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The implications of judicial non-intervention in religious matters: a South African human rights law perspective

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Declaration

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I, MUKWEVHO TSHIMANGADZO DONALD, hereby declare that this mini dissertation for Master of Laws in Human Rights titled: **The implications of judicial non-intervention in religious matters: a South African human rights law perspective**, hereby submitted by me at the University of Venda, has not been submitted previously for a degree at this or any other institution and that it is my own work in design and execution, and that all reference material contained therein has been duly acknowledged.

Signature of LLM candidate: ……

Candidate Student Number: 17001227

Signature of Candidate Supervisor: ……

Signed in my presence on this …….. day of ……..2022

Commissioner of Oaths

Dedication

I would like to dedicate this work to my mother, Nengalavhani Mpho.

Acknowledgments

Above all, thanks to God from whom I sought guidance throughout this journey.

I am indebted to my supervisor, Dr DT Mailula, who guided me throughout this work with comments and constructive suggestions. His commitment and effort in making sure my work was up to standard motivated me to go the extra mile.

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Abstract

Since the decision by the court in *Johan Daniel Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*, there has been a rise in advocacy on the need to ensure strict protection of human rights, specifically with reference to religious freedom, equality, and freedom of association. The core issue in this case was the accepted forms of intimate relationships allowed within the church in relation to the leadership roles the individuals play within the same church. Relationships involving same sex persons were not allowed. Furthermore, women were only allowed to undertake certain limited church based activities such as cleaning and the safety of the church, while men's activities within the same church were not limited. The court in *Ecclesia De Lange v the Presiding Bishop of the Methodist Church of Southern Africa* attempted to resolve the problems emanating from the religious doctrine and the expected conduct of the members ascribed to a certain religion, by answering the question on how the dispute within the religious context should be dealt with. However, the court failed to address the implications of the developed jurisprudential perspective that courts should not interfere with religious doctrinal matters.

The main purpose of this study is to critically assess the doctrine of entanglement with religious matters adopted by the courts, and its implications on the protection of the right to freedom of religion, culture, and equality in an open democratic South Africa. A doctrinal method of research will be employed. The doctrinal method of research allows access to information remotely through desktop research. A doctrinal approach allows for the analysis of materials to support the hypothesis. As this study requires analysis of the doctrine of entanglement and the manner in which the doctrine is interpreted and applied in South Africa, analysis of its historical background and development, case laws and opinions of other scholars will be essential, as it all forms part of the doctrinal perspective to research. The hypothesis states that the interpretation and the application of the doctrine of non-entanglement leave a gap in ensuring the effective protection of human rights by the judiciary.

Key words: entanglement, religious freedom, equality, freedom of association

Chapter 1

Introduction and Background

1.1 Introduction

Despite the full constitutional recognition of the right to freedom of religion,[1] culture,[2] equality,[3] and freedom of association[4], there is criticism[5] on the practicality of these rights. These criticisms may be seen in instances where some religious and cultural practices are afforded more attention and recognition by courts than the others when disputes arise. Furthermore, these criticisms arise following the unfair discrimination that occurs within religious institutions. Based on this, the study seeks to address the extent to which the doctrine of entanglement is relevant in ensuring that the protection of human rights in a democratic country like South Africa, with different religious and cultural practices, is afforded constitutional recognition and protection.

With reference to the case of *Taylor v Kurtsag NO and Others*,[6] it may be submitted that the doctrine of entanglement is a jurisprudential perspective which suggests that the courts should be reluctant in becoming involved in doctrinal disputes of religious nature. From the definition above, it may be concluded that courts have developed this doctrine to ensure a limited interference with religious doctrines. This means they can only be entangled with religious doctrines in certain exceptional circumstances, each case on its own merit. This study thus argues that such a judicial interpretation and the application of the doctrine results in the lack of promotion of the values in the Constitution of South Africa founded on the respect for human rights. The above-mentioned point is made after assessing the effects the doctrine of entanglement has on balancing religious activities with those of a cultural nature, which are also often categorised as non-religious when disputes are brought before courts, as well as the

[1] Section 15 of the Constitution of the Republic of South Africa, 1996.
[2] Section 30 of the Constitution of the Republic of South Africa, 1996.
[3] Section 9 of the Constitution of the Republic of South Africa, 1996.
[4] Section 18 of the Constitution of the Republic of South Africa, 1996.
[5] In instances where in an attempt to protect the religious institution, courts apply the doctrine of entanglement on certain religions, but fail to do apply the doctrine similarly when a cultural practice that is also religious in nature is concerned.
[6] 2005 (1) SA 445 (D).

manner in which disputes arising from religious doctrines are dealt with within religious institutions, as will be discussed.

This study argues that in as much as the doctrine of entanglement serves as a guiding principle for South African courts in deciding on matters at their disposal, this concept is subject to the Constitution of the Republic of South Africa and the constitutional scrutiny.

The fact that religious freedom and equality rights have been entrenched in the Bill of Rights shows that they are also of importance in the new constitutional era. As a result, their protection is of paramount importance. Despite such recognition, the manner in which the doctrine is interpreted and applied by South African courts creates an impression that there is a need to revisit the grounds on which the doctrine was adopted by the South African judiciary. Due to the pluralist nature of culturalism and religious practices in South Africa, some cultural practices, which are religious in nature, are not treated as religious by the courts in cases brought before courts, and that is where the courts are supposed to review the manner in which the doctrine of entanglement is interpreted and applied in the context of South Africa as a constitutional supreme state.[7]

A practical example of the problem can be seen in the case of *Lewis v Media 24 Ltd*[8] wherein his religious rights to observe Sabath were not taken into consideration. The employee was dismissed for observing Sabath, which the company contended that it was more of a cultural celebration than religious as he argued he was dismissed based on such. It is against this backdrop that this study aims to critique the interpretation and the application of the doctrine of entanglement in religious matters by the South African courts.

It remains a hypothesis that the doctrine of entanglement has serious implications on the protection of the right to equality, freedom of association, religious freedom, and related rights. To provide a clear analysis on this aspect, the doctrine of entanglement

[7] G van Niekerk 'Legal pluralism' in JC Bekker *et al Introduction to legal pluralism in South Africa* 2nd Ed (2006) 419.
[8] (2010) 31 ILJ 2416 (LC).

will be unpacked, followed by an analysis of the rights affected by the manner in which the doctrine is interpreted and applied by the South African courts.

This study is beneficial as it unpacks the doctrine of entanglement to assist the judiciary in reconsidering its interpretation and application of the doctrine. The reasons why it was adopted are outlined in subsequent chapters. The failures of the judiciary to protect human rights through its interpretation and application of the doctrine of entanglement are outlined to determine the existing gap and provide solutions thereafter. This will probably assist the law makers in identifying the failures and noting the proposed approaches to religious matters, while ensuring there is equal protection of human rights. The inputs made in this study will help the victims of religious discrimination to have the proper means to remedy in cases wherein the established religious institutions failed to address the issue in question.

1.2 Problem Statement

Even though it may be submitted that the Constitution provides clear recognition of the right to religious freedom[9] and the right to equality,[10] the practical enjoyment of the right to equality within religious institutions has not been fully realised because some churches still discriminate against individuals based on gender and sexual orientation. This ranges from not allowing members of a church to hold certain positions because they believe in, or are involved in, same-sex relationships. This attracts a discussion on the aspect of equality and freedom of association. With these rights being violated, the victims of these violations are afforded a chance to approach the courts as a means of access to justice.[11]

However, the court in *Ecclesia De Lange v the Presiding Bishop of the Methodist Church of Southern Africa*[12] has somehow limited this right by holding in paragraph 39 that courts should refrain from deciding on matters involving religious doctrines.[13] The court drew inference from the case of *MEC for Education: Kwazulu-Natal &Others v*

[9] n 1 above.
[10] n 3 above.
[11] Section 34 of the Constitution of the Republic of South Africa, 1996.
[12] (726/13) [2014] 151 (ZASCA).
[13] *De Lange* Para 39.

Pillay & Others,[14] when it held that religious disputes emanating from religious doctrines must be dealt with taking into account the doctrine of entanglement as the guiding principle, and thus, leaving such matters to be dealt with by the religious structures and bodies created.

In some instances, discrimination occurs between individuals ascribed to one religion and those individuals ascribed to other religious beliefs.[15] As a result, resolving matters emanating from different religious rules becomes a difficult exercise. The effect is that the element of discrimination comes into place. Against that backdrop, the question arises to what extent is the doctrine of entanglement relevant in ensuring the promotion of the protection of human rights. Its interpretation and application thus result in many victims being unable to bring their religious cases before court to subject them to the constitutional scrutiny.

1.3 Aims and Objectives

1.3.1 Aim

The aim of this study is to comparatively analyse the judicial interpretation and application of the doctrine of non-judicial intervention (entanglement) in religious matters within the South African jurisdiction, drawing inferences from the Indian, United States of American and the United Kingdom's jurisdiction.

1.3.2 Objectives

The objectives of this study are to:

a) Outline the implications of the interpretation and the application of the doctrine of entanglement on the protection of human rights in South Africa; and
b) Establish the relevance of the doctrine of entanglement in the new democratic South Africa.

1.4 Research Questions

The main research question that this study seeks to answer is:

[14] 2008 1 SA 474 (CC).
[15] *Ex Parte Speaker of the Western Cape Provincial Legislature* 1997 4 SA 795 (CC).

What are the implications of non-judicial intervention on religious matters with reference to the South African human rights law?

To answer this question adequately, the following research sub-questions are also addressed:

a) What is the doctrine of entanglement (judicial non-intervention)?
b) What are the constitutional rights affected by the interpretation and application of the doctrine of entanglement on religious matters?
c) To what extent does the doctrine of entanglement affect the identified constitutional rights?

1.5 Hypothesis

This study assumes that the acceptance of the doctrine of entanglement by the courts to excuse themselves in so far as religious matters are concerned, poses a risk of the violation of human rights at large. The study assumes that decision-making bodies disregard the respect of human rights on the basis that any person who becomes subscribed to that religion, as the case may be, has taken an oath to follow the laws of that religion. The failure to recognise the automatic and direct access to courts for purposes of litigation on religious matters then result in the violation of human rights, such as the right to equality and freedom of association. It is also assumed that should the judiciary recognise the need to look at other angles of interpreting and applying the doctrine of entanglement, there will be an improvement in the respect and protection of human rights. It is herein assumed that the reliance on the doctrine of entanglement (judicial non-interference) is an unjust and uninformed jurisprudential ideology.

1.6 Literature Review

In his dissertation on the religious freedoms and equality rights, du Plessis addressed the need to have a full transformation regarding the realisation of religious and cultural rights within all the countries that follows the values of the international law.[16] He

[16] LM du Plessis 'Affirmation and celebration of the religious other in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' (2008) 8(2) *African Human Rights Law Journal* 376.

focused on the setting of public schools, and argued that there should be mechanisms put in place to deal with the imbalance of religious freedom rights, equality rights, freedom of association, and freedom of expression. His argument resonates to the argument raised in this study that seeks to address the need to have respect for the right to religious freedom in a manner that promotes the right to equality.[17] The memorial constitutionalism as advanced by du Plessis in the article, shows that there needs to be consideration for the past and the promise to create a better tomorrow with better respect for human rights. This might be the need to consider the past where religious institutions would just impose their rules without considering the implications of these rules on other human rights, such as the right to equality, freedom of association, and freedom of expression. In so doing, it would be easier to propose effective measures to ensure that this violation of human rights does not continue to occur.

The argument by du Plessis in the article above resonates with the idea in this study that the objective of the need to revisit the doctrine of entanglement is to achieve one goal, which is the respect for, and the protection of, human rights.[18] The doctrine of entanglement is the main issue in this study, and revisiting its application in the South African jurisdictions means creating an opportunity to advance the protection of human rights, which were violated in the past. However, as informative as his work is, du Plessis fails to address the impact of the court's failure to interfere with the matters concerning religion.

Currie and de Waal advocated for the broader recognition of religious rights and not merely within a public school context.[19] They raised the point that religious issues should not only be addressed for academic purposes, but the need to have religious institutions transformed with mechanisms that promote its existence, and the realisation of rights.[20] However, Currie and de Waal fail to critically evaluate the doctrine of judicial non-intervention in religious matters as far as the respect and promotion of human rights is concerned. The authors also fail to explain the effects of the court's failure to automatically interfere in religious matters on the restoration,

[17] Du Plessis (n 16 above) 376-408.
[18] As above.
[19] I Currie and J de Waal *The Bill of Rights Handbook* 6th Ed (2013) 314-317.
[20] n 19 above.

respect, and protection of human rights, specifically the right to equality, freedom of association, and freedom of and from religion.

De Freitas makes an argument similar to the one made in various court decisions,[21] that the courts can only interfere with the religious matters when the internal bodies have decided unfairly against either of the parties in a particular case.[22] This argument proposes that judicial intervention on religious matters should take place only when it is necessary to do so.[23] The pluralist nature of the South African society makes it difficult for the court to decide on the circumstances warranting its interference in religious matters is concerned.[24] De Freitas' argument supports the current judicial interpretation and application of the doctrine of entanglement, and fails to address the negative impact it has on the protection of human rights. As a result, it still does not solve the violation of human rights issue and as such, still leaves the gap to be addressed in this study. A contrary argument made in this study is that no person should be subjected to arbitrary decisions on the basis that he or she subscribes to a particular religion, and that nothing will be done simply because what informed the decision is an accepted conduct or norm of that church or religious association.

