion of equality eludes an answer to these questions,<sup>65</sup> an insight aligned with Peter Westen's observation of equality as derivative by nature.<sup>66</sup> John Safranek similarly observes that the principle of equality cannot generate the standard when describing two objects as equal; the stipulation of the standard precedes the finding of equality.<sup>67</sup>

This derivative element accompanying the application of equality; this standard to be applied when describing two objects as equal (and therefore assisting in the determination whether unfair discrimination has taken place), hinges on foundational beliefs (and concomitant moral convictions), whether religious or nonreligious. In this regard, the concept of marriage serves as an apt example, which closely relates to views on the permissible bounds of conduct regarding sexual orientation. To argue, for example, that excluding same-sex relationships from the meaning of marriage where heterosexual couples may well qualify for marriage results in a violation of equality (and consequent unfair discrimination) fails to recognize that the standards applied in what type of relationships should and should not be included under the meaning of marriage, may be different. Therefore, where the standards differ related to a concept such as marriage, there can be no level surface on which both groups can be judged to have been treated in an unequal manner (and therefore that there was unfair discrimination). Equality as such cannot answer the question whether, for example, marriage should include relationships between same-sex couples in addition to relationships between a man and a woman, because it cannot tell us whether they are relevantly similar.<sup>68</sup> Rather, what is employed to make such a determination are the criteria that provide marriage with a specific meaning and these criteria are molded by the foundational beliefs of the individual (also in an associational context); beliefs, whether religious or nonreligious, that lay the basis for fundamental moral claims.

Agreement on all the criteria that should govern an understanding of marriage is not always possible due to the different lists of governing criteria related to marriage; criteria that are set by individuals and groups of individuals sharing the same moral convictions (such as members of a church). A description of marriage as, for example, a "comprehensive union—a union of will (by consent) and body (by sexual union); inherently ordered to procreation and thus the broad sharing of family life; and calling for permanent and

<sup>64</sup> John Inazu, *Confident Pluralism. Surviving and Thriving through Deep Diversity* (Chicago: University of Chicago Press, 2016), 31. It could also be asked whether the aforementioned questions are at all relevant to a private religious school that is pressured by the civil authorities to accommodate transgenderism and where the central tenets held by such a school prohibit such accommodation.

<sup>65</sup> Inazu, *Confident Pluralism*, 31. Similarly, John Gray comments that the ideals of equality differ from one another because they filter different human interests as being most important for well-being and therefore, incompatible principles of equality serve conflicting conceptions of the good. John Gray, *Two Faces of Liberalism* (New York: New Press, 2000), 90. See also Gray, *Two Faces of Liberalism*, 91–92. Steven Smith comments, "The notion of 'equality' cannot carry us far toward any particular resolution. If there is a sincere disagreement about, say whether same-sex marriage should be legalized, then insisting on 'equality' is merely a distraction ... More generally, when we observe an advocate placing a great deal of weight in 'equality,' we have cause to suspect that something sneaky is going on." Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA: Harvard University Press, 2010), 30.

<sup>66</sup> Peter Westen, "The Empty Idea of Equality," *Harvard Law Review* 95, no. 3 (1982): 537–96, at 592. According to Westen, "equality is an entirely formal concept: it is a 'form' for stating moral and legal propositions whose substance originates elsewhere." Westen, "The Empty Idea of Equality," 577. See also Westen, 548, 560.

<sup>67</sup> John Safranek, *The Myth of Liberalism* (Washington, DC: Catholic University of America Press, 2015), 52.

<sup>68</sup> Safranek, *The Myth of Liberalism*, 55.

exclusive commitment, whatever the spouses' preferences,"<sup>69</sup> points to a list of criteria governing what marriage should mean. This differs from a list of governing criteria that includes, for example, the accommodation of same-sex couples under the banner of marriage (even though some criteria may overlap). Therefore, both these lists cannot form part of a unified standard by which to measure whether unequal treatment has taken place—in order to determine whether unequal treatment has taken place, a comparison between that which is the same is required and where the lists of governing criteria pertaining to a specific moral matter are different, there cannot be a comparison of the same and a consequent determination whether unfair discrimination has taken place.

