Sexual Orientation at the Crossroads

Johan D. van der Vyver
SEXUAL ORIENTATION AT THE CROSSROADS

By: Johan D. van der Vyver*

ABSTRACT

The decision of the U.S. Supreme Court in the case of Bostock v. Clayton County that sexual orientation is included in the concept of “sex” in the non-discrimination provisions of the Civil Rights Act of 1964 is historically indefensible. The Civil Rights Act was initiated by President John F. Kennedy to combat racial discrimination in the workplace and the word “sex” was included in the Act by a “claque of Southern Congressmen” as part of a filibuster attempt to prevent its enactment. It was accepted by proponents of the Act on the instructions of President Johnson merely to avoid the filibuster. No one in his or her right mind believed in the 1960s that women, let alone members of the LGBT community, should be treated equally in labor relations. However, prohibiting discrimination based on sexual orientation can have a great influence on the trend in the United States to treat LGBT as “normal and natural, satisfying and right.”
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INTRODUCTION

In 1971, I was a visiting scholar at the Center for the Study of Human Rights of Columbia University in New York to conduct research for my dissertation on *The Juridical Meaning of the Doctrine of Human Rights* for the Doctor of Laws degree of the University of Pretoria in South Africa. When I introduced myself to Professor Louis Henkin (1917-2010), for many years chair of the Center, and explained to him the focus of my research, he placed into my hands a document, saying: “If you want to know what human rights are all about, you should read this document.” The document was a pre-publication copy of the judgment of the U.S. Supreme Court in the case of *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971)—the very first judgment that upheld the provision in Chapter VII of the Civil Rights Act of 1964 which prohibits discrimination in employment practices based on “sex”.¹

The word “sex” was not included in the original text of the Civil Rights Act, but its inclusion was proposed by Congressman Howard Smith (1883-1976) of Virginia as part of attempts by what came to be designated as “a claque of Southern Congressmen” to filibuster the enactment of the Civil Rights Act. No one in their right mind could in the 1960s possibly conceive that men and women should be treated equally in the workplace. However, proponents of the Act accepted this amendment simply to counteract the filibuster. Neither the proponents of, nor the opposers to, the Civil Rights Act were

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concerned with the principle of gender equality. But then, following the judgment of the U.S. Supreme Court in *Phillips v. Martin Marietta Corporation*, the Women’s Liberation Movement gained tremendous momentum in the United States—in spite of the fact that the United States is one of only six countries in the world that have not ratified the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979.

All of the above came back to my mind when I read the judgment of the U.S. Supreme Court delivered on June 15, 2020, in the case of *Bostock v. Clayton County* (590 U.S. —) in which a six to three majority decided that discrimination based on sexual orientation is prohibited by the reference to “sex” in the non-discrimination provision in the Civil Rights Act of 1964. The thought that crossed my mind was that this judgment might have the same long-term advantages for members of the LGBT (lesbian, gay, bisexual, and transgender) community as *Phillips v. Martin Marietta Corporation* many years ago had for the promotion of gender equality in a wide range of human rights concerns. Is it possible, for example, that under the influence of *Bostock v. Clayton County* sexual orientation will be included in the condemnation in international criminal law of gender-based crimes?

In this essay, I will outline the history of the Civil Rights Act of 1964 with emphasis on the inclusion of “sex” in the non-discrimination provision in Chapter VII of the Act. I will thereupon consider the reasoning in *Bostock v. Clayton County* for finding that sexual orientation is included in the concept of “sex” in the non-discrimination provision of the Civil Rights Act of 1964. This then will bring us to the question whether sexual orientation might be included in the provisions of international criminal law that prohibit offences based on the “gender” of the victim. A perspective of commendable developments in South African constitutional law is thereupon called for. A pertinent question to be considered is whether the contribution in this regard of prominent personalities in the realm of religion will eventually influence the prevailing negative assessments of LGBT in the mindset of a cross-section of people of the world.
THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1964 was a brainchild of the late President John F. Kennedy (1917-1963) for the purpose of eliminating racial discrimination in the United States. The Act was the outcome of proposals put forward by President Kennedy in a message to Congress on February 28, 1963, which proposals were repeated and elaborated in a second message to Congress on June 19 of the same year. President Kennedy outlined a number of desegregation and non-discriminatory measures which he thought should be contained in the Civil Rights Act, such as the elimination of discrimination in voting rights, the enforcement of desegregation of schools, and the banning of racial discrimination in public facilities. In his second message, the President specifically mentioned the necessity of a ban on racial discrimination in employment, but never for a moment did concerns relating to gender discrimination enter into the discussions—at least not until the closing stages of the actual debate on the bill in the House of Representatives when Representative Howard Smith of Virginia (Democratic Party) insisted on an amendment of the original draft to include a prohibition of sex discrimination in employment.