Bilchitz argues that indeed, the doctrine of non-entanglement should continue to be part of the South African law.[25] He argues that it would be trivial for courts to entertain squabbles that arise from religious associations.[26] The reasoning put forward is that every person affiliated with a particular religion, should accept everything that is done within that religious institution.[27] This is a similar approach advanced by de Freitas. This study aims to argue that the judiciary should ensure that human rights are

[21] *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (CCT223/14) [2015] ZACC 35; *Johan Daniel Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* ZAGPHC 269.
[22] SA de Freitas 'Freedom of association as a foundational right: religious associations and *Strydom v Nederduitse Gereformeerde Kerk, Moreleta Park*' (2002) 2(28) *South African Journal of Human Rights* 258.
[23] IT Benson 'The Case for Religious Inclusivism and Judicial Recognition of Religious Associational Rights: A Response to Lenta' (2008) 1(1) *Constitutional Court Review* 54.
[24] R Henrico 'Proselytising the Regulation of Religious Bodies in South Africa: Suppressing Religious Freedom?' (2019) 1(22) *Potchefstroom Electronic Law Journal* 57.
[25] D Bilchitz 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 (2) *South African Journal of Human Rights* 286.
[26] D Bilchitz 'Religion and the public sphere: towards a model that positively recognises diversity' (2012) 2 (28) *South African Journal on Human Rights* 260.
[27] n 26 above.

protected and respected by dealing first with rules and norms that have a potential to violate human rights. The imbalance between different genders due to church leadership roles[28] given to individuals within the churches, which amount to gross human rights violation within the religious context and the constitutional value of equality, is an issue that needs serious attention, as it is so prevalent. This is due to the fact that beliefs in a religious context were developed from different historical backgrounds, some which never perceived respect for human rights as a serious matter.[29] Therefore, violations of human rights in these religions are the norm. This study aims to propose and provide justification on why the judiciary should reconsider its interpretation and the application of the judicial interference doctrine.

Bennet and Amoah wrote about the importance of respecting religious rights.[30] They argued that there is a huge gap between the most known religions like Christianity, Hinduism, and the traditional religions, which are often categorised as culture rather than religion by courts when disputes arise.[31] These authors proposed the equal treatment of religion and culture as equal, and as one and the same thing.[32] This study seeks to make a similar argument that there exists equal protection and realisation of religious rights, and the right to equality within religious institutions. However, this study differs from Bennet and Amoah's work as far as it attempts to link the lack of respect for religious rights, where traditional religions do not receive equal treatment to given to others, to the principle adopted by the courts that the judiciary should not interfere with the matters of religion.

The arguments made by both the applicant and the respondent in *Christian Education, South Arica v Minister of Education*[33] show the true nature of the conflict occurring between religion and the constitutional rights such as equality, freedom of religion, culture, freedom of association, and human dignity. The argument made by the

[28] Advisory positions given to men, and women only limited to do basic functions such as cleaning.
[29] D Bilchitz 'Should Religious Associations be Allowed to Discriminate?' (2011) 2(27) *South African Journal of Human Rights* 219.
[30] J Amoah and T Bennet 'The freedoms of religion and culture under the South African Constitution: do traditional African religions enjoy equal treatment?' (2008) 8(2) *African Human Rights Law Journal* 357.
[31] n 30 above.
[32] IT Benson 'The case for religious inclusivism and the judicial recognition of religious associational rights: A response to Lenta' (2008) 1(1) *Constitutional Court Review* 295.
[33] 2004 4 SA 757 (CC).

applicant in the case was that the existence of corporal punishment was justifiable, especially in Christian schools on the basis that the Christian bible allows for corporal punishment to discipline children.[34] The acceptance of non-entanglement as an approach for the South African courts led to the continuation of human rights violations.[35]

The court in the above-mentioned case held that the right to religious freedom and the related rights are of paramount importance, and everything should be done to address the same.[36] The failure of the court to realise that the religious matters should also be treated like other matters, wherein direct access to court exists without first waiting for the internal structures to decide, is an anomaly this study aims to address. Thus, the study addressed the gap brought by the judicial interpretation and application of doctrine of entanglement, as far as the scope of human rights in South Africa is concerned.

In his article on the realisation of the religious rights, Beckam argued that the religious rights should be understood better by allowing a further division of religion and culture.[37] However, he made submissions that the division should not attract the unfair treatment of those who practice cultures, having same status as the different kinds of religion.[38] Even though he seeks to suggest that there should be a promotion in the respect of human rights, especially the religious freedom and equality right, his proposal contradicts his main submission. This is because he begins by saying that religion and culture should be divided.[39] The article relates to the area of this study's focus that addresses what religious rights are, and also what cultural rights are. This study also aims to advance the idea that culture and religion should not be treated as different things. This would then allow the courts to efficiently deal with issues arising from religion.

[34] n 33 above.
[35] n 6 above.
[36] n 33 above.
[37] F von Benda-Beckam 'Who's afraid of the legal pluralism' (2002) 37(47) *Journal of Legal Pluralism and Unofficial Law* 49-50.
[38] n 37 above.
[39] As above.

Bonthuys argues in his article on religion, race, culture, and gender that the problem of inequality within the religious institution began when South Africa was colonised by Britain in 1806.[40] British courts applied the doctrine of entanglement in religious matters, and thus, the doctrine had to be applied in South Africa too as its colony. The arguments raised in this article are relevant to the focus of this study, as it begins by explaining where the entanglement doctrine originates and the reasons thereto.[41] What the article fails to do though, as it was written long ago and the evolving constitutional values were not yet tested in the constitutional perspective, is to examine the relevance of the manner in which the courts are interpreting and applying the doctrine of judicial interference on religious matters. This study also tests its relevance in the promotion, respect and protection of human rights, and specifically, the equality rights, the right to religion, and the right to freedom of association.

Gunn made submissions on the importance of the realisation of religious rights to have a proper community built on ethical values and the respect of humanity.[42] He believes that the existence and realisation of religious rights creates a community that is stable and continues to respect the human existence.[43] The relevance of this article to this study is that it explains what religious rights are in nature, and what religion is. This then becomes relevant when trying to understand the submission made by other scholars that there should be a distinction between religion and culture. Even though the article provides extensive information regarding the nature of religion and the related rights, namely right to equality, right to freedom of religion, human dignity, and freedom of association, the article does not address the conflict resolution mechanisms whenever there is a dispute on religious matters. As a result, it fails to demonstrate what can be done to promote the respect and realisation of the human rights entrenched in different authoritative instruments, nationally and internationally.

Gouws and du Plessis further explain that the reason for the continued existence of, or the application of, the entanglement doctrine is the political influence on the

[40] Bonthuys E 'Accommodating gender, race, culture and religion' (2002) 41(52) *South African Journal on Human Rights* 45-46.
[41] n 40 above.
[42] TJ Gunn 'The complexity of religion and the definition of religion in international law' (2003) 1(16) *Harvard Human Rights Journal* 88.
[43] n 42 above.

judiciary.[44] In this sense, their argument that politics has influence on the continued application of the doctrine of entanglement in South Africa is important to this study, as it assists in weighing human rights affected by the application of the doctrine, and examining the rationality of the reasons for the continued application of the doctrine.[45] The article focused on the political influence as a reason for the continued application of the doctrine of entanglement. In addition to their arguments in their article, this study seeks to explore other reasons for the continued application of the doctrine of entanglement, and weighing same in line with the duty of courts to ensure the protection of human rights.

An argument for the protection of the right to religious freedom is overshadowed by the contrary arguments made by Horwitz.[46] Horwitz argues that the focus should rather be on the possibility of limiting the religious rights, and not to put the doctrine of entanglement on the spotlight.[47] This article is relevant as it provides an alternate approach to the issue of religious litigation. However, this study aimed in promoting the realisation of human rights, and cannot go along the submissions made by Horwitz that religious rights should rather be limited.

1.7 Research Methodology

To achieve the objectives of this study, a doctrinal research methodology is adopted. Different constitutional provisions are analysed, together with relevant statutory provisions relating to the rights concerned. Domestic and foreign case law, together with the international instrument, are referred to as well. This is a comparative study which seeks to draw inference from the Indian, United States of American and the United Kingdom's jurisdiction. These comparator countries have much literature on the doctrine of entanglement. The United States of America and the United Kingdom serves as the main countries where the doctrine e of entanglement has seen its development. Followed by the Indian jurisdiction, the doctrine of entanglement is well developed and provides wide guidance on how it is applied. Like South Africa, India is

[44] A Gouws and LM du Plessis 'The relationship between political tolerance and religion: The case of South Africa' (2000) 1(14) *Emory International Law Review* 657.
[45] n 44 above.
[46] P Horwitz 'Against Martyrdom: A Liberal Argument for Accommodation of Religion' (2016) 4(91) *Notre Dame Law Review* 27.
[47] n 46 above.

a multi-religious state and has dealt with the issue in question in a manner that can provide guidelines to addressing the problem in question. The doctrinal method is appropriate for this study because the search for information to address the problem is viable through a desktop mode, rather than field work research. This is also informed by the nature of research questions identified above.

1.8 Definition of key concepts

1.8.1 The doctrine of entanglement

The doctrine of entanglement may be ascribed to the court's reluctance in adjudicating on matters of religious nature, which involves the disputes arising from religious perspective.[48] Through the application of this doctrine, the courts avoid intervening with disputes that arise due to the norms and standards of practice accepted by those ascribing to different religious and cultural beliefs. The doctrine of entanglement has its origin in the United States case law.

In the case of *Walz v Tax Commission*,[49] the court was faced with a dispute arising from the provisions of article XVI of the New York Constitution.[50] The Constitution provided that exemptions to pay tax may only be granted on the properties used for any purpose except those of religious, educational, or charity.[51] The contention by the plaintiff was that these exemptions meant that he had to indirectly make a contribution to religious bodies, which was prohibited by the religious clauses in the First Amendment.[52] The United States Supreme Court rejected this contention and held that there was no link between the exemptions and the religious clause. The court acknowledged the fact that there should be no interference with the governance of religious institutions. On whether exempting the religious bodies from paying tax meant it was in accordance with the constitutional dispensation of the country.

The court held that this meant that there is a need for government to limit its involvement with principles that govern the functioning of religious bodies. The

[48] n 8 above.
[49] 397 U.S 664 (1970).
[50] The New York Constitution, 1938.
[51] Article XVI of the New York Constitution, 1938.
[52] n 49 above.

exemption of religious institutions from paying tax would have less state involvement than it would if religious institutions were expected to pay tax.[53]

From the above narration of the doctrine of entanglement, it may thus be said that the doctrine in question is a full doctrine with ancient history, as it has been applied in the United States of America.[54]

In the South African contex however, the doctrine of entanglement is not codified, but only serve as a guiding principle upon which the courts rely to settle disputes arising from religious doctrines. Its application is subject to constitutional scrutiny. This means whenever the court has to decide whether they should decide on a certain matter where there are elements of religious doctrine, it should be done in consideration of the constitutional provisions which aims to protect human rights founded on the values of equality, dignity and non-discrimination.

1.8.2 Religious freedom

This may be described as the freedom from which a community, individual, or a group of people are allowed to express and manifest their religious practices, teachings, and observance without fear of being discriminated against and or prejudiced.[55]

Many major international treaties on human rights to which South Africa is a signatory, recognise the right to freedom of religion. Below is a discussion on some fundamental international instruments that provide for the right to equality, religious freedom, and freedom of association.

Article 18 of the Universal Declaration of Human Rights, which was adopted by the United Nations in 1948, provides that every person has the right to freedom of own thoughts, conscience, and religion.[56] It is provided further that one has the right to change his or her religion, manifest and practice own religion, teachings, worship and observe in accordance with what the person believes in.[57] Article 18(1) of the

[53] As above.
[54] *Walz v Tax Commission* 397 U.S 664 (1970); *Wolman v Walter* 433 U.S 229 (1977); *Wolmer v Maryland Public Works Bd* 426 U.S 736 (1976)
[55] *Singh v Ramparsad and Others* 2007 (3) SA 445 (D).
[56] Article 18 of the Universal Declaration on Human Rights, 1948.
[57] n 56 above.

International Covenant on Civil and Political Rights[58] also guarantees people the right to be free from any form of discrimination as far as they practice, observe, and follow the norms and standards of the religion they chose to follow. Furthermore, the European Convention for the Protection of Human Rights and Fundamental Freedoms[59] provides that a freedom of thought, conscience, and religion is guaranteed to everybody.

1.9 Ethical Considerations

The University of Venda has adopted its institutional research ethics, stipulating that the rights of those who participate in research undertakings should be considered. Therefore, it is required of the researchers to protect participants' identities. Furthermore, consent must be obtained before an undertaking of the research. This study did not require participation and interviewing of human beings. It only focused on primary and secondary data. This is because the information used was extracted from case law, journal articles, statutes, international legal instruments, and books. All materials used in this study have been duly acknowledged.

1.10 Overview of Chapters

Chapter one is an introductory chapter that introduces the topic, the background to the study, the problem statement, and the methodology used when conducting the research and what the study seeks to achieve.