A violation of the right to equality takes place where, for example, a minister in a religious association that holds a central doctrine supportive towards the meaning of marriage as "a comprehensive union inherently ordered to procreation and calling for permanent and exclusive commitment," refuses to solemnize such a marriage due to the race of the couple or the race of one of the persons in the relationship. In this regard, the agreed upon view on marriage in no manner excludes specific races from the meaning of marriage. Therefore, where race is proffered as a reason for not solemnizing a marriage, as in the example above, those who qualify for marriage in accordance with the aforementioned agreed-upon meaning of marriage are being treated in an unequal manner by the minister who refuses to solemnize a marriage on the grounds of race, thereby resulting in unfair discrimination. A religious association that prohibits the solemnizing of marriages of same-sex couples relies on an understanding of marriage that differs from those who view same-sex couples as qualifying for marriage; and, therefore, to aver that such a religious association is violating the right to equality and, consequently, unfairly discriminating against same-sex couples is nonsensical. Determining whether equality was violated requires a comparison of like cases—that is, cases that are on an equal footing with one another to begin with. In the aforementioned example of the prohibition of same sex marriages, the two differing views do not reflect like cases and therefore the claim that the right to equality was violated, is unpersuasive.<sup>70</sup> For example, "Laws that distinguish marriage from other bonds will always leave some arrangements out. You cannot prove an inch toward showing that marriage policy violates equality, without first showing what marriage is and why it should be recognized legally at all ... There is, in short, no direct line from the principle of equality to same-sex civil marriage. Equality requires treating like cases alike."<sup>71</sup>

According to Ahdar,<sup>72</sup> "By framing their debate in terms of equality, the protagonists fail to recognize that their real dispute is not about the equality or inequality of heterosexual and homosexual couples, but about the precise content of the prescriptive rules or criteria that ought to govern the treatment of opposite-sex and same-sex couples in a particular respect—in respect of the legal institution of marriage."<sup>73</sup>

<sup>69</sup> Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012), 6. For an elaboration on this meaning ascribed to marriage, see especially 23–36, 99–109.

<sup>70</sup> It is not only same-sex relationships that a doctrine of a religious association may oppose; such a doctrine may oppose a multitude of other types of relationships, among them polygynous, polyandrous, polyamorous relationships, and heterosexual relationships out of wedlock.

<sup>71</sup> Girgis, Anderson, and George, *What Is Marriage?*, 80–81.

<sup>72</sup> Paraphrasing Peter Westen, "The Meaning of Equality in Law, Science, Math, and Morals: A Reply," *Michigan Law Review* 81, no. 3 (1983): 604–63, at 610.

<sup>73</sup> Rex Ahdar, "The Empty Idea of Equality Meets the Unbearable Fullness of Religion," *Journal of Law, Religion and the State* 4, no. 2 (2016): 146–78, at 152. Steven Smith comments that, "The current egalitarian movement, campaigning under the question-begging slogan of 'marriage equality,' takes marriage as an existing, already formed institution or practice, and then seeks to negate one of the traditional features that has defined marriage—namely, the feature of being a relation between a man and a woman ... But if the secular egalitarians cannot tell us

The same applies to convictions regarding matters related to the permissible bounds of conduct pertaining to sexual orientation. The argument that a religious association that prohibits membership to persons in same-sex relationships is acting in a manner that violates the right to equality of persons in same-sex relationships (hereby constituting unfair discrimination), fails to recognize that such a dispute is not about equality of heterosexual and homosexual couples. Rather, it concerns the protection of the exact content of the moral view on what the limits should be of conduct regarding sexual orientation. In other words, a religious association's support (in accordance with its central tenets) of conduct regarding sexual orientation that is exclusively limited to persons within a marriage—where marriage, for example, means “a comprehensive union inherently ordered to procreation and calling for permanent and exclusive commitment”—constitutes a moral view that requires protection. The same is of relevance to a religious association that, for example, prohibits the solemnizing of marriages of same-sex couples in that here a moral view or conviction is also denoted.

The arbitrary use of equality to argue for same-sex couples' entitlement to marriage is illustrated in the reference to “marriage equality,” which popularly accompanies arguments in support of same-sex couples' entitlement to marriage. On closer inspection it is clear that to refer to *marriage equality* omits a recognized and agreed upon meaning of marriage, which is required before a reliance on *marriage equality* can be qualified. Therefore, to refer to *marriage equality* without there being a recognized and agreed upon meaning related to marriage is nonsensical. Michael Quinlan explains that when *equality* is added to the term *marriage* (to form *marriage equality*) the foundational question that must first be addressed is how the term marriage is being used. If the answer to this question is vague, the demands for *marriage equality* have no substantive content: “If there is no recognised meaning of the term ‘marriage’ when equality is being discussed in that context it is not possible to identify the nature of the equality with ‘marriage’ which is sought.”<sup>74</sup> The same applies to matters regarding the question as to what the permissible parameters should be pertaining to conduct related to sexual orientation. If there is vagueness as to what the permissible bounds of conduct regarding sexual orientation should be or where there are differences as to what such parameters should be, then it is impossible to identify the nature of the equality that is sought after.