President Kennedy had established an Equal Employment Opportunity Commission on March 6, 1961, to ensure that Americans of all races and beliefs would have equal access to employment by

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4 See Leo Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 HASTINGS L. REV. 305 (1968); Jo Freeman, How ‘Sex’ Got into Title VII. Persistent Opportunism as a Maker of Public Policy, 9(2) L. & INEQUALITY: J. OF THEORY & PRAC. 163 (March 1991).
the government and governmental contractors. A subsequent Commission was created by President Lyndon Johnson (1909-1973) on September 24, 1965, under section 705 of the Civil Rights Act of 1964, with the power to investigate allegations of discrimination on the grounds mentioned in section 703 of the Act. Section 703 in its final form provided in part:

(a) It shall be unlawful employment practice for an employer—
   (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

“Sex” was not included in the original draft of this provision but including it in the non-discrimination provisions was part of a strategy to obstruct the enactment of the Civil Rights Act.

Enactment of the Civil Rights Act was strongly opposed by the “claque of Southern Congressman” who did their utmost to filibuster the proceedings by proposing endless amendments to the Act in the hope that lengthy debates on those amendments would consume the time constraints for the enactment of the Act. Eighteen Senators from both sides of the aisle, under the leadership of Senator Richard Russell Jr. (1897-1971) of Georgia, representing all Southern States except Tennessee and Texas, organized the longest filibuster in the history of the Senate. Four hundred and eighty-three amendments were proposed, over a hundred of which were voted on, but only one was adopted—one that related to the problem of double jeopardy by being tried for both a crime and criminal contempt based on the same

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5 Exec. Order No. 10925 of March 6, 1961.
act.\(^8\)

The opposition to the Act was concerned with the policy of race relations and not with sex equality in employment. However, President Lyndon B. Johnson, who succeeded President Kennedy following Kennedy’s assassination on November 22, 1963, was equally committed for the Act to be adopted within the prescribed timeframe in memory of President Kennedy. Proponents of the Act in the end simply accepted without question the proposed amendments so as to avoid time-consuming debates on those amendments. And then opponents of the Act came up with an ingenious proposal launched in the House of Representatives by Howard Smith of Virginia: add the word “sex” to the grounds of unlawful discrimination in employment practices. Within the legal mindset of the 1960s no one could possibly accept the notion of non-discrimination based on sex in labor relations. However, proponents of the Act again simply accepted the amendment for no other reason than to counteract the filibuster attempt.

The simple fact is that the inclusion of “sex” in the non-discrimination provision of Chapter VII of the Civil Rights Act was not in the least inspired by concerns for gender equality in employment practices but was exclusively a filibuster strategy. In the mindset of a bulk of the population in the 1960s women had an inferior status in life and the idea of including “sex” in the non-discrimination provision in the mindset of Howard Smith and the *claque* of Southern Congressmen was so outrageous that it could not possibly be accepted by proponents of the Civil Rights Act; and the bulk of those who wanted the Civil Rights Act to be adopted accepted its inclusion simply to counteract the attempted filibuster.\(^9\)

It is important to note that “sex” in this context was exclusively designated to denote being a man or a woman. The provision was first applied successfully in the case of *Phillips v. Martin Marietta*

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\(^8\) See generally 42 U.S.C., § 2000b-1; Van der Vyver, *supra* note 1, at 343.