Chapter two critically discusses the doctrine of non-judicial intervention/ entanglement with respect to religious matters. As this is a comparative chapter, the United States of American case law and jurisprudential basis are used to advance the history and origin of the doctrine, as the doctrine has seen its first interpretation and the application in the United States. Furthermore, the South African judicial decisions are used for reference for a better understanding in the South African context, and in particular the meaning and the reason why the doctrine was introduced, and the manner in wh it has been interpreted and applied by the South African courts. Lastly, a comparison on the

[58] The International Covenant on Civil and Political Rights, 1966.
[59] Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

interpretation, meaning, and the application of the doctrine of entanglement between the United States of America, the United Kingdom, India, and South Africa is made. This will be a comparative chapter as indicated in chapter one of the study.

Chapter three discusses the constitutional rights affected by the doctrine of entanglement. These range from the right to religious freedom, freedom of association, equality, and respect of human rights at large. Furthermore, the discussion on the affected rights includes the tests used to determine the existence of human rights violations. The chapter also incorporates a discussion on the difference between religion and culture with reference to relevant South African case law and constitutional provisions.

Chapter four discusses the nature and extent to which the doctrine of entanglement, as adopted by the court in *de Lange,*[60] affects the protection and realisation of the human rights of people involved in religious activities. The chapter discusses the extent to which the courts allow the churches and/ or religious bodies to be free from interference, and whether such allowance is in line with the provisions in the Bill of Rights. A detailed discussion is made on which matters or issues the churches are allowed to deal with on their own as part of their internal adjudication, and the upper bodies as well as the rules relied on when decisions within religious bodies are taken. The limitation clause in the South African Constitution is taken into account in determining if the interpretation and the application of the doctrine of entanglement impair the human rights. From that angle of discussion, a determination is made on the relevance of the doctrine in today's constitutionally dispensed South Africa.

Chapter five makes some concluding remarks drawn from the discussion. Recommendations on possible solutions to address the problem in question are also made.

1.11 Research Schedule

This study schedule is as follows:

a) June 2021: Submission of the first draft of the proposal.

[60] n 12 above.

August 2021: Submission of the final dissertation proposal.

b) October 2021: Proposal defence and submission of chapter one.
c) November 2021: Submission of chapter two.
d) December 2021: Correction of chapter two.
e) January 2022: Submission of chapter three.
f) January 2022: Submission of chapter four.
g) January 2022: Submission of chapter five.
h) January 2022-February 2022: Correction of chapter three, chapter four, chapter five.
i) February 2022: submission of the final dissertation.

1.12 Limitations of the Study

Limitations are those obstacles that hamper the study and its findings. Because the doctrinal method is applied in conducting this study, it is often difficult to properly go through case law, as some cases relevant to the study might be unreported. This then makes applicable case law inaccessible. Time constraints were also one of the obstacles that hampered the completion of this research in time.

Chapter 2

The historical background to the doctrine of entanglement

2.1 Introduction

The application of the doctrine of entanglement finds its historical basis in the judicial decisions of the United States of America.[61] In the year 1976, the Supreme Court of the United States brought into law the principle of judicial entanglement through what is known as excessive entanglement.[62] The concept of judicial entanglement has, over many decades, been transformed from a mere expression to the most accepted and underlying principle used to assist the courts in avoiding becoming entangled with religious disputes that require an interpretation of religious clauses.[63] The point reached by this development led to the doctrine serving as the relied-upon test used to establish an arena for the analysis for different clauses, more especially the religion-oriented ones.[64]

It is through this doctrine that the American courts managed to determine if religious rights will be violated in case a court interferes with religious disputes.[65] The courts were able to identify those relationships of administrative legal nature, existing between civil authorities and religious authorities or bodies, having adverse prospects of affecting the way in which the government supports the religious activities.[66] The main point sought to be achieved herein was to avoid a situation wherein the government would be providing more support that it should to the religious bodies.[67]

The courts in the United States of America were also able to identify those civil-religious relationships that would possibly lead to government politics becoming religious-centric.[68] The idea behind this was to avoid mixing up religion and politics, which would have a negative impact on the uniqueness and originality of the state of

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[61] PJ Webber 'Excessive Entanglement: A Wavering First Amendment Standard' (1984) 46(4) *The Review of* Politics 483.
[62] *Wolmer v Maryland Public Works* Bd 426 U.S 736 (1976).
[63] *Wolman v Walter* 433 U.S 229 (1977).
[64] n 61 above.
[65] Ripple K 'The entanglement test of the religious clauses: A ten year assessment' (1980) 27(1) *UNCLA Law Review* 1195.
[66] Ripple (n 65 above) 1195-1196.
[67] *Committee for Public Education v Regan* 444 U.S 646 (1980).
[68] Ripple (n 65 above) 1198-1201.

politics in the United States of America. The court in *Sloan v Lemon*[69] reasoned that society must not be divided merely because the government prefers or supports a certain religion, as there are instances where a decision would need to be taken, and the decision would be in favour of one religion and against the other.[70]

The justices of the court have in the past decades included this doctrine in their reasons for different judgments.[71] The court incorporated this doctrine in the United States of American analysis of cases that dealt with the need to impose the restrictions on matters of religious doctrine to let the churches function independently, while at the same time, protecting the right to religious freedom.[72] This was to ensure that courts give judgments that are not influenced by the religion that one member of the judiciary subscribed to.[73] The doctrine of entanglement has been used as one of the most important aspect to determine to what extent the right to freedom of religion is being violated, and if found that it is not being violated, to what extent can the state get involved in matters of religious doctrine. Lastly, as a test to determine the extent to which the courts may freely exercise their discretions in the application of the rules that also guarantee freedom of the religious organisations.[74]

The purpose of this chapter is to extensively discuss the origin of the doctrine of entanglement, with reference to the United States of America's jurisprudence, the meaning, and the reasons behind its adoption in the South African jurisprudence, as well as the extent to which the South African judiciary has similarly adopted the doctrine.

2.2 A historical background to the doctrine of entanglement

It is a common cause that in most instances, the new doctrinal perspectives emerge due to the need to revisit the old doctrinal perspectives, especially when new issues arise and end up in courts for adjudication.[75] Circumstances such as the prevalence

[69] 413 U.S 756 (1973).
[70] n 69 above.
[71] *Committee for Public Education v Nyquist* 413 U.S 756 (1973; *Roemer v Board of Public Works* 426 U.S 736 (1976).
[72] n 69 above.
[73] *Jones v Wolf* 443 U.S (1979).
[74] M Markovic 'The inextricable entanglement of argumentation and interpretation in law' (2017) 28(4) *Filozofijia I drustvo* 1101.
[75] Ripple (n 65 above) 1196.

of issues, which invited the development of a certain doctrinal perspective may in most cases, contribute to the doctrine in question to continue being applicable in a certain society or fade away.[76] An example may be drawn from the doctrine of entanglement and the free exercise perspective in relation to the protection of religious rights as discussed below.

Even though some authors are of the view that the doctrine of entanglement dates to earlier years, this doctrine has first seen its codification in the case of *Walz v Tax Commission*.[77] In this case, the court was faced with a task of dealing with issues caused by a clause in the New York Constitution, which established the grounds on which the religious bodies were exempted from paying the mandatory tax to the government one property in which the religious bodies used same for the purposes of educating the learners for religious purposes, as well as a centre to run charity within the area.

The court in the above-mentioned case held that the exemption granted on the organisations as outlined above, was neither to advance the status religion has in the society, nor putting into record that the government wants the religious bodies to be downgraded in comparison with other institutions.[78]

The Chief Justice further held that the above legislative provision was not passed to push the sponsorship aspect towards the church and not showing hostility towards the church, even though they performed different activities within the said government building.[79] The Chief Justice made it clear that such support did not amount to excessive entanglement into the religious institution.[80] The court reasoned that the fact that the government exempted the church from the tax laws meant that the government then had less contact with the church, as they would no longer interact for the purpose of facilitating the payments of tax.[81] The court also reasoned that the

[76] As above.
[77] n 49 above.
[78] *Walz* at 674-676.
[79] *Walz* at 675.
[80] *Walz* at 674.
[81] As above.

practice of granting such exemption to churches has been an accepted normality in the United States of America.[82]

It was thus held in the above-mentioned case that the exemption of churches from paying taxes had nothing to do with how the churches were run in the country.[83] From the reasons given in the above case, it can be said that the approach adopted resembles the test known as the primary test, which outlines that one thing a legislation should achieve on implementation is non-interference with religion, either through advancement or demotion.[84]

The Supreme Court of the United States of America also dealt with the difficulties that come with the interpretation of the religious clauses in the case of *Lemon v Kurtzman.*[85] The court reasoned that the doctrine of excessive entanglement is best established by the purposive test of entanglement, which provides that entanglement exists if the purpose of legislation results in interfering with religion, either through advancing or inhibiting religion.[86] In this case, the court was faced with a situation wherein the legislations in Pennsylvania and Rhodes Island included clauses that aimed at providing regulations on the governments provision of aid to the church-related elementary and secondary schools. In the Pennsylvania statute, it was provided that the state has the duty to reimburse private schools that were religion-oriented for the expenditures on the salaries for the teachers, learning materials, and the textbooks. The teachers were required to submit to the government's auditing department the records for the school's expenditure to be reimbursed.

To deal with the resultant challenges, the court applied different tests, namely, secular purpose, primary effect, and the excessive entanglement test. The court accessed the legislation and found that the legislation did not have any effect in advancing religion, but rather unconstitutional in that it violated the provisions of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.[87] The court's silence on the legislative impact on religion, and

[82] *Walz* at 668-686.
[83] *Walz* 692-693.
[84] Ripple (n 42 above) 1197.
[85] 403 U.S 602 (1971).
[86] *Lemon* at 613
[87] *Lemon* para 13.

only ruling on the constitutionality using the secular test means that it was not established that the legislation also had an effect in supressing religion. As a result, the court had to pass to the 2nd test to determine the purpose of the legislation in the governance of religion and the religious organisations. The court found that the purpose was not entirely religion-focused, and therefore was left with an option to test such legislation through the excessive entanglement test.[88] It was then held that the legislative scheme resembled the excessive entanglement between the governmental sphere and religion.[89]

The court further held that it is impossible to have the church separated from the functionary role of the government. The Chief Justice reasoned that the examination of the institutions that benefited from the state, as well as the purpose for such benefits, play a major role in determining whether the entanglement was excessive or not. The Chief Justice further outlined that the nature of the relationship between the government and the church also assists in determining if the extent to which interference occurred was excessive or not.[90]

It was held in the above-mentioned case that the government, in normal circumstance, does not grant cash subsidy to institutions with conditions of surveillance and control by the same government over the beneficiary institutions.[91] In the facts of the case, it was held that the government was put in a position to inspect the records of the school to determine if the transactions being made are for religious educational purposes. It was thus held that there continues to be a relationship between the state and the church. Thus, it confirmed that there was an excessive entanglement of the government in the religious organisations and their functionality.[92]

The Rhode Island legislation included a provision which allowed the church-oriented schools to receive financial aid from the state for covering the salaries of the teachers in these schools. It was concluded by the court in this case that the continued conditions and restrictions on which the salaries would be supplemented, created a

[88] *Lemon* para 15.
[89] *Lemon* para 15.
[90] n 85 above.
[91] As above.
[92] n 85 above.

continued surveillance and control of the schools by the government.[93] This is because the government would need to know if the legislative provisions are being followed before injecting funds into the school.

The Supreme Court of the United States of America also used the separation of powers principle to justify the application of the doctrine of entanglement in religious disputes. The court in the above-mentioned case held that it is an accepted principle that there is a division between politics and other organs of the government to have a well function government.

In the case of *Tilton v Richardson*,[94] the term prophylactic dimension was introduced to deal with challenges arising from an alleged state entanglement in issues of religious doctrines or questions. This perspective provides that it is not only when the relationships between civil and religious authorities would result in the government getting involved in religious doctrines that they should be avoided, but also when it is indicative that there is a possibility of excessive entanglement coming right up. This was also confirmed in *Everson v Board of Education*.[95] Thus, it can be said that the main purpose of the prophylactic dimension is to ensure that the religious value of strife avoidance is protected at all costs.

As the doctrine of excessive entanglement was becoming popular in the United States of America, it then developed into a concept of free exercise. This was due to the transformation the concept went through from its initial recognition as the classical establishment clause of interpretation. As the Supreme Court outlined in *Watson v Jones,*[96] the doctrine of free exercise gave rise to what is known as entanglement, where the courts are reluctant to decide on religious matters. The American courts have since become reluctant in getting involved in civil disputes that require courts to pronounce on the religious questions. The primary reason for this angle of adoption was outlined in the case of *Kedroff v St Nicholas Cathedral*.[97]

[93] As above.
[94] 403 U.S 672 (1971).
[95] 330 U.S 1 (1947).
[96] 80 U.S (13 Wall) 679 (1971).
[97] 334 U.S 94 (1952).

In the above-mentioned case, it was held that the right to religious freedom incorporated the right for the religious bodies to decide on matters concerning religious questions on their own, without any external force or assistance from the government. It was held that the doctrine prevents state interference in matters arising from the normal accepted religious rules. This was a portrayal of the free exercise of power as an approach into dealing with disputes involving the civil law and doctrinal questions of the church. The courts have on several occasions used the term excessive entanglement as a defence for the judiciary not to entertain disputes arising from church rules and regulations. It was further held that restricting the court's jurisdiction outside the ambits of the religious doctrines also guaranteed the independence and transparency in the exercise of full political and democratic powers as the two will not be mixed.