Also, *Gaum's* weighing of the right to protection from discrimination based on sexual orientation with the right to freedom of religion is of concern. In this regard, the Court states that, “[o]n the one hand it's the conflict between the right of freedom of religion and the right not to be discriminated against based on sexual orientation.”<sup>75</sup> How can the right not to be discriminated against based on sexual orientation be prioritized above that of the right to freedom of religion when any specific view taken on conduct regarding sexual orientation reflects a certain moral conviction or foundational belief? This applies to the conviction or belief that calls for the accommodation of same-sex couples in a religious association whose central doctrines prohibit the granting of membership to such couples. Any prioritization of

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what marriage is, they do tell us (with unflinching gratitude) what marriage is not, or must not be: it must not be a relationship that has as an essential feature a union between a man and a woman.” Steven D. Smith, “Has Equality Replaced Christianity?,” *Law & Liberty*, July 11, 2014, <https://lawliberty.org/has-equality-replaced-christianity/>. This in itself is indicative of a moral view taken regarding the criteria to be considered pertaining to the treatment of opposite-sex and same-sex couples specifically related to what a legal understanding of marriage should look like.

<sup>74</sup> Michael Quinlan, “Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia,” *University of Notre Dame Australia Law Review*, no. 18 (2016): 71–123, at 83.

<sup>75</sup> *Gaum*, para. 23; see also, *Gaum*, para. 65.

permissible bounds related to conduct regarding sexual orientation over that proffered by a religious view is accompanied by some or other conviction in and of itself; and, therefore, sexual orientation as such cannot escape qualification through a foundational belief or moral conviction. Consequently, it is not about the right to freedom of religion versus the right to protection from unfair discrimination based on sexual orientation; rather, it is about religious beliefs (and attendant moral judgements) versus nonreligious beliefs (and attendant moral judgements) pertaining to acceptable forms of conduct regarding sexual orientation. According to Iain Benson,

[a] common way of describing recent challenges involving ‘equality’ is to put the favoured category, in recent years ‘sexual orientation,’ as *the* equality right then juxtapose it with something else—usually ‘religion’ so that the conflicts are inaccurately described as ‘between religion and equality’ when they are nothing of the sort. What is at issue is a *conflict within the category of equality itself*. But note this: in all regimes, religion is listed as an ‘equality’ right. This clever sleight of hand puts ... ‘religion’ in a defensive position when, in fact, it should be on an equal footing as *another ‘equality’ right itself*. When there is an ‘intra-equality’ conflict, the proper manner for analysis and resolution should involve a searching evaluation of context.<sup>76</sup>

A closer look at section 9(3) of the South African Constitution<sup>77</sup> shows that *religion* is listed alongside *sexual orientation*, which implies that both sexual orientation and religion may be pitted against one another. How sensical is this? Different views on the permissible boundaries for conduct related to sexual orientation emanate not only from religious beliefs but also from nonreligious beliefs; it is these beliefs that determine the accepted moral bounds of conduct related to sexual orientation in the first place. In this regard, sexual orientation is qualified by foundational beliefs (whether religious or nonreligious), and consequently, it is nonsensical to have sexual orientation and religion pitted against one another. For this same reason, it would also be absurd to pit sexual orientation against nonreligious belief, something that the South African Constitution (in section 9) fortunately does not do, which raises the question as to why religion is treated differently by the South African Constitution. The *South African Charter on Religious Rights and Freedoms*<sup>78</sup> is an example of a deeper, more nuanced understanding of equality: “WHEREAS *religious belief* may

<sup>76</sup> Iain T. Benson, “The Necessity for a Contextual Analysis for Equality and Non-discrimination,” in *Equality and Non-discrimination: Catholic Roots, Current Challenges*, ed. Jane F. Adolphe, Robert L. Fastiggi, and Michael A. Vacca (Eugene: Wipf and Stock, 2019), 63–75, at 67. This observation pertains to § 9 of the South African Constitution (see above, note 3). *Gaum* also insinuates the prioritization of constitutional rights over religious views, which misses the fact that constitutional rights in certain instances include religious rights: “it is wrong to then employ the religious sentiments of some as a guide to the constitutional rights of others,” *Gaum*, para. 78. Also, *Gaum*’s view that, “[t]he sacred is forced into the secular when there is prejudice to basic rights,” *Gaum*, para. 78, assumes that the secular is purged from foundational moral beliefs, which is most certainly not the case. In other words, it is not religion versus the secular, but religious beliefs versus nonreligious beliefs or a religious belief versus another religious belief regarding a specific moral issue.