\(^9\) See Van der Vyver, *supra* note 1, at 343-44.
Corporation, 400 U.S. 542 (1971) when an employer would not consider the application for employment of a woman with pre-school age children while the very same employer did not disqualify men with pre-school age children.\(^\text{10}\) Earlier, in Cooper v. Delta Airlines Inc., firing an air assistant because she got married was not regarded as a violation of the Civil Rights Act because the employer distinguished between a married and unmarried female employee and not between a married woman and a married man.\(^\text{11}\) However, the decision of the U.S. Supreme Court in Phillips v. Martin Marietta Corporation became a viable tool for promoting gender equality in the United States.

**JUDGMENT OF THE U.S. SUPREME COURT IN BOSTOCK V. CLAYTON COUNTY**

The judgment of the U.S. Supreme Court in the case of Bostock v. Clayton County, 140 S. Ct. 1731, decided on June 15, 2020, relating to non-discrimination based on sexual orientation in employment practices, is, to say the least, quite controversial but has been applauded by many who champion the legal protection of LGBT individuals. The 6 to 3 majority decision was essentially focused on the question whether or not sexual orientation is included in the concept of “sex” within the confines of the provision in Chapter VII of the Civil Rights Act of 1964, which—as noted above—prohibits “discrimination against any individual . . . because of such individual’s . . . sex.” Is sexual orientation included in the concept of sex as envisioned way back in 1964 by drafters of the Civil Rights Act? Must “sex” in this context be interpreted as it was perceived in 1964 or must it be applied with a view to contemporary understanding of the term? Whereas the majority decision was based on the contemporary understanding of the concept of “sex”, the dissenting judges preferred

\(^{10}\) Phillips v. Martin Marietta Corporation, 400 U.S. 542, 543 (1971).

the meaning of “sex” within the mindset in 1964 of drafters of the Civil Rights Act.

Actually, *Bostock v. Clayton County* was based on three distinct cases in which a person was dismissed from employment because of his or her sexual orientation. In the first of these cases, Clayton County, Georgia fired Gerald Bostock, a child welfare advocate in the County, for “unbecoming conduct” after he began participating in a gay recreational softball league. Altitude Express terminated the employment of Donald Zarda as a sky-diving instructor days after he mentioned that he was gay. R.G. & H.R. Harris Funeral Homes dismissed Aimee Stephens who was assigned male at birth and for that reason was instructed by the employer to dress as a man. However, Aimee (her birth-name remained a secret) turned out to be a lesbian, she was married to Donna Stephens in a same-sex marriage for twenty years, and finally informed her employer that she planned to “live and work full-time as a woman”. This prompted her dismissal since the employer insisted that its employees would wear business attire at work dictated by the gender they had been biologically assigned at birth. These three cases provoked litigation contesting the dismissal of the persons concerned as instances of discrimination based on “sex” in violation of Section 703 of the Civil Rights Act of 1964. The three cases were subsequently dealt with jointly by the U.S. Supreme Court in *Bostock v. Clayton County*.

Little attention was given in the judgment to the history of inserting “sex” in the non-discrimination provision of the Civil Rights Act of 1964. The majority in *Bostock* discarded the history of inserting “sex” in the Civil Rights Act on the basis of the assumption that legislative history can only be taken into account “to clear up ambiguity, not to create it”, or that “legislative history can never defeat unambiguous statutory text”. The dissenting opinion of Alito, J., joined by Thomas, J., was based on the fact that “sex” in Title VII of

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the Civil Rights Act denotes “biologically male and female” and that the proscription of discrimination does not apply to a person “being sexually attracted to members of the same sex” or who “identifies as a member of a particular gender.” They decided that “sex”, “sexual orientation” and “gender identity” are different concepts and that at the time Title VII of the Civil Rights Act was enacted, “sex” was understood to refer to men and women. Quite compelling is the dissenting judgment of Kavanaugh, J. who outlined an impressive list of proposed statutory provisions relating to sexual orientation, and judgments of the past in which it was held that Chapter VII does not prohibit discrimination based on sexual orientation. Extending the non-discrimination provisions of Title VII to include sexual orientation should be entrusted to Congress within the confines of the separation of powers and must not be imposed by the judiciary.