2.3. The interpretation and application of the doctrine of entanglement: a United States of America's perspective

From the cases discussed above, the main point of departure in the application of the doctrine of judicial non-interference in religious matters is informed by the need to protect religious values. The jurisprudence around the application of this doctrine is the assumption that the main purpose of the religious clauses is to avoid the mixing of the civil and religious components within American society. The other reason behind the way the doctrine of entanglement is interpreted and applied in the United States of America, is the assumption that even though the country is multi-religious, there is a possibility of civil altercations between the citizens if the government expressly make it public that they support a certain religion.

A conclusion that can be drawn from the above-discussed case law is that the excessive entanglement doctrine is used by the government as a tool to create space for religious bodies to exercise their rights freely without fear of intrusion by the government. The respect for religious freedom might be the primary factor of the court's reluctance to adjudicate on matters of religious doctrine. This position was also confirmed in the case of *Catholic Bishop of Chicago v NLRB*.[98]

[98] 440 U.S 490 (1979).

It is argued that the doctrine of entanglement also finds its application in the Indian jurisdiction. This is because of the wording in the Constitution of India and some case law.[99] Article 26 of the Constitution of India provides that every religious denomination has the right to establish its religious institution and maintain it for the purposes of charity-giving.[100] It further provides that such religious denomination has the right to manage its own affairs of religion.[101]

Like South Africa, India is does not have an official religion for all the citizens.[102] This means that everyone is allowed to follow any religion of choice. Article 25 of the Constitution[103] provides that all persons are permitted to practice their own religion of choice without fear of any kind.[104] When practicing religion, as recognised by the Constitution of India, no person should encroach on the religious rights of another. This means that through the duty put on state to ensure that measures are out to maintain religious diversity, any violation of religious rights becomes the duty of the state. By granting individuals ascribed to different religions, the freedom to practice their religion on their own, may be the grounds upon which the Indian courts also do not entertain disputes arising from religious doctrines.

The concept of the state's non-entanglement with religion may be seen from the provisions of article 27 of the Constitution,[105] providing that any funds paid from the public sector to religious institutions, with the sole purpose of promoting a certain religion, must not be taxed. Furthermore, article 28(1) prohibits teaching of a certain religion at educational facilities as long as the school is supported by the state for its daily functioning. Discrimination on the basis of religion is prohibited in terms of article 15 and article 16 of the Constitution.[106]

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[99] *The Commissioner, Hindu Religious Endowments, Madras v Laksmindra Thirtha Swamiar of Sri Shiru Mutt* 1954 AIR 388, *Ratilal Panachand Gandhi* v *The State of Bombay And Other* 1954 SCR 1035.
[100] Article 26(a) of the Constitution of India, 2019.
[101] Article 26(b) of the Constitution of India, 2019.
[102] PT Babie and AR Bhanu 'Freedom of Religion and Belief in India and Australia: An Introductory Comparative Assessment of Two Federal Constitutional Democracies' (2018) 39(1) *Pace Law Review* 7.
[103] Article 25 of the Constitution of India, 2019.
[104] n 103 above.
[105] Article 27 of the Constitution of India, 2019.
[106] The Constitution of India, 2019.

The Constitution of India also provides for the right to equality.[107] This resonates with the constitutional provision in the Constitution of South Africa,[108] where it is provided that everyone is equal before the law. It is argued that the free exercise right to freedom of religion is not an absolute right, but a qualified right.[109] This is because article 25 and article 26 of the Constitution[110] limit the right to religious freedom on the grounds of morality, public order, health, the constitutional provisions as whole, social welfare, as well as social reform.[111] The court in *State of Bombay v Mali*[112] confirmed the above constitutional provisions when it held that laws inconsistent with the constitutional provisions must be struck off.[113]

The Supreme Court of India in the case of *Indian Young Lawyers Association & Others v The State of Kerala & Others*[114] dealt with the applicability of the doctrine of entanglement in India. In the above-mentioned case, the court posed five questions to settle the dispute.[115] The court sought to find out if the act of excluding women of age group 10 to 50 was unfair discrimination; whether such exclusion of women from entering the temple constituted an essential religious practice; whether the Authorisation of Entry[116] permitted such an exclusion of women and lastly; whether rule 3(b) of the Authorisation of Entry[117] was out of the scope of the Kerala Hindu Places of Public Worship Act.[118]

The court in the above-mentioned case held that the rule 3(b) of the Authorisation of Entry is *ultra vires* of rule 3 of the Kerala Hindu Places of Public Worship Act 7 of 1965. The court in the above-mentioned case held that the exclusionary rule is discriminatory towards women and could not be regarded as an essential practice of the Hindu religion.[119] The court further held that the provisions of the rule 3(b) of the Kerata Hindu

[107] Article 14 of the Constitution of India, 2019.
[108] Section 9 of the Constitution of the Republic of South Africa, 1996.
[109] Babie (n 102 above) 15.
[110] n 106 above.
[111] As above.
[112] AIR 1052 BOM 84 (India).
[113] *State of Bombay* para 12.
[114] WP (C) No 373, 2006.
[115] *Indian Young Lawyers Association & Others* para 7.
[116] Rule 3 of the Kerata Hindu Places of Public Worship Act 7 of 1965.
[117] n 116 above.
[118] 7 of 1965.
[119] *Indian Young Lawyers Association & Others* para 144.

Places of Public Worship Act was itself *ultra vires* to section 4 and section 5 of the Kerala Hindu Places of Public Worship Act 7 of 1965.[120]

Drawing inferences from the case discussed above, it is clear that the application of the doctrine of entanglement in the Indian Jurisdiction is limited only to those practices that are essential practices of a certain religion. However, the fact that the court in the above-mentioned case ruled on the constitutional aspect of equality, means that the court did not limit itself in only deciding if the practice of excluding women from the temple was an essential practice. It is argued that it went as far as determining the constitutionality of the practice of restricting women from entering the temple, by holding that it discriminated against women.[121]

It is therefore submitted that even though there is a slight difference in the application of the doctrine of entanglement between India and South Africa, the Indian jurisdiction also does not completely deny victims or interested parties an opportunity to bring disputes to court merely because they emanate from religious doctrine.

Furthermore, the principle of judicial non-entanglement in religious matters has seen its application in the United Kingdom, through disputes dating back to the medieval England.[122] This is supported by the existence of church courts, as well as crown courts, which had distinctive roles and jurisdictions.[123] Under the then legal system of England, common law courts only had the jurisdiction to adjudicate on all other matters, but lacked the jurisdiction to adjudicate on religious matters, as there were church courts created for religious matters.[124] Throughout the nineteenth century, common law courts would enforce the decisions of religious bodies regarding religious doctrines, and endorse them as final position of the law, citing that only religious bodies and religious courts had the powers and abilities to decide on questions of religious doctrines.[125]

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[120] n 116 above.
[121] n 115 above.
[122] Goldstein JA 'Is there a religious question doctrine? Judicial authority to examine religious practices and beliefs' (2005) 2(54) *Catholic University Law Review* 504.
[123] As above.
[124] Goldstein (n 122 above) 504-505.
[125] Goldstein (n 116 above) 505.

From the above discussion, it is argued that the manner in which the doctrine of entanglement has been practiced throughout the years in the United Kingdom is not different to the manner in which the doctrine has been applied in the Indian jurisdiction. There is a slight difference in the application of the doctrine of entanglement between South Africa, India, and the United Kingdom. While the South African judiciary did not establish the extent to which the courts should avoid getting entangled with religious matters,[126] the judiciary in India and the United Kingdom has held that excessive entanglement has occurred if it is established that courts have interfered with a conduct that forms part of the essential practices of a certain religion.[127]

2.4 The adoption of the doctrine of judicial entanglement (judicial non-entanglement) into the South African jurisprudence

South Africa has not seen much of judicial precedent on the doctrine of entanglement. The court in *Taylor v Kurtstag NO and Others*[128] attempted to explain what the doctrine of entanglement means in the South African law context. In the above-mentioned case, the court held that the doctrine of entanglement relates to the reluctance of the courts to intervene in doctrinal questions or disputes emanating from religious principles and expected normal conduct. It was further held in the case of *Singh v Ramparsad and Others*[129] that the fact that the courts have in the past ensured that they avoid getting entangled in religious matters, means that the doctrine of entanglement is indeed part of the South African law. Even though the doctrine of entanglement is now a guiding principle to courts in deciding whether they should adjudicate on a matter or not, it is argued that the above-mentioned concept of entanglement is a full doctrine and not a principle of law that the South African judiciary should be bound by.

The Supreme Court of Appeal in *Ecclesia De Lange v the Presiding Bishop of the Methodist Church of Southern Africa*,[130] had to consider the extent to which religious rights are protected, and the extent to which the courts should intervene in the doctrinal

[126] n 12 above.
[127] *State of Bombay v Mali* AIR 1052 BOM 84 (India); *Indian Young Lawyers Association & Others v The State of Kerala & Others* WP (C) No 373, 2006.
[128] 2005 (1) SA 362.
[129] 2007 (3) SA 445 (D).
[130] (726/13) [2014] ZASCA 151.

questions emanating from religion. The court termed the above as the avoidance of the courts in getting entangled with religious doctrines.[131]

In the above case, Ecclesia de Lange, the Reverend made an announcement to the congregation regarding her intention to get married to another woman. She was then brought before the disciplinary board and got suspended from her position as the Reverend, pending the decision of the disciplinary board. She was charged in terms of the Laws and Discipline of the Church, which prohibited same-sex marriages between members of the church. The members of the church at large were vested with the obligations to adhere to the laws and regulations of the church without compromise.[132]

The laws of the church described above provided that a party who has a reasonable belief that the decision taken by the Church's Connexional Disciplinary Committee is arbitrary to the respect of human rights, has an option to have the matter referred for arbitration.[133] The appellant approached the High Court thereafter, seeking amongst other reliefs, that the decision by the church bodies that led to her being dismissed from performing her duties as the Reverent of the church, be declared unconstitutional on the basis that they discriminate the members of the church on the ground of sexual orientation.[134]

The Supreme Court of Appeal reasoned those associational rights wherein there are other people attached to the rights by virtue of being ascribed to a certain religion need to be respected and preserved at all costs. The court further held that once a person takes a decision to follow a certain religion, that person should be ready to be ruled by the rules and regulations accepted in that religion.[135] In minority judgment, it was held that the fact that the nature of being ascribed to a certain religion amounted to a

[131] n 12 above.
[132] As above.
[133] n 12 above.
[134] SA de Freitas 'Doctrinal Sanction and the Protection of the Rights of Religious Associations: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151' (2016) 19(1) *Potchefstroom Electronic Journal* 3.
[135] n 13 above.

contract, the appellant was forced indeed to firstly deal with the matter within the established church bodies before referring the matter to actual courts.[136]

Reference was made to the case of *Mohamed v Jassiem*,[137] when the Supreme Court of Appeal held that the jurisprudential basis, also supported by the foreign case in Canada, Australia, United Kingdom, and the United States of America, that courts should avoid getting entangled in doctrinal questions of religious a basis and should be protected through the continuation of its application in the South African courts.

Relying on the reasoning of the court in the above-mentioned case, the Supreme Court of Appeal held that whenever the internal measures taken by the religious bodies is unconstitutional, the courts should then interfere.[138] However, the Supreme Court of Appeal continued to contradict itself when it held in paragraph 39, that as the issue at hand was the interpretation and application of the doctrine of entanglement with regard to the dispute arising from the rules, which were adopted by the church, the matter thus had to be left to the church to adjudicate to avoid the court getting entangled.[139] It is argued that the constitutional rights affected by the decision of the church were not taken into consideration in this case. It held that the court should refrain from getting involved, and only get involved when it is necessary to do so. It outlined further that even in circumstances where it is necessary, the courts should avoid deciding on or determining the doctrinal issues on extreme entanglement in religious matters.

The court in the last-mentioned case has thus placed courts in a very difficult position about the question on when the courts draw the line between the extent to which the courts should be involved, and to what extent they should not get involved. It is through the reasons advanced above that the South African courts have adopted the doctrine of entanglement, which prevents the courts from adjudicating at first instance, issues involving doctrinal questions on religion. Because of the manner in which the court in this case has advanced the application of the doctrine of entanglement, it is argued that the courts put the religious rights at a better advantage compared to the other

[136] *De Lange* para 51.
[137] 1996 1 SA 673 (A).
[138] n 12 above.
[139] n 13 above.

rights in the Bill of Rights that may be affected by treating religious rights with preference over others.

2.5 Conclusion

From the discussion above, a conclusion is drawn on the fact that the United States of America has much on case law that South Africa has drawn inferences from. The Unites States created a test through which it can be determined by the courts if there is an excessive entanglement through which the government is interfering in religious matters and doctrinal questions of religion. From that perspective, the South African courts have adopted the similar test through which the courts are exempted from deciding on religious matters. However, in as much as the application of the doctrine is concerned, the United States through the test for excessive entanglement established the extent to which entanglement can be said to exist.