<sup>77</sup> See above, note 3.

<sup>78</sup> The Charter was drafted and subsequently unveiled in 2008. It is the first charter of its kind in the world. In 2012, official recognition was petitioned to the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, a Chapter 9 Institution, and this document was drafted by representative religious organizations and individuals with the purpose of defining the freedoms, rights, and responsibilities of the citizens of South Africa and their relationship with the state regarding their various religious beliefs. See Iain T. Benson, “Religious Interfaith Work in Canada and South Africa with Particular Focus on the Drafting of a South African Charter of Religious Rights and Freedoms,” *HTS Teologiese Studies/Theological Studies* 69, no. 1 (2013): 1–13.

*deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationships in our lives and in society, and may therefore contribute to the common good.*"<sup>79</sup>

This points to religious belief as preceding and determining, amongst others, insights related to equality; in other words, it is not equality that primarily and substantively deepens religious belief, rather it is religion. The same applies to the prioritization of nonreligious belief in its relationship with equality where equality finds itself deepened by the specific nonreligious belief itself (whatever the moral issue at hand may be). Equality, says Ahdar, "is a singular concept, whereas religion is a shorthand term for an entire interconnected system of beliefs. Religion is an inherently rich or full concept, unlike equality."<sup>80</sup> Equality fails to inform as to what a good life or a good society should be comprised of.<sup>81</sup> Religion, on the other hand, informs what a good life or a good society should consist of. With the focus specifically on marriage, Steven Smith comments that equality is not capable of making marriage; rather, "[m]arriage is the creation of human nature and need, rather, or culture and tradition, or perhaps of religion, or some mixture thereof."<sup>82</sup> The same applies to permissible forms of conduct regarding sexual orientation.

What the permissible parameters should be pertaining to conduct related to sexual orientation differs from person to person, and religious associations also find themselves loyal to specific views in this regard, views that clash in many instances with views external to such associations. These differences in views have important implications for the application of equality because a determination on the violation of equality or whether unfair discrimination has taken place rests on agreement on the criteria regarding what the permissible boundaries should be for conduct regarding sexual orientation. Such criteria, in turn, hinge on foundational beliefs whether religious or nonreligious. The voice that emanates from a religious association on what conduct related to sexual orientation should be allowed, therefore, says something different in the determination whether the right to equality has been violated or whether unfair discrimination has taken place when compared to certain voices from outside a religious association pertaining to the same matter (also bearing in mind that there may be many voices outside of the religious association that are in agreement with those of the religious association regarding a specific moral matter). It is not for the voices on the outside (including the civil authorities and the judiciary) to dictate to religious associations on what the acceptable parameters should be for conduct regarding sexual orientation. In other words, religion's equality related to important moral matters such as those related to the permissible bounds of conduct regarding sexual orientation also requires protection. Irrespective of

<sup>79</sup> South African Charter of Religious Rights and Freedoms, preamble, para. 7 (my emphasis).

<sup>80</sup> Ahdar, "The Empty Idea of Equality Meets the Unbearable Fullness of Religion," 160. According to Michael McConnell, "Religion is an institution, a worldview, a set of personal loyalties and a locus of community, an aspect of identity and a connection to the transcendent. Other parts of human life may serve one or more of these functions, but none other serves them all." Cited in Ahdar, "The Empty Idea of Equality Meets the Unbearable Fullness of Religion," 160. Stephen Carter states, "Religion is not like any other human activity. Religion proposes a transcendence, the existence of a greater reality. Religion stretches the soul in a direction that nothing else does—the direction of considering the purpose of human existence. In particular, the Western religious traditions, by positing that we have been created by God, propose that our lives belong to God, not to ourselves. This understanding in turn generates propositions about what we should and should not value." Stephen L. Carter, *Civility: Manners, Morals, and the Etiquette of Democracy* (New York: Basic Books, 1998), 260.

<sup>81</sup> Smith, "Has Equality Replaced Christianity?"