It is perhaps interesting to note that the vocabulary used in *Bostock v. Clayton County* has been introduced by drafters of the Constitution of the Republic of South Africa in 1996. The South African Constitution was the first in the world to provide constitutional protection to LGBT persons by including sexual orientation in its list of prohibited grounds of discrimination, and the sixth country to legalize same-sex marriages. Its inclusion in the Constitution was indeed quite controversial. When a proposal was submitted to the Constitutional Assembly, which drafted the post-apartheid Constitution, there was strong opposition to the inclusion of sexual orientation in the non-discrimination provision in certain, mostly religiously inspired, groups. Members of the groups proposed that Archbishop Desmond Tutu (1931-2021), head of the Anglican Church in South Africa, be invited to make a public statement—thinking that Archbishop Tutu as a theologian will come out against

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13 *Id.* at 1737 (see Kavanaugh, J., dissenting at I).
14 *Id.* at 1738 (see Kavanaugh, J., dissenting at II).
15 *Const. of the Republic of S. Afr, § 9(3) (1996)*.
its inclusion in the non-discrimination provision. However, Archbishop Tutu responded by saying: “South Africa has a history of discrimination. In the ‘New South Africa’ there will be no discrimination at all on any grounds.”

It was thereupon decided to include “sexual orientation” in the equal protection provisions of Section 9(3) of the Constitution. The terminology was also in dispute. The original proposal referred to “sexual preference”. However, it was pointed out that “sexual preference” might also apply to persons practicing bestiality, and so the wording was changed to “sexual orientation”.

**SEXUAL ORIENTATION IN INTERNATIONAL CRIMINAL LAW**

An outstanding feature of the Conference of Diplomatic Plenipotentiaries for an International Criminal Court that was held in Rome on June 15 through July 17, 1998, was the inclusion in the Statute of the International Criminal Court (ICC Statute) of an impressive list of gender-based crimes. This came about as consequence of the tireless efforts of the Women’s Caucus for Gender Justice in the NGO Coalition for an International Criminal Court to include distinct gender-based crimes in the subject-matter jurisdiction of the ICC and to define those crimes in detail and with precision. Its efforts culminated in the inclusion in the ICC Statute of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes.

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against humanity,\textsuperscript{19} and also as war crimes committed in an international armed conflict,\textsuperscript{20} and as war crimes committed in an armed conflict not of an international character.\textsuperscript{21}

The concept of “gender” also featured prominently in the definition of persecution. The ICC Statute identifies, as a crime against humanity:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . ., or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.\textsuperscript{22}

“By adding the ground of gender to the crime of persecution,” said Cate Steains, “the Rome Statute represents an important step toward ensuring that gender-based persecution . . . receives greater attention in future.”\textsuperscript{23}

Initially, the terms “sex” and “gender” were used interchangeably. However, towards the end of the previous century, these two concepts came to be clearly distinguished. In the 1996 \textit{Report of the Secretary-General on Integrating the Human Rights of Women Throughout the United Nations System}, the following definition appears:

As sex refers to biologically determined differences between men and women that are universal, so

\begin{thebibliography}{19}
\bibitem{20} \textit{Id.} at art. 8(2)(b)(xxii).
\bibitem{21} \textit{Id.} at art. 8(2)(e)(vi).
\bibitem{22} \textit{Id.} at art. 7(1)(b).
\end{thebibliography}
gender refers to the social difference between men and women that are learned, changeable over time and have wide variations both within and between cultures. Gender is a socio-economic variable in the analysis of roles, responsibilities, constraints, opportunities and needs of men and women in any context. The use of the term “gender” as an analytical tool focuses not on women as an isolated group, but on the roles and needs of men and women. Given that women are usually in a disadvantaged position as compared to men of the same socio-economic level, promotion of gender equality usually means giving explicit attention to women’s needs, interests and perspectives.

Therefore, while “sex” denotes the physical and biological attributes of men and women, “gender” has come to denote the roles attributed to men and women within the social constructs of a religious, economic, or political community. Barbara Bedont defined “gender” in terms of “socially constructed differences between men and women which result in unequal power relationships.”