The South African courts as discussed above, only pronounced that the courts should limit themselves from deciding on religion-based doctrinal questions. It is thus concluded that the doctrine of entanglement as interpreted and applied by the South African courts, means an instance where the courts are warned against entertaining religious matters, to protect religious institutions and religious rights. From the discussion above, it is concluded that the origin of the doctrine of entanglement suggests that the doctrine is not a principle of law in which the governments were forced to rely on, but a doctrine emanating from religious beliefs instead.

Chapter 3

The constitutional rights affected by the interpretation and the application of the doctrine of entanglement

3.1 Introduction

It is the constitutional right of every person to practice a religion of his or her choice.[140] The court in *Christian Education, South Arica v Minister of Education*[141] held that it is with no doubt that the right to religious freedom as well as other related rights such as belief and the right to have a say in an open and democratic society, as provided for in the Constitution, are some of the important rights that need to be protected at all costs. The constitutional provisions for the rights mentioned above stem from the historical events and the present events relevant to the protection of religious freedom and related rights.[142]

This chapter provides a comprehensive analysis of the South African constitutional jurisprudence on the rights affected by the interpretation and application of the doctrine of entanglement by the South African judiciary. It also draws inferences from their recognition at the international level. The analysis of South African case law aids in ensuring an understanding of the rights concerned. Firstly, the right to freedom of religion is discussed, followed by the right to equality and lastly, the right to freedom of association.

It is of paramount importance to look at the constitutional provisions that deal with the religious rights directly. This is done to lay a proper foundation towards a survey of the constitutional jurisprudence regarding the extent to which the religious rights are protected.

The Constitution in section 15 provides that every person is entitled to freedom of religion, which includes the freedom of thoughts, belief, and the opinions relevant to religious choice.[143] This right, read with the provisions of section 9,[144] states that if a

[140] Section 15 of the Constitution of the Republic of South Africa, 1996.
[141] 2000 (10) BCLR 1051 (CC).
[142] n 41 above.
[143] n 140 above.
[144] n 3 above.

person ascribed to a certain religion, every person thereto must be afforded equal status and the equal benefit of the law. The right also strengthens the right to religious freedom in the provisions of section 9(3), which expressly provide that no person may be discriminated against based on their religion, their conscience, and belief.[145] This right undoubtedly covers the equal protection by the law of people ascribed to different religious beliefs and organisations.

The above-mentioned rights are contextualised in terms of other provisions in the Bill of Rights. Section 15(2) provides that the practice and observance of the religious beliefs are allowed at institutions aided by the state, with the condition that it occurs in a manner that is equitable and respects the rights of others. The relevant authorities are given a task to ensure that all reasonable protocols are followed.[146] The above-mentioned provision also makes it easily accessible to everybody to have this observance attended by anyone who so likes and on a free basis.[147]

Section 29(3) of the Constitution also provides that every person is permitted to establish his or her own educational institution, at his or her own expense, including institutions that are religiously centred. These may include the establishment of independent schools where religion is dominant. Upon establishing schools under this provision, the institutions are then given responsibilities to ensure that no person is discriminated based on race, religion, or culture. It might be that the legislature has created an additional requirement that these institutions must be registered with the state.[148] In addition to compliance with the law of the country, the state is able to monitor how registered institutions are run, and in the scope of this study in particular, the protection of the right to freedom of religion, equality, and freedom of association.

In terms of section 15(3) (a) of the Constitution,[149] all marriages which were concluded through the religious system, be it personal or family beliefs, are recognised as valid marriages in the South African context. This is another clear indication of the South African jurisprudence on the protection of the constitutional right to religious freedom

[145] Section 9(3) of the Constitution of the Republic of South Africa, 1996.
[146] Section 15(2)(b) of the Constitution of the Republic of South Africa, 1996.
[147] Section 15(2)(c) of the Constitution of the Republic of South Africa, 1996.
[148] Section 29(3)(b) of the Constitution of the Republic of South Africa, 1996.
[149] The Constitution of the Republic of South Africa, 1996.

in an open and a democratic South Africa. It is provided for in section 31[150] that no person belonging to a certain cultural group, religious or a linguistic, may be discriminated against and be prevented from exercising their rights to enjoy their culture, religion, or use their language, as well as joining and forming their cultural, religious, or linguistic associations. This provision supports the provisions of section 9(1) and (3) and section 15(1) discussed above.

Furthermore, section 185 of the Constitution establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities that is tasked with the mandate of protecting, amongst others, the religious communities.[151] It is provided that the Commission's main function is to ensure that religious, cultural, and linguistic communities are protected and respected.[152]

It is required by the Constitution that the religious rights provided for in the Bill of Rights be executed in line with the constitutional provisions in section 1 and section 2 of the Constitution, the objectives of the Bill of Rights, and the preamble to the Constitution. It is also required of every court, tribunal, or a forum that when interpreting the Bill of Rights, the promotion of the values that underline an open and democratic South Africa as entrenched in section 1,[153] must be the first priority.[154] Section 39(1) requires that human dignity, equality, freedom, and the international law must be considered when interpreting the Bill of Rights.[155] Even if the common law and customary law principles need to be developed, the spirit, purport, and the objects of the Bill of Rights must be considered.[156]

In terms of section 7(1) of the Constitution,[157] the constitutional authority and the Bill of Rights are categorised as the cornerstone of democracy, where the rights afforded to the people are enshrined. The said rights are so enshrined to affirm the value of

[150] Section 31(1) of the Constitution of the Republic of South Africa, 1996.
[151] Section 185 of the Constitution of the Republic of South Africa, 1996.
[152] Section 185(1)(a) of the Constitution of the Republic of South Africa, 1996.
[153] Section 1 of the Constitution of the Republic of South Africa, 1996.
[154] Section 39(1) of the Constitution of the Republic of South Africa, 1996.
[155] n 150 above.
[156] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
[157] Section 7(1) of the Constitution of the Republic of South Africa, 1996.

human dignity and freedom in a democratic state like South Africa.[158] The state is joined in the responsibilities of respecting and promoting the rights in the Bill of Rights.[159]

Lastly, the rights in the Bill of Rights are subject to the provisions of section 36, which serves as the limitation clause.[160] It is provided that the Rights in the Constitution can be limited through the law of general application, with such limitation being reasonable and justifiable in terms of the founding values of the democratic South Africa.[161] It thus can be said that religious and related rights can be limited in terms of the above provision, if the requirements of the section are met.

3.2 The constitutional jurisprudence on the right to freedom of religion

The right to practice one's religion is a fundamental right afforded by the Constitution of the Republic.[162] Thus, it may be argued that the above-mentioned right also affect one's right to human dignity. It is also argued that the right to freedom of religion enjoys judicial eminence in comparison with other constitutional rights. This is backed up by the reasoning of the Constitutional Court in the cases discussed below. The discussion of the cases below is incorporated in this study to show the extent to which the Constitutional Court aims to protect religious rights, especially when they conflict with other constitutional rights.

3.2.1 S v Lawrence; S v Negal; S v Solberg[163]

Ms Solberg, who was an employee at Seven Chain store, was found guilty of contravening the provisions of section 90(1) of the Liquor Act[164] when she sold wines on a Sunday, which was prohibited. In challenging the constitutionality of the section, she alleged that it was in violation of the right to freedom of religion as enshrined in

[158] n 157 above.
[159] As above.
[160] Section 36 of the Constitution of the Republic of South Africa, 1996.
[161] n 160 above.
[162] L du Plessis 'Religious freedom and equality as celebration of difference: A significant development in recent South African constitutional case law' (2009) 12(4) *Potchefstroom Electronic Journal* 1.
[163] 1997 (10) 1348 (CC); 1997 (4) SA 1176 (CC).
[164] 27 of 1989.

section 14(1) of the then Constitution,[165] the precursor of section 15(1) of the present Constitution.[166]

In the above-mentioned case, it was held that the right to freedom of religion incorporates the right not to be forced to do something that is against one's religious beliefs or non-beliefs. According to the court, in the above-mentioned case, the right guaranteed a person an entitlement to be protected against any form of violation.[167] This case serves as an important source from which the ambit of the right to freedom of religion may be inferred upon.

3.2.2 Christian Association v Minister of Education[168]

In this case, the Christian Association approached the court to seek an order in which section 10 of the South African Schools Act[169] should be struck off as it abolished corporal punishment in all the public schools. The applicants alleged that according to the Christian religion, corporal punishment is an important aspect that contributes to the proper upbringing of children. The court held that the authority to which the applicants relied on does not say anything about delegating such powers to teachers and arguing in that direction is merely factional.[170]

The court had to determine whether the abolishment of corporal punishment was in actual fact, in contravention of the right to freedom of religion taking into consideration the effects of such abolishment. The court had to decide whether limiting such religious rights would be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. In so doing, the court acknowledged the fact that it is so difficult to balance religious rights and other fundamental rights, mainly because such requires weighing considerations of faith and reason, and secondly, the difficulty part in deciding what constitute religious activity protected by the Bill of Rights and what constitutes secular activity, which is regulated by the ordinary rules.

[165] The Constitution of the Republic of South Africa Act 200 of 1993.
[166] n 165 above.
[167] n 149 above.
[168] n 141 above.
[169] 84 of 1996.
[170] *Christian Education* para 6..

The court considered the best interest of the child, the purpose sought by the Schools Act, which was to protect children from having their rights violated by teachers, and within the premises of the schools, as compared to the public where the parents stand to claim their right to exercise their religious right over their children.

It may be argued that the court in this case has dealt with dispute arising from religious doctrine in an efficient manner. The right argued for was for the parents, and the court had to employ the provisions of section 36 of the Constitution in order to come to the decision it took. Some scholars argue that the court entangled itself and thus has acted against the accepted doctrine of entanglement in that it had to answer whether the right to religion raised by the appellant was guanine, and in the process had to examine the extent to which an activity may be said to be religious for the party alleging same.[171] This is a practical example on the difficulty in applying the doctrine of entanglement in our courts.

From the above-mentioned case, it can be seen that the right to freedom of religion has been the main concern. It is argued by those who advocate for the right to freedom of religion that the court in this case has taken preference of the rights of the children over religious rights through the limitation clause, and it led to violation of human rights.[172] However, this study argues that the approach by the court is a proper one and should be preferred over the court's reluctance to deal with matters on a mere basis that the argument raised emanates from religious doctrine.

3.2.3 Prince v President, Cape Law Society[173]

While the case concerned itself with the requirements of one to become an attorney in South Africa,[174] the issue of religious practice of using dagga caused much controversy. The appellant contended that the provisions of section 22A(10) of the Medicines Act[175] violated the right to practice religion by Rastafarians as it deemed it a criminal offence to be found in possession of dagga unless it is for medicinal

[171] P Farlam 'Freedom of religion, belief and opinion' in S Woolman *et al* (Eds) *Constitutional law of South Africa* 2nd Ed (2008) 40.
[172] Du Plessis (n 162 above) 10.
[173] 2001 (CCT36/00) [2002] ZACC 1.
[174] As above.
[175] Medicine and Related Substances Act 101 OF 1965.

purposes. This is because according to the appellant, using dagga was an essential practice of the Rastafarian religion. The court had to determine whether it was justifiable to possess dagga for religious purposes.

The court above had to determine whether the above prohibition could be limited in terms of section 36 of the Constitution without undermining the purpose of such prohibition. The court had to establish further whether such prohibition amounts to a justifiable limitation on the right to freedom of religion. It was also stated that the limitation test requires an inquiry into the reasonableness and justifiability of the limitation in an open and democratic society founded on the principles of equality, human dignity and equality. Consideration must be had on the purpose of the limitation, nature of the right and its limitation, the importance of limitation and consideration of other less restrictive measures to achieve the purpose of limitation.[176]

The adopted method by the court above was that the prohibition of use of dagga was justified and reasonable on the basis that the limitation sought to combat the abuse of drugs which has been occurring in South Africa, as well as minimising the health hazards that come with the use of dagga. It was held further that no other less restrictive measures could be put into place to achieve this objective than the implementation of the prohibition.

Without discussing the recent case subsequent to the above, it is clear from the court's analysis of the right to freedom of religion and the limitation clause that dealing with matters emanating from religious doctrines is not as difficult as it is made to appear through advocacy of the doctrine of entanglement as discussed in the previous chapter. The court only has to determine whether in terms of the limitation clause,[177] the limitation would be reasonable and justifiable considering the reason for that limitation, other avenues which can be employed and are less restrictive, the purpose of the limitation of a certain right.

It is argued that the South African courts can be able to deal with any matter before them without even have to consider the doctrine of entanglement. The only issue left to court is to balance the conflicting rights, and in this case, religious rights and other

[176] n 160 above.
[177] Same as above.

fundamental rights based on the surrounding circumstances than relying on the doctrine of entanglement that courts should rather be reluctant in deciding on such matters involving religious doctrine.

3.2.4 MEC for Education: Kwazulu Natal v Pillay[178]

The court in this case was faced with the pronouncement on the violation of the constitutional right to freedom of religion. This was the case after Pillay had a gold stud inserted on her nose as part of her cultural and religious practice. The school which she attended had a policy that prevented the learners from wearing jewellery in the manner which Pillay did.[179] The school requested Pillay's mother to write to the school and explain why Pillay had to wear the nose stud as part of her religion. After Pillay's mother wrote to the school explaining that the practice of Pillay wearing the nose stud was an Indian cultural practice, which is also religious, and not for fashion purposes, the school management did not take to this kindly.