<sup>82</sup> Smith.



*Gaum* having taken due cognizance of the importance and relevance of the avoidance of doctrinal entanglement principle,<sup>83</sup> *Gaum* proclaims that a religious association should give heed to the voice of the Court on matters related to an understanding and application of equality in the context of the permissible bounds of conduct regarding sexual orientation, which signifies the enforcement and prioritization of the Court's view on what the parameters should be regarding permissible forms of conduct related to sexual orientation.

## Conclusion

*Gaum* heralds cause for concern for the protection of the autonomy of religious associations, an approach that is in contrast to the avoidance of doctrinal entanglement principle. Courts in many liberal democracies remain committed to this principle and the comfort for the South African context is that, although the Constitutional Court has not been confronted with questions related to the status of religious associations against the background of a claim that unfair discrimination has taken place based on sexual orientation, the Supreme Court of Appeal remains supportive toward this principle.<sup>84</sup> Included in *Gaum*'s handling of the concept of equality and the determination of unfair discrimination is a violation of the avoidance of doctrinal entanglement principle. This calls for a critical response due to the concerns that meanings arising from the religious regarding substantive moral issues will be neglected where a determination needs to be made whether the right to equality has been violated. The reliance on equality in trying to qualify some or other moral view says Peter Westen, "gives an aura of revealed truth to whatever substantive values it happens to incorporate by reference."<sup>85</sup> Consequently, values that are bolstered by means of equality tend to be viewed as being, morally and legally speaking, of more weight than is deserved when tested on their merits.<sup>86</sup> The concept of equality remains attractive for an easy promotion of views that oppose the protection of autonomy of religious associations that in turn gives the law free passage to dictate to communities what the moral view should be, which consequently threatens the promotion of diversity.

Mere claims that unequal treatment has taken place need to be cautioned against where there are substantive differences in moral views on the permissible parameters regarding conduct related to sexual orientation. *Gaum* approached equality and, consequently, unfair discrimination, from a subjective, uninformed, and unconvincing angle. According to *Gaum*, the views included in the 2016 decision that same-sex relationships should not form part of mainstream church ceremonies and that a person in a same-sex relationship may not be a minister in the church, diminished the applicant's dignity to such an extent that there was a violation of equality resulting in the taking place of unfair discrimination. *Gaum* thus professes, through the guise of equality, a specific view on the permissible boundaries

<sup>83</sup> See, for example, *Gaum*, paras. 26–29. The Court was also reminded of this in the amicus brief submitted by the Alliance Defending the Autonomy of Churches in South Africa para. 83. See also, *Gaum*, paras. 88–89.

<sup>84</sup> See *De Lange* [2014] SCA, 151.

<sup>85</sup> Peter Westen, "The Empty Idea of Equality," 593.

<sup>86</sup> Westen, "The Empty Idea of Equality," 593. As Westen writes elsewhere, "We become so accustomed to talking about equality in contexts in which the standards of measure are taken for granted (e.g., the way 'number' is implicitly taken as the standard for measuring equalities in arithmetic), that we tend to leave the standards of measure unspecified; and we become so accustomed to leaving the standards of equalities unspecified that we tend to forget that equalities presuppose standards." Peter Westen, "To Lure the Tarantula from Its Hole: A Response," *Columbia Law Review* 83, no. 5 (1983): 1186–1208, at 1189.

regarding conduct related to sexual orientation that should permeate religious associations, hereby placing into question the avoidance of doctrinal entanglement principle.<sup>87</sup> *Gaum's* approach to equality confirms the exclusion of religion, and surely this does not bode well for the development of a more nuanced understanding of the application of equality, the protection of freedom of religion, and the advancement of diversity.<sup>88</sup>

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<sup>87</sup> To argue that the 2015 decision taken by the church constitutes the official decision and stance of the church and not the 2016 decision, and therefore, that *Gaum* does not counter the doctrinal view of the church, makes no difference to the fact that *Gaum* proclaims a certain moral view on the permissible bounds of conduct regarding sexual orientation and that, therefore, it becomes entangled with matters related to essential doctrine, which is not the customary approach taken by the judiciary in such matters.

<sup>88</sup> Added to this concern is that according to *Gaum* the church as a whole (across all its congregations) must allow practicing homosexuals to be ministers in the church and to marry in the church. Consequently, *Gaum's* findings are significantly broader than the 2015 decision, which provided individual congregations the choice to decide this issue for themselves.