However, it was deliberately decided in Rome that “gender” for ICC purposes does not include sexual orientation. The inclusion of gender-based crimes in the ICC Statute provoked serious concerns of the delegation of the Holy See. Its obvious mission was to make sure that the definition of crimes within the jurisdiction of the ICC will not in any way implicate the principles adhered to by the Roman Catholic Church, and its great concerns included condemnation by

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the Church of (a) abortions, and (b) homosexuality. These concerns culminated in lengthy negotiations with the Women’s Caucus for Gender Justice to secure the support for the ICC of countries with a predominantly Catholic population. Reference in the ICC Statute to forced pregnancy could implicate the condemnation of abortions by the Roman Catholic Church, and in order to overcome this obstacle a provision was inserted in the ICC Statute that provides:

“Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. The definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”

In order to avoid sexual orientation to be included in the concept of gender, the ICC Statute defined “gender” as “the two sexes, male and female, within the context of society,” adding that “[t]he term ‘gender’ does not indicate any meaning different from the above.” The definition of “gender” was carefully crafted in negotiations behind the scenes with the Holy See (and perhaps some other delegations) in order to ensure that gays and lesbians will not come within

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29 Rome Statute, supra note 19, at art. 7(2)(f).

the enumerated groups protected against acts that constitute gender-specific crimes.\textsuperscript{31}

It is to be hoped that efforts to exclude members of the LGBT community as victims of gender-specific crimes will not prevail. Even within the wording of the definition of “gender”, discriminatory action against persons because of their sexual orientation derives as much from a gender-based prejudice as does discrimination against women because of their sex, and because the negotiations referred to never occurred openly or in official conference debates, there is actually no recorded “legislative history” that could prompt a different interpretation. Nothing can be said for not regarding criminal action against persons because of their sexual orientation to be admissible for prosecution in the International Criminal Court (ICC).

It is perhaps worth noting that the Roman Catholic Church—the driving force behind the exclusion of sexual orientation from gender-based crimes within the jurisdiction of the ICC—is seemingly also on a path of reform. In 2018, Pope Francis, in a meeting with a group of gay men said to a man, “God made you that way and loves you.” This statement has been struck off the record since it was regarded as embarrassing for the Church, but the Pope did say the same to a gay man from Chile who was visiting the Vatican.\textsuperscript{32} The Church did subsequently confirm its condemnation of same-sex marriages.

\textbf{A SOUTH AFRICAN PERSPECTIVE}

Including sexual orientation in the equal protection provisions


of the Constitution of the Republic of South Africa, 1996 has had far-reaching consequences.

Prior to the political change in that country, courts of law regarded homosexuality as quite unbecoming. A case that comes to mind is a judgment of the Witwatersrand Local Division of the High Court (as it is now called) in the case of Van Rooyen v. Van Rooyen centered upon the following facts: the Applicant and the Respondent had been married and had two children. Upon their divorce, custody of the children was awarded to the father. The mother subsequently engaged in a lesbian relationship and eventually shared her home, and her bedroom, with her same-sex companion. The father consequently began to place restrictions on the mother’s visiting rights and the mother, in the matter under consideration, brought an application to clarify her rights of access to the children—an eleven-year-old son and nine-year-old daughter. The Court, while proclaiming that the mother “can live in whatever way she likes” and that “the Court should try to respect and protect” her lifestyle, nevertheless felt constrained, with the interest of the children as its supreme guide, to impose restrictions upon the mother during the times when the children are within her custody so that they (the children) would not be exposed to “wrong signals” such as videos, photographs, articles and personal clothing (including male clothing) that might connote homosexuality and approval of lesbianism. If during weekend visitations the children were to sleep in their mother’s home, she may not share a bedroom with the lesbian companion, and when the children are there during school holidays, her companion may not “share the same residence and/or sleep under the same roof.” Responding to a report submitted to the Court claiming that homosexuality is no longer regarded as a mental illness

33 See generally Van Rooyen v. Van Rooyen, 2 SA 325 (S. Afr. 1994).
34 Id. at 329.
35 Id.
36 Id. at 332.
37 Id. at 331.
or sin, Judge Flemming stated that he accepts the mental illness bit, but “I would prefer the Heavenly Father to decide” whether homosexuality is a sin.\textsuperscript{38}

The judgment of Flemming, J. cannot possibly be upheld under the constitutional morality reflected in the non-discrimination ethos of the new South Africa. The interests of children are still the supreme consideration in any case concerning their well-being. However, distinctions founded on sexual orientation can no longer be taken to have a bearing on the interests of a child. If the evidence would today be presented to a court of law proclaiming that exposure of a child to an LGBT relationship might cause the child to develop homosexual tendencies, the proper response should be: “So What!”