On approaching the Constitutional Court to appeal the school's decision, the Constitutional Court held that the Code of Conduct the school relied on when refusing the exemption to Pillay wearing the nose stud, was in fact unconstitutional as it discriminated against her; however, did not pronounce whether it was based on the grounds of culture or religion. This is because Pillay is from a group that is defined by a combination of religion, culture, ethnicity, language, and geographical origin.[180]

The court made one importance pronouncement in paragraph 47 when it held that in as much as a belief or practice can be pure religious or pure cultural, it is possible for such to be both cultural and religious at the same time[181] This follows what the court said when making a difference between religion and culture. The Court outlined that religion is concerned with one's faith and belief on a personal level, while culture on the other side is concerned with traditions and beliefs developed by the community.[182]

[178] 2008 (2) BCLR 99 (CC).
[179] *MEC for Education: KwaZulu Natal* para 50.
[180] As above.
[181] *MEC for Education: KwaZulu Natal* para 47.
[182] n 178 above.

The court went further to hold that freedom is one of the important and underlying values upon which the Bill of Rights has been founded, and when the courts interpret the same, it must consider the values of human dignity, equality, and freedom.[183] The courts have to consider the mutual existence of these rights and consider the fact that they strengthen each other.[184] The court also held that the concept of freedom guarantees one a right to be respected and protected as one chooses to pursue, be it religious, cultural, or anything out of the scope of the case before the court.[185]

3.3 The right to equality

As seen from the cases above, the right to religious freedom has in most cases been dealt with in relation with the right to equality. This is mainly because the troubling aspect in the religious is the equal treatment of the congregants. The court's reluctance in dealing with disputes arising from religious questions poses the risk of the continued discrimination within religious bodies based on the ground of, amongst others, sexual orientation, and belief. This is the reason why it is important to discuss in this section what equality entails, and to what extent can we say that there has been a violation of the right to equality to back the opinion regarding the relevance, adequacy of the interpretation, as well as the application of the doctrine of entanglement. Critiquing the adequacy and the relevance of the interpretation and the application of the doctrine of entanglement, helps to advance the mission of protecting and respecting human rights enshrined in the Constitution of the Republic of South Africa.[186] The concept of equality has, over many years, been problematic for many writers and theorists. To date, there is no mutual definition of the concept.[187] A distinction is drawn between the formal and substantive equality.[188]

3.3.1 Formal equality

In terms of the formal equality concept, it is required that all persons who are in the same position or having similar circumstances surrounding them, should be afforded

[183] *MEC for Education: KwaZulu Natal* para 63.
[184] *MEC for Education: KwaZulu Natal* para 64.
[185] n 178 above.
[186] n 149 above.
[187] A Smith 'Constitutionalising equality: The South African experience' (2014) 14(1) *African Human Rights Law Journal* 611.
[188] n 187 above.

similar and equal treatment. They should not be treated differently and to their detriment based on religion, gender, or race.[189] This view resonates with the historical perspective by Aristotle who invented the idea that through the concept of equality, cases that are similar should be treated equally.[190] This may be the most understood and broadly spread definition of the formal equality. It is argued that the only way to prevent discrimination is the consistency in the treatment of human beings.

A formal perspective to equality requires that there is an equal application of the law, rules, and regulations without considering the surrounding circumstances of the persons concerned. Thus, it can be said that the concept of formal equality is a symmetrical concept for the reason advanced above. If direct discrimination is found to exist, it is required in terms of the concept of formal equality, that the comparator test be used.[191] Through the comparator test, the dominant norm is used to determine if there was indeed any direct discrimination in any action that has been taken, either by the state, private institutions, or between people themselves.[192]

However, it remains a question if the above notion of comparator is still relevant in today's era where there is huge growth and development of different cultural practices, traditions, and religions in different societies throughout the world. It is argued that by a mere abstraction of people on their individual levels from the context of their cultural and social belonging, they then become conceptualised and are treated with equality in relation to those who are categorised as the privileged.[193] Furthermore, it is argued that using sameness as a concept of comparator test, undermines the importance and the existence of diversity.[194]

It is further argued that through the formal equality concept, there is a marginalisation, disempowering and rendering women, who are in most cases, invisible.[195] It is on this basis that the concept of formal equality is rendered to be inappropriate as it results in

[189] As above.
[190] n 187 above.
[191] As above.
[192] Smith (n 187 above) 612.
[193] N Fraser 'From individual to group' in B Hepple & E Szyszczak (Eds) *Discrimination: The limits of the Law* (1992) 102.
[194] J Flax 'Beyond equality: Gender, justice, and difference' in G Block & S James (Eds) *Beyond equality and deference: Citizenship, feminist politics and female subjectivity* (1992) 72.
[195] LM Finley 'Transcending equality theory: A way out of the maternity and the workplace debate' (1986) 86(1) *Columbia Law Review* 1118.

the deference between people as they are categorised, while equality is supposed to promote sameness. Thus, it may be said that the concept that is preferable is the one that is concerned with the state signing into law those legislations and policies that do not impose the continued maltreatment of those who are already suffering economically, socially, and politically under the existing laws and policies.

3.3.2 Substantive equality

As mentioned above, the preferred definition of what constitutes equality is that which orients the equality right from a negative perspective of non-discrimination to the substantive nature of equality.[196] That is achieved through ensuring that the policies and laws created do not continue to strengthen the marginalisation of the already suppressed group of individuals. Thus, it can be said that substantive equality concepts aim to eradicate all the barriers that exclude a certain group of people from celebrating, exercising their religious, cultural, and other practices they have ascribed to.

The concept of substantive equality incorporates, in its approach to disputes, the concept of indirect discrimination.[197] The concept of indirect discrimination addresses equality based on historical events. This approach allows the recognition of the reality that people are not really on the same level. This notion was also supported by the court in *President of the Republic of south Africa v Hugo*,[198] when it was stated in paragraph 112 that even though the primary mandate of the Constitutional Court is to ensure that there exists in the democratic South Africa, equal treatment of people, practicing equality in a society where there exists inequality has the potential of creating further inequality.[199]

In terms of substantive equality, equal opportunity and the equality of the outcomes are the main concerns. This approach to equality disputes, uses the affirmative action as a tool to restore the position before the unequal opportunity and unequal treatment of individuals took place. In terms of affirmative action, programmes and provisions

[196] Smith (n 187 above) 612-613.
[197] As above.
[198] 1997 1 (CC) 41.
[199] Smith (n 187 above) 613.

are made with the sole idea of giving preference to those who are regarded as previously disadvantaged groups of people. Affirmative action requires the government to put into place positive measures for the previously disadvantaged groups of people to enjoy the full and equal opportunities.[200]

3.4 The South African judicial approach to the concept of equality

It is necessary, before going into detail on how the Constitutional Court has dealt with the right to equality, to lay a foundation on the constitutional provisions and related legislations addressing the right to equality. Section 9 of the Constitution[201] served as the cornerstone of the concept of equality. It is provided that every person is afforded equal protection, and the benefit of the law on the basis that everyone is equal before the law.[202] The said equality includes the free and full enjoyment of the rights in the Bill of Rights on an equal basis[203] The section prohibits the state from unfairly discriminating, either directly or indirectly, against any person on the grounds of race, sex, gender, social origin, age, disability, religion, culture, belief, conscience, sexual orientation, colour, marital status, pregnancy, ethnicity, birth, or language.[204]

3.4.1 Du Toit & Another v Minister of Welfare and Population Development & Others[205]

The court in this case was faced with a task to pronounce on the constitutionality of some of the provisions of the Child Care Act[206] and the Guardianship Act[207] with regard to the adoption of children. In this case, it was a lesbian couple that wanted to adopt children. Such was not allowed in terms of the provisions of the two legislations mentioned above.[208] It was held by the Constitutional Court that the provisions of the two Acts violated the provision on the grounds of sexual orientation as well as the marital status of the lesbian couple. It is argued that the approach by the Constitutional Court in this case was appropriate in that the substantive equality was advanced. This

[200] Smith (n 187 above) 613-614.
[201] n 149 above.
[202] Section 9(1) of the Constitution of the Republic of South Africa, 1996.
[203] Section 9(2) of the Constitution of the Republic of South Africa, 1996.
[204] Section 9(3) of the Constitution of the Republic of South Africa, 1996.
[205] 2003 (2) SA 198 (CC).
[206] 86 of 1991.
[207] 192 of 1993.
[208] Child Care Act 86 of 1991, Guardianship Act 192 of 1993.

is because the court emphasised on the need to accept people for who they really are, and not considering other factors such as their religion, sexual orientation, marital status, beliefs, and their cultural practices to name a few. It may be said that the approach by the court in this case is similar to the one that was taken in the *Fourie* case.[209]

3.5 Unfair discrimination within religious organisations

As discussed in the previous sections of this study, unfair discrimination occurs when a conduct is found to have been subjectively arbitrary to another person or a group of people. This section outlines the test that has been adopted by the South African courts to determine whether a certain conduct constitute unfair discrimination. This will advance the understanding of the rights that are affected through the interpretation and the application of the doctrine of entanglement within the South African sphere. This relates specifically to the equality right enshrined in the Bill of Rights. Furthermore, this section examines the relationship between culture and religion, as well as the extent to which they are treated at the public level. This will assist in determining the extent that the way the doctrine of entanglement is interpreted and applied in the South African context, affects the protection and respect of human rights.

In the case of *Harksen v Lane NO*,[210] the court attempted to establish the test that can be used to determine whether any person has been discriminated against unfairly or not. The court held that the first stage of inquiry is whether the law or conduct in question does differentiate between people. If differentiation is found between people, does the differentiation serve as a rational purpose by the government? If it was found that it does not exist, then the equality clause has been violated. It is, however, a fact that sometimes this conduct or law might have a rational purpose but still be discrimination.[211] The second leg is whether the discrimination amounts to unfair discrimination. The requirement is that the discrimination must have been based on either of the grounds listed in section 9 of the Constitution. This objective test requires that the differentiation must have the prospects of impairing one's fundamental rights

[209] *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC).
[210] 1998 (1) SA 300 (CC) [53].
[211] n 210 above.

as protected by the Constitution.[212] Should it be found that the differentiation was based on certain grounds, with prospects of violating human rights, then it may be said that there is unfair discrimination.

There is a growing tension between the rights of women and religious rights within different religious organisations throughout the world. An example may be drawn from a known fact that women are not allowed to hold certain positions within the Catholic Church. This church does not allow women to become priests. In some instances, only men are allowed to have multiple partners, while women are not allowed to practice same. In its setting, it suggests a continued violation of human rights with specific reference to women. In a Jewish community, women are expected to get permission from their husbands to proceed with divorce, and their husbands may refuse.[213] The said requirement is not expected of males. This depicts the gross violation of the right to equality against women.

Taking into consideration historical development of religion in South Africa, it is argued that the Apartheid government actively contributed to the multi-religious South Africa. Although not even a single religion was made a state religion, the government encouraged certain Christian beliefs. Through the apartheid political philosophy, many Christian churches practiced and encouraged racial segregation of its members.

3.6 Conclusion

It was highlighted in the research hypothesis that the interpretation and the application of the doctrine of entanglement by the South African judiciary influence the protection and respect of human rights enshrined in the Bill of Rights. This chapter discussed the religious and related rights that are most likely to be affected through the judicial non-entanglement doctrine adopted by the judiciary. Specific reference has been made to the right to equality in section 9 of the Constitution. Furthermore, reference was made to the practical examples on how the right to religious freedom may interfere with the right to equality. This has been depicted through reference to some of the case law the South African judiciary has dealt with in the past.

[212] As above.
[213] n 163 above.

Chapter 4

The doctrine of entanglement and its relevance in the constitutional and democratic South Africa: inferences drawn from the *De Lange* case

4.1 Introduction

In the case of *Johan Daniel Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park,*[214] the advocacy and scholarship on the protection and respect for human rights, and particularly religious rights and freedoms pertaining to associations of religious nature, has seen a sharp rise. In this context, the advocacy that has given rise emanates from what scholars on what the parameters, if any, should be with religious associations. More focus is put on sexual conduct, the questions arising from the normal way of practicing religion as well as the membership values regarding one choosing to follow a certain religion. As in the above-mentioned case, the South African courts have not been lucky to be confronted with the same set of facts similar to the ones in *Strydom*. However, the Supreme Court of Appeal has recently dealt with similar facts in the case of *Ecclessia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*.[215]

Following the above decision there arose again the questions regarding the extent or parameters of religious rights, and religious association related rights in the context of sexual orientation and relationships, as it is in most cases wherein the law and religion are found to be in conflict against each other. This chapter therefore analyses the above judgement by the Supreme Court of Appeal to advance the understanding of the parameters of religious association rights in relation to the founding values of the Constitution in a plural and democratic country like South Africa.

This chapter assesses what De Freitas refers to as doctrinal sanctioning in the constitutional values.[216] The Supreme Court of Appeal in the above case was confronted with a task to deal with the challenging dispute, while taking into

[214] ZAGPHC 269.
[215] n 12 above.
[216] De Freitas (n 134 above) 19. De Freitas defines doctrinal sanctioning as the penalties imposed on individuals who contravenes the doctrinal rules. This includes the procedure used when imposing such penalties against a party in contravention of the rules provided for b3y a certain doctrine.

consideration the principle of judicial avoidance of religious matters. The judgment in this case represents the interpretation and the application of the doctrine of entanglement as adopted by the United States of America. A critical analysis of the above-mentioned case will assist in outlining the gap, therefore, paving the way for proper recommendations to address the issue at hand. This is one important aspect of human rights activism that advocates for better methods that may be employed in order to preserve, protect, and encourage the respect for human rights. This chapter further presents the situation where there are human rights violations and attempts to adopt the limitation method to address the conflict between religious rights and other fundamental rights as enshrined in the Bill of Rights.