South Africa has come a long way in eliminating discrimination based on sexual orientation. In a matter dealing with immigration law that facilitated the immigration into South Africa of spouses of permanent South African residents but not affording the same benefits to gays and lesbians in lasting same-sex partnerships with permanent South African residents, the Constitutional Court listed the following principles that must be applied in the country:

- Gays and lesbians have a constitutionally entrenched right to dignity and equality.
- Discrimination based on sexual orientation is unfair unless the contrary is established.
- Criminalization of private and consensual sexual expression between gays arising from their sexual orientation (sodomy) is unconstitutional.
- Gays and lesbians in same-sex relationships are as competent as heterosexual spouses of expressing their sharing love in its manifold forms, including affection, friendship, eros and charity.

\textsuperscript{38} Id. at 327.
• They may form intimate, permanent, committed, monogamous, loyal, enduring relationships, furnish emotional and spiritual support, and provide physical care, financial support and assistance in running the common household.
• They are individually able to adopt children and in the case of lesbians to bear them.
• They have the same ability to establish a *consortium omnis vitae* (a partnership in the whole life).
• They are competent to constituting a family, whether nuclear or extended, and of establishing or benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.  

It has accordingly been decided that the common-law definition of marriage as a union between one man and one woman is unconstitutional and the Constitutional Court therefore called on the legislature to legalize same-sex marriages, which it did.

Implementing these principles of non-discrimination are subject to basic principles of constitutional law, such as the principle of sphere sovereignty of non-state institutions within the confines of the law which is based on the Neo-Calvinistic doctrines of prominent Dutch philosophers, such as Groen van Prinsterer (1801-1876), Abraham Kuyper (1837-1920) and Herman Dooyeweerd (1894-1977). This means that the State will not interfere in the internal affairs of

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40 Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project v. Minister of Home Affairs, supra note 39.
41 No. 29441 Civil Union Act 17 of 2006; see also Elias Kifon Bongmba, Same-Sex Relations & Legal Traditions in Cameroon & South Africa, 1 J.L. & RELIGION 36, 139-143 (2021).
non-state organizations, including religious denominations.  

A case involving a religious institution that comes to mind is a judgment of the Witwatersrand Local Division of the High Court in the case of *Taylor v. Kurtstag*. The Plaintiff in the matter had been served a notice of excommunication (*cherem*) from the Orthodox Jewish Faith by a Jewish ecclesiastical court (*Beth Din*) and applied for the *cherem* to be set aside on the grounds that it violated his constitutional right to freedom of religion (Section 15(1) of the Constitution) and, as a component of the right to self-determination, the entitlement to practice his religion and maintain religious associations with fellow members of his faith (Section 31(1)(b) of the Constitution). That indeed was found to be the case, but the Court went on to consider the legality of those violations in view of the limitation provisions of the Constitution (Section 36). The Court noted that “[a] religious tribunal is subject to the discipline of the Constitution, but its being a religious body giving effect to the associational rights of its members, must be accounted for.” Having noted that “the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded,” and in the absence of evidence of bias or bad faith on the part of the *Beth Din*, the Court upheld the constitutionality of its *cherem*.

The Court also upheld the sphere sovereignty of a religious denomination in a case relating to the predicament of the Reverend Ecclesia de Lange, a minister of the Methodist Church of Southern Africa in Rondebosch, Cape Town. In December 2009, the Reverend De Lange entered into a same-sex union with Amanda van Aswegen. The Church, which does not condone same-sex marriages,

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43 It might be noted that national courts of law will set aside a disciplinarian decision of an ecclesiastical tribunal if such tribunal has not applied the internal rules of procedure of the particular religious denomination, or if it has not upheld basic principles of justice (notably the *audi alteram partem* rule).
45 *Id. at 397.*
46 *Id. at 396.*
suspended her in January 2010 from her post. De Lange attempted
to get her job back through internal church arbitration channels. A
disciplinary committee of the Church recommended that De Lange
“continue under suspension until such time as the Methodist Church
of Southern Africa makes a binding decision on ministers in same-
sex unions.” In a statement on Facebook and other websites, De
Lange proclaimed:

I desire to serve Jesus. I desire to be true to myself. I
desire to minister within the Methodist Church of
Southern Africa with integrity and be faithful to
God’s call on my life.
I have reached the point where I can no longer be si-
lent. I have come to see that it is better to be rejected
for who I am than to be accepted for who I am not.47

Ecclesia de Lange was eventually defrocked because of her same-
sex marriage. She thereupon brought action against the Church in
the Constitutional Court under Article 9(3) of the Constitution,
which prohibits discrimination based on sexual orientation. Her ap-
application was again unsuccessful,48 because on the basis of the prin-
ciple of sphere sovereignty, the decision of the Church must be up-
held by courts of law. She subsequently stated publicly that she
would no longer contest the decision of the Church.

In the context of this survey, it is important to note that Ecclesia
de Lange received support from Reverend Peter Storey, a former
Bishop of the Methodist Church in South Africa.49 In a sermon in
support of Ecclesia de Lange he proclaimed that the time has come

47 Shanaaz Eggington, Minister’s Allies Talk of Court Action, SUNDAY TIMES LIFESTYLE
48 De Lange v. Presiding Bishop of the Methodist Church of S. Afr. for the Time Being
& Another, 2 SA 1 (S. AFR. 2016).
49 His achievements included an appointment as Distinguished Professor of the Prac-
for the Methodist Church to state clearly what is right and what is wrong. Just like apartheid discriminated against people based on the color of their skin which they could not change, gays and lesbians are now being discriminated against based on their sexual orientation which they, too, cannot change.\textsuperscript{50}

Discrimination based on sexual orientation by a church institution was also an issue in the case of \textit{Strydom v. Dutch Reformed Congregation, Moreleta Park}, decided by the Equality Court, Transvaal Provincial Division on August 27, 2006.\textsuperscript{51} Johan Daniel Strydom was employed by the Moreleta Park congregation of the Dutch Reformed Church as a music instructor (organ teacher) in its Arts Academy. He was fired by the Church authorities because he became involved in a same-sex relationship with another man. Mr. Strydom challenged his dismissal before the Equality Court and was awarded compensation in the amount of R75,000 for pain and suffering and a further R11,000 for loss of income. The Reverend Dirkie van der Spuy of the Moreleta Park congregation testified that elders and deacons of the Church may be gay but are not allowed to practice homosexuality. The dismissal of Mr. Strydom, according to the Equality Court, amounted to unbecoming discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The Church did not take the matter on appeal.

The Equality Court based its decision mainly on the fact that Mr. Strydom (a) served as an independent contractor, (b) was in no way involved in the spiritual calling of the Church, and (c) was not even a member of the particular Dutch Reformed Church that employed him as an organ teacher. The Equality Court made it abundantly clear that it would not have ruled against the Church if Mr.


\textsuperscript{51} Strydom v. Nederduitse Gereformeerde Gemeente, Moreleta Park, 4 SA 510 (Equality Ct., TPA 2009).
Strydom’s contractual obligations included functions that were part of the spiritual mission of the Church.

**CONCLUDING OBSERVATIONS**

Elimination of discrimination based on sexual orientation, it is to be hoped, will be stimulated by the judgment of the U.S. Supreme Court in *Bostock v. Clayton County*. In the closing paragraph of his dissenting judgment in *Bostock v. Clayton County* Judge Kavanaugh acknowledged “the important victory achieved today by gay and lesbian Americans”, noting that “[t]hey have advanced powerful policy arguments and can take pride in today’s result.” The question remains whether the outcome of the case would spark the equal treatment of members of the LGBT community in the same way that *Phillips v. Martin Marietta Corporation* in the 1970s stimulated the women’s liberation movement in the mindset of a cross-section of the American legal community.

James Wilets pointed out that “to the extent societies are uncomfortable with homosexuality, it is usually because that activity is perceived as crossing gender, rather than sexual, boundaries.” He reminded us that “gay bashing” has become endemic throughout the world. A major obstacle to overcome in this regard is the opposition in mainstream religious communities to legal protection of homosexuality. Christy Green referred in this context to “the power of religion to shape narratives and understandings of sex and gender.”