4.2 Factual background of the case

The appellant in the above-mentioned case was an ordained Minister of the Methodist Church of Southern Africa. The appellant informed church members of her intentions to get married to another woman who was also a member of the church. The appellant did so through reading out a letter to the congregants following the revelation of her intentions. The appellant was expelled from the church and removed from her ministerial position pending the outcome of the disciplinary hearing.[217] The appellant was charged in terms of the Laws and Discipline of the Church, which expressly mentioned that homosexual marriages are prohibited in the church, and that only heterosexual marriage may freely take place within the ambits of the church.[218]

The Ministers of the church were vested with powers by the set of rules of the church, to observe and implement the laws provided in the Constitution of the church, other policies, practices, decisions, and customs of the church. The appellant was found guilty by the District Disciplinary Committee for her failure to observe and follow the abovementioned provisions of the Laws and Discipline of the Church and all other policies, usages, practices, and decisions of the church.

Following the decision in question, the appellant then noted an appeal to the Church Connexional Disciplinary Committee against the decision by the District Disciplinary

[217] *De Lange* para 4.
[218] *De Lange* para 6.

Committee.[219] The Church Connexional Disciplinary Committee unfortunately confirmed what the District Disciplinary Committee that the appellant was wrong and ought to have been found guilty of contravening laws and policies of the church and be discontinued from her ministerial roles at the Methodist Church of Southern Africa.[220]

The Laws and Discipline of the Church afforded the appellant an opportunity to refer the matter to arbitration if still not satisfied by the decision of the Church Connexional Disciplinary Committee. It was on this basis that the appellant asked the convener of the Connexional Arbitration Panel of the Church to take the matter for arbitration. The agreement that included the processes for the arbitration was signed by the convenor on behalf of the appellant. The appellant then approached the High Court seeking that the arbitration agreement be set aside and immediately cease to operate, that the decision by the church bodies be declared unlawful and unconstitutional as it discriminated against her based on sexual orientation, that the action of suspending her be declared null and void and set aside, and to reinstate her as the Minister of the church retrospectively.[221] The High Court dismissed her application reasoning that the application is premature and should first be dealt with through the arbitration processes. [222]

The court held that they are required, by its adopted principle of judicial non-interference, to avoid being entangled in issues of religious nature.[223] Based on this, this study is conducted on the protection of human rights. This is because the courts that are supposed to protect constitutional rights, have limited themselves in executing a mandate by not adjudicating on disputes arising from religious doctrines.

The matter then went to the Supreme Court of Appeal. The majority judgment held that the appellant brought this case before it not based on the unfair discrimination she suffered at the hand of the church and the laws that governs the church. It held further that she brought the case alleging that she was entitled to a fair and just administrative

[219] *De Lange* para 9.
[220] *De Lange* para 10.
[221] *De Lange* para 1.
[222] *De Lange* Para 15.
[223] As above.

action,[224] in terms of the Constitution[225] and the Promotion of the Administrative Justice Act.[226]

The court was concerned with the question whether the appellant has proved and shown a good cause on why the arbitration process should not prevail in the circumstances before court. The court further relied on section 3(2) of the Arbitration Act,[227] which provides that the discretion lies with the court whether to enforce the arbitration agreement or not. The court held that the appellant failed to furnish the court with grounds sufficient to warrant non-consideration of the arbitration agreement, and thus the appeal failed.

The appellant argued that no valid arbitration agreement existed between her and the church.[228] The court countered the argument by alleging that that appellant accepted that the convenor signs the agreement on her behalf.[229] The appellant also argued that there was a delay in completing the arbitration agreement.[230] In response, the court held that the delay in concluding the arbitration agreement was foreseen and could not be prevented.[231] In other ways, the deal was an exceptional circumstance.

The appellant further argued that the arbitration agreement required that she must waive some of her constitutional rights, and further exclude the courts in deciding on the issues at hand, and lastly, denied that that she appoints her legal representative in the proceedings.[232] The court however reasoned that no condition on the agreement resulted in her rights being waived; instead the agreement ensured that her right are protected, and that dealing with the matter internally before approaching the court was the best method, which also keep the courts in line with the judicial non-entanglement doctrine as far as religious matters are concerned.[233]

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[224] *De Lange* para 19.
[225] Section 33 of the Constitution of the Republic of South Africa, 1996.
[226] Section 1 of the Promotion of the Administrative Justice Act 3 of 2000 (PAJA).
[227] 42 of 1965.
[228] *De Lange* para 24.
[229] n 172 above.
[230] *De Lange* para 25.
[231] n 230 above.
[232] *De Lange* para 26.
[233] *De Lange* para 26.

The appellant also contended that there was a possibility that the arbitrator would be biased in the processes, as he was a member of the church that was party to the proceedings. The court in response held that there was no reasonable suspicion that the arbitrator would be biased against the appellant. The court emphasised the fact that allowing the arbitration process to take place, the private functioning of the church would be kept intact, thus protecting the internal process of the church from the public.[234]

In responding to the appellant's contention that the arbitration would be futile,[235] the court held that the arbitration process was an important stage or process that ought to be followed in the circumstances to determine whether the church had any rule or policy that precluded the members of the church to marry.[236] The court emphasised on associational rights that there are other people concerned with the right to practice religion. The court held that the rights of others in the practice of religious rights should be taken into consideration to preserve the religious practices that are deemed a norm in certain churches. The court thus mentioned that where there are disputes arising from religious rule, and where individuals willingly commit themselves to that religion, the religious bodies responsible for overseeing should be the ones allowed to take decisions and not the courts, and lastly, those individuals should be prepared to be bound by such rules.[237]

In a minority judgment, Justice Wallis commented on the existence of a valid arbitration agreement between the appellant and the respondents. It was pointed out that the clause in the Laws and Discipline of the Church was pursuant to the understanding that the Laws and Discipline of the Church constitute a contract binding all those who chose to follow the religion followed at the respondent's church.[238] The court in the minority judgment endorsed the reasoning of the court in the minority judgment, where it was held that even if the arbitration agreement was found to have

[234] *De Lange* para 27.
[235] *De Lange* para 28.
[236] n 235 above.
[237] *De Lange* para 40.
[238] *De Lange* para 57.

been unlawful, the decision to dismiss the appeal would still have been the final verdict[239]

4.3 Analysis

4.3.1 Freedom of association and religious association rights

The court in *de Lange* has confirmed the position adopted by the South African judiciary and other foreign jurisdictions such as the United States of America, Australia, and Canada that the judiciary should try to avoid getting entangled in internal issues of the church that involve religious questions. This is also referred to as the courts' avoidance of doctrinal entanglement, the doctrine of entanglement, judicial non-entanglement, or judicial non-interference as outlined in *Mohamed v Jassiem.*[240]

In the context of this case, the court should, at all costs, avoid finding itself entangled in deciding on or reviewing the validity of the procedure followed when the disciplinary steps were taken against the appellant, who was found to have contravened the provisions of the Laws and Discipline of the Church. Furthermore, in instances where the court would have been required to decide on the lawfulness of the provisions of the Laws and Discipline of the Church, it would have been that the court should try to avoid deciding on such predicaments.

One aspect to take into consideration is whether, by a mere subscription to the church, a member then becomes bound by the internal rules of the church and the applicability of the doctrine of entanglement. The court emphasised on associational rights that the rights of an individual ascribed to a certain religion are limited in that association (religious) takes preference.[241] For this reason, the court felt that the religious questions should be left for the church to decide and not the courts. The court also emphasised the impact of one deciding to follow a certain religion and held that such an individual should be prepared to be governed by the laws that governs that religious organisation.

[239] *De Lange* para 47.
[240] 1996 1 SA 673 (A).
[241] n 240 above.

With reference to the doctrine of entanglement, it may be argued that the issues in dispute were not that complicated. This is because the rules of the church were clear pertaining to the church's recognition of heterosexual relationships in exclusion of homosexual relationships. The appellant had committed herself to the internal rules of the church the day she chose to follow the religion within the respondent's organisation, and that the procedures, which were used to discipline the appellant were in terms of the internal rules and policies of the church, which the appellant was also aware of.

In this case, the doctrinal matter that informed the church's decision was that the appellant was in fact involved in a same-sex relation with another woman, which was prohibited in the laws of the church. This is because the tenets of the church clearly recognised heterosexual relationships only. In addition, the fact that such a person should not be involved with the daily functioning and the management of the church is part of the church doctrine. Even though the appellant chose to adopt the unfair administration route by the church, the relief sought by the appellant included an order to the effect that the decision of the church to discontinue her as a church minister, was in fact unconstitutional and unfair discrimination on the ground of sexual orientation. This is the reason why the Supreme Court of Appeal could not decide on that aspect, as it was not argued on.

A question posed in this study, thus, is what would have been the position had the appellant brought forward the claim of unfair discrimination based on the ground of sexual orientation?

It is argued that the court in *de Lange* would have been a good opportunity for the judiciary to develop the jurisprudence of the South African judicial approach to the nexus between equality, sexual orientation, related conduct in churches, as well as the religious associational rights. The closest the judiciary has ever been to this aspect is in the case of *Strydom*.[242] However, in *Strydom*, the position of the complainant was not that of spiritual realm and core functioning of the church. The complainant was also not a member of the church in question, and lastly, his contract was silent regarding his sexual relationship with any other person. Unlike in this case, the

[242] n 214 above.

appellant was an ordained Minister of the church who was involved in the core functioning of the church and was in the spiritual leadership of the church.

As the Supreme Court of Appeal could not deal with the issue of unfair discrimination on the grounds of sexual orientation, an appropriate approach, which could have been taken should the argument have been advanced, would resemble substantial autonomy to the church whenever it is confronted with spiritual leaders alleged to have taken part in relationships of that kind. The Supreme Court of Appeal held that as the issues brought before court involves the internal rules adopted by the church, which the appellant accepted by a mere acceptance of, or choosing to ascribe to the religion of the church, then everything should be left to the church to decide on the dispute and not the court.[243] The court went further to hold that it can only interfere when it is necessary to do so.

The court in this case has placed the judiciary in a difficult position to decide on when they are supposed to interfere in the religious doctrine. This follows after the comments made by Justice Ponnan that it must be strictly necessary that the courts should find themselves involved or entangled in issues of doctrinal questions. Perhaps this test should be related to the issue at hand, which involves the sexual conduct that is inconsistent with the rules of the church. It is common cause that the pure practice of religion involves the violation of other human rights such as equality. It is then a question whether the courts should, in relying on the strict requirement of involvement in religious issues, first check the nature of rights being violated before getting involved?

From that point of departure, it is argued that the courts weighed religious rights and the rest of the constitutional rights, and particularly, the right to equality, freedom of expression, freedom of association, human dignity, and found that religious rights should enjoy preference over the other. Therefore, a discussion on the limitation clause is essential. This would assist in understanding the reason behind the judicial preference of religious rights over others in the Bill of Rights. This aids in determining the extent to which the limitation of the right to equality, freedom of expression,

[243] As above.

freedom of association, and human dignity, with preference given to religious rights, is justified.

Section 36 of the Constitution provides that the rights in the Bill of Rights can only be limited in terms of the law of general application, as long as that limitation is reasonable and can be justified in an open and democratic community that has been found on the values of human dignity, freedom and equality; taking into consideration all the surrounding circumstances such as the nature of right, the importance of the limitation, the nature and the parameters of the limitation, the nexus between the limitation and the purpose which the right concerned is being limited, and other less restrictive measures that could be taken to address the issue at hand.[244]

From the reasoning by the court above, the court considered the right to religious freedom, and the other constitutional and fundamental rights such as the right to equality, which is the most violated right within religious organisations, and decided that religious rights should prevail in instances where there is a conflict between religious rights and other fundamental constitutional rights. This is evident by the remarks made that the individuals should accept that they are bound by the decisions of religious bodies of different religions they have ascribed to, despite the known fact that a gross violation of human rights occurs within thousands of religious organisations across South Africa.

It is further argued that our individual understanding of rights overlaps with what our beliefs dictate to us. As a result, this influences our understanding on what a right ought to be, and how far we perceive violation of human rights. Based on this, the unfair discrimination that surfaced in the *de Lange* case can be addressed with caution as far as the right to equality is concerned. This in turn requires an extensive discussion of the nature and extent of sexual orientation related conduct. The importance of this is that it provides an extensive analysis and creates a balance between the right not to be unfairly discriminated against, and the constitutionality of segregation of church members by merely getting involved in conduct that are inconsistent with the laws and policies of a certain religion.

[244] n 160 above.

The court in the above-mentioned case held that across South Africa, many religious and those not ascribed to any religious belief, cultures, and religious associations, have their own requirements of sexual conduct as part of their core belief.[245] These beliefs are indirectly connected to marriages, family, purpose in life, and child rearing.[246] It is therefore argued that what we use our bodies for and how, is of paramount concern and overlaps with our beliefs, and the right to freedom of religion, belief and opinion.