It might be voices crying in the wilderness, but it is worth noting that prominent dignitaries in mainline churches have spoken out publicly in support of the homosexual and transgender community.

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53 Id. at 1002.
This included Archbishop Desmond Tutu of the Anglican Church in South Africa and—as we have seen—Reverend Peter Storey of the Methodist Church. And perhaps Pope Francis has also shed a drop in the ocean.

The problem under surveillance was perhaps more elaborately debated in the context of the status of persons who are infected with HIV. Here, too, there are voices calling in the dark not to regard the AIDS community as persons with a disability but to treat them as a distinct group with a right to non-discrimination.

As far as the United States is concerned one might note, besides the judgment in Bostock v. Clayton County, the decision of the U.S. Supreme Court in Obergefell v. Hodges in which a bare majority of five against four decided that the fundamental right to marry is guaranteed to same-sex couples by the Due Process and the Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. President Barack Obama referred to the judgment as “a victory for American democracy.”

However, the recent judgment of the U.S. Supreme Court in Dobbs v. Jackson Women’s Health Organization, 597 U.S. — (2022), decided on June 24, 2022, which upheld the ban on abortions in the State of Mississippi, is indicative of a trend in the U.S. Supreme Court that might go against the “victory for America” in respect of a personal right of pregnant women to have an abortion as proclaimed almost 50 years ago in the case of Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). Those cases legalized abortions

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55 See Van Klinken, supra note 17.
56 See supra notes 49-50.
57 See supra note 32.
throughout the country based on the right to privacy that derived from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.\textsuperscript{61} It might be noted that the U.S. Supreme Court initially construed only a right to physical privacy of one’s home and correspondence based on the prohibition in the Fourth Amendment of unauthorized searches and seizures of one’s property, and the Fifth Amendment, which amongst other things contains the rule against self-incrimination, which includes the right to remain silent in respect of one’s personal affairs.\textsuperscript{62} The right to privacy was subsequently extended to include personal privacy,\textsuperscript{63} which was also incorporated into the Fourteenth Amendment and was applied to invalidate certain birth-control laws.

This decision of the U.S. Supreme Court in \textit{Dobbs v. Jackson Women’s Health Organization} strongly indicates that judicial activism based on perceptions of justice is currently not flourishing in the U.S. Supreme Court, and that the protection of sexual orientation may also in due course be abolished because of its lack of a sound historical foundation within the legal confines of the United States.

Sexual orientation should clearly not be seen as a “disability” of members of the LGBT community. The \textit{Convention on the Rights of Persons with Disabilities} defines “persons with disabilities” as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”\textsuperscript{64} The \textit{Vienna Declaration and Programme of Action} that

\textsuperscript{61} The Court in \textit{Dobbs} also overruled the decision in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833 (1992), which redefined several provisions relating to abortion rights.

\textsuperscript{62} \textit{Boyd v. United States}, 116 U.S. 616, 630 (1886) (holding that the doctrines of the Fourth and Fifth Amendments “apply to all invasions . . . of the sanctity of a man’s home and the privacies of life”); \textit{See also Terry v. Ohio} 392 US 1, 8-9 (1968).


recorded the outcome of the World Conference on Human Rights of 1993 accordingly proclaimed gender-based violence to be incompatible with the dignity and worth of the human person,\textsuperscript{65} called for the elimination of gender bias in the administration of justice,\textsuperscript{66} and appealed to treaty monitoring bodies to make use of gender-specific data and to take steps to address gender-specific abuses.\textsuperscript{67}

It is important to accept that an LGBT disposition is not a disability but must come to be accepted as something which as a matter of constitutional morality is considered “normal and natural, satisfying and right.”\textsuperscript{68}

\begin{footnotesize}
\textsuperscript{66} Id. § II.38.
\textsuperscript{67} Id. § II.42.
\textsuperscript{68} The phrase is borrowed from the language of publications control in the days of strict censorship in South Africa. See Publications Control Board v. William Heinemann Ltd., 4 SA. 137, 154 (S. AFR. 1965).
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