Reaching consensus on some fundamentals, can thus be an important aspect towards the protection of human rights. It is further argued that in certain instances, the mission to protect these rights requires that the sensitivity be considered towards distinctive meanings that may be attributed to these rights. This is because, in most cases, beliefs play a bigger role in how things may be interpreted.

4.4 The relevance of the doctrine of entanglement in the current democratic constitutional dispensation: a South African human rights law perspective

4.4.1 Religious freedom rights and the right to equality

To answer the question on the relevance of the way the doctrine of entanglement is interpreted and applied by the South African judiciary, it is important to address the jurisprudence on the religious freedoms of conscience and religion in the constitutional dispensation. This is because the primary adoption of the doctrine lies in the need to protect and preserve religious freedom and associational rights. The South African judiciary has adopted the interpretation and application of the doctrine of entanglement with the sole purpose of preserving religious beliefs and protecting the associational rights.

Based on this, a discussion on the intersection of religious rights with other fundamental rights must be made. This is done through an examination of both rights mentioned above on an international level to determine whether the way the South African judiciary has decided to adopt the doctrine, should it continue to be applied

[245] n 12 above.
[246] As above.

and interpreted similarly, and or whether the South African judiciary should disregard the doctrine totally.

The most usual intersection of rights occurs between religious freedom rights and equality rights as previous discussed South African case law depicted. This stems from the inherent nature of the beliefs that women are limited in terms of performing certain religious activities, the biblical norms that made homosexual relationships a taboo in the ancient communities, as well as the long existing religious practices largely recognised within societies in exclusion of those not largely known. Regard must be taken that when these norms and standards were developed; the advocacy on human rights was not strong and not as broadly spread as it is today. This might be because people in the past had little to no rights and could not stand up for the way they used to be treated, even if the sense of humanity dictated otherwise. This may be seen through a practical example of slavery. The same slaves felt the inhumane treatment by their masters, but having no rights and opportunities to speak out, they could not revolt and speak out of their perspective towards the act of slavery.

The right to freedom of religion has, in the international human rights law area, two components that needs to be understood. That is the freedom of thought, conscience, and religion that incorporates one's right to hold to or change his or her religious beliefs in an unrestricted manner. The second part of the right incorporates one's right to observe and manifest his or her religion or belief. which can however, be restricted if such restriction is prescribed by law, is reasonable and justifiable depending on the circumstances surrounding the need to restrict such right.

Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides further that religious freedom may be limited as long as the values that underline a democratic society are considered.[247] The purpose of this limitation is to protect the public, morals, and the protection of religious rights of others.[248] In limiting religious rights in the South African context, the purpose is to ensure that the rights of others are considered whenever there is a conflict of laws. Perhaps this is the position from the South African judiciary should adopt in dealing

[247] Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
[248] n 247 above.

with the inherent religious rule that the state should avoid entanglement with religious matters.

The European Court on Human Rights in the case of *Arrowsmith v UK*[249] held that the phrase necessary in a democratic society means that whenever there is an interference with the religious rights and beliefs, such interference must be executed with the sole purpose of protecting the public and creating an environment where rights can be freely balanced, to achieve a goal of having a society that believes in humanity. The court went on to further emphasise that the limitation of these rights must be done with a legitimate purpose that benefits society. In this sense, the court applied the proportionality rule that was advanced in the case of *Handside v UK*.[250] This rule means that there must be a reasonable proportion between the purpose of restriction or interfering with a right, and the measures taken to achieve the purpose of the limitation of a right to religious freedom, belief, conscience, and expression of one's religious customs.[251]

It is argued that the protection of human rights lies with the judiciary through its interpretative and adjudicative roles. It is further argued that failure of the judiciary to execute this, means that a gap is left unattended. Especially in the South African context, where case law has shown that there is gross violation of human rights, and specifically unfair discrimination within religious bodies, which is left unattended as the courts have adopted the doctrine of entanglement in a way that the main priority rights are free exercise and observations of religious rights by the individuals associated with different religious beliefs recognised in South Africa.

The similar limitation clause of religious rights is found in article 29(2) of the Universal Declaration on Human Rights, wherein it is provided that religious rights, amongst others, may be limited if the exercising of these rights is weighed against the main aim of ensuring that there is due recognition and respect of fundamental rights and

[249] No 7050/75, 12 October 1978.
[250] No 5493/72, 7 December 1976.
[251] n 250 above.

freedom of others, while attempting to consider the morality requirements, public order, and the welfare within a democratic society.[252]

Article 1 of the Universal Declaration [253] provides that every person is freely born with equal human dignity and equal rights and treatment before the law. Furthermore, it is provided that people should enjoy the rights in the declaration without being discriminated based on grounds of race, sex, language, political affiliation, national and social origin, property, birth, or religion.[254] Article 7 of the Declaration further provides that by virtue of being equal, every person has the right to be protected by the law.[255] Reference may be made to this provision that the manner in which the South Africa the African judiciary interpret and apply the doctrine of entanglement in religious matters, wherein other fundamental rights enshrined in the Constitution are affected, there must be a consideration of the need to protect every person from prejudice of their rights. It is of paramount importance to regard the promotion of all the rights, especially those that are mostly violated daily.

The Human Rights Commission in *Toonen v Australia* held that the ground of sex, as listed in article 2(2) of the International Covenant on Civil and Political Rights[256] includes sexual orientation. From this point of view, it may be argued that the United Nations instruments highly regard the protection of human rights, specifically right to equality as provided for in section 9 of the Constitution of South Africa.[257] The custodians of these rights are thus vested with the obligations to ensure that these rights are protected. So is the South African judiciary at the same position to ensure that there is a balance distribution of equal treatment of people by treating their rights with caution, with the aim of bringing stability in communities.

4.4.2 Conflict between religious rights and other fundamental rights

The point at which religious rights become conflicted with other fundamental rights is a special area of controversy. It was indicated that the international human rights law

[252] Article 29(2) of the Universal Declaration on Human Rights, 1948.
[253] Article 1 of the Universal Declaration on Human Rights, 1948.
[254] Article 2 of the Universal Declaration on Human Rights, 1948.
[255] (488/1992) CCPR.
[256] Article 2(2) of the International Covenant on Civil and Political Rights, 1966.
[257] n 149 above.

requires that the right to religious freedom should be limited in instances where it is in the best interest of the public safety, public order and peace, morals, health, and other rights of others. This provision would mean that in cases where people are being discriminated against with the justification that the discrimination emanates from religious doctrine, should be limited. The courts are thus the relevant bodies to ensure the same provision is put into practice.

Another area of controversy is when the application or protection of religious rights comes into conflict with the right to freedom of association and freedom of expression. This occurs when in religion, no person is allowed to be involved in same-sex relationships as we have seen in the previous case *of de Lange,* and that person argues that the basis in which he or she gets involved in same-sex relationship is because of the right to freedom of expression as well as the right to freedom of association.

In *Eweida and Others v UK*,[258] the court was confronted with the conflict of the right to freedom of religion, belief, and the right to be free from being discriminated against on the ground of religion, and the right to be free from being discriminated against on the ground of sexual orientation. The applicants in this case refused to perform their duties of birth registration and related duties to a same-sex couple as the religion they ascribe to does not allow the sexual relationship between same sex individuals. The European Court on Human Rights held that the conduct by the applicants amounted to unfair discrimination based on sexual orientation and the institution that employed the applicants had the policy considerations which did not approve their conduct.

In deciding this, the court in the above-mentioned case considered the fact that discrimination on the ground of sexual orientation was prohibited by the Universal Declaration on Human Rights as discussed above. The court attempted to provide clarity on the route that should be adopted when confronted with the conflict of religious rights and other fundamental rights. The court posed a question as to whether the proper means were employed to balance the right to freedom of religion, and the right

[258] NO 48420/10.

to not be subjected to unfair discrimination on the grounds of religion and sexual orientation.[259]

The court in the above-mentioned case emphasised the fact that the authorities, including the judiciary, is vested with powers to exercise their discretion with caution in deciding on the conflict of rights, especially religious rights and other fundamental rights enshrined in the law of the country. The importance of this case in determining the relevance of the way the South African judiciary interpret and apply the doctrine of entanglement, is that it sets a balance between religious rights and the rationale behind protecting other fundamental rights human beings have in terms of the law of their country. Should the court have refused to entertain the cases on the basis that the dispute arises from the religious doctrine, there would have been no protection of rights as the victims would not have been remedied, and the applicants would continue to violate other people's rights, knowing that the courts would not interfere should a dispute arise out of their conduct.

The interpretation and application of the doctrine of entanglement also manifested in the case of *Gaum and Others v Van Rensburg No and Others*.[260] The court in this case set aside the 2015 decision where the church decided that gay people may be ordained as the church Ministers only if they remain celibate. Ministers were then vested with the power to not to recognise and solemnise same-sex marriages. The reversal of the decision was informed by the religious doctrine that prohibits homosexual relationships within the church and by the members. The applicants in this case above wanted the court to declare the reversal of the judgment unlawful and against the tenets of the Constitution[261] as it deprived them of a just and fair administrative action.

The court in the above-mentioned case outlined the importance of respecting religion by stating that religion is the power of the world and as a result, there should be a higher degree of respect and promotion of religious rights.[262] The court acknowledged the fact that religious rights and other fundamental rights are enshrined in the

[259] n 259 above.
[260] (40819/17) [2019] ZAGPPHC 52.
[261] n 149 above.
[262] *Gaum* para 21.

Constitution,[263] the controversy that gives rise when the two rights are in conflict should not be taken lightly. The court further held that it is a difficult task to deal with matters arising from religious doctrines, to determine the extent to which they should accept that certain conducts are what they are and should be left as they are.[264]

The court in the above-mentioned case went on to hold that the difficulty in determining the above is due to the following reasons; firstly, that beliefs are subjective in nature and as a result, it is often difficult to evaluate this on a standard that is applicable to every person. The courts are required to possess a certain degree of expertise to evaluate claims and issues arising from religious disputes.[265] The court referred to the reasoning in the *Prince* case, where it was held that the right to religious freedom is a constitutional right that is also extended to those beliefs that seem to be irrational, illogical, or exceptional in the view of those who are not subscribed to these beliefs. It is on this basis that in most cases, questions of morality arise within religious organisations as compared to other associations like football clubs, trade unions, and other charity organisations.[266]

From the above point of view, it may be argued that the rules in religious organisations do not, and are not, expected to make sense to anyone who is outside the ambits of the religion wherein these rules apply. However, that fact should not prevent us to think outside the box and avoid the gross human rights violation that occurs within religious organisation in the name of “churches must remain independent without the interference of the state”.

The court in the above-mentioned case held that the nature of religious rights as depicted above, warrants the government to create a legal system that sets boundaries regarding the state interference with the rights associated with religion.[267] It was outlined that the legal system allows for the limitation of rights, as rights are not absolute and does not serve the purpose of protecting religious rights and beliefs

[263] n 149 above.
[264] n 260 above.
[265] As above.
[266] *Gaum* para 22.
[267] *Gaum* para 23.

thereto. This is because at some point, the way in which different people practice their religion would need to be limited to accommodate other fundamental rights.

The idea advanced by the court in this case is relevant to this study because it provides an alternative route the courts could take to address the conflicts of religious rights with other constitutional rights. In this case, where the judiciary has adopted its way of interpreting and applying the doctrine of entanglement with the sole purpose of preserving religious rights and beliefs, it is argued that this approach is no longer relevant in today's constitutional dispensation, especially considering the fact that there is so many of human rights violations within religious organisations that are left undealt with, due to the application of the doctrine of entanglement by the South African judiciary.

In this case, the religious doctrinal questions arise on the right to freedom of religion and the right not to be discriminated against on the grounds of sexual orientation. It is clear that such discrimination is an inherent norm of the church and the members are expected to be bound by such. But what does that say about the equality rights? It is argued herein that the continuation of the application of the doctrine of entanglement fuels the continuation of the violation of human rights within religious institutions. It is common cause that when the gatekeeper is not willing to protect the homestead, criminals are likely to invade the homestead. The same resonates with the situation where the courts are not willing to entertain disputes that arise out of religious doctrines; the said religious organisations, through their leaders, are able to continue with the violation of human rights.

The court in the *Gauw*[268] case held that the report by the Commission for the Protection of Rights of Cultural, Religious and Linguistic Communities, indicated that there is a real need to protect religious rights without involving the state.[269] Even though such recommendations were made, regard must be had on the current practices and observance of religious beliefs and their impact on the constitutional rights. This is the reason that the Commission suggested that the communities were these religious organisations operate, should ensure that they regulate themselves in

[268] n 260 above.
[269] *Gauw* para 24-25.

a manner that promotes the constitutional values and the laws of the country.[270] The main purposes was to avoid the entanglement of state with religious matters, where it was going to be the judiciary as the implementing and interpretative body of the constitutional and related rights.

An argument advanced in this study is that the communities themselves cannot safeguard the practice of religion without interfering with other constitutional rights. This mainly stems from the fact that the norms and standards of the religious organisations are what the communities believe in. As a result, it is almost impossible that the very same community that has adopted certain practices of religion, will see something wrong with the practice and implement measures aimed at eradicating such practices.

This study further argues that the way the doctrine of entanglement is applied in South Africa, raises the question on how the appropriate standards through which disputes emanating from religious and cultural practices, should be adjudicated. The application of the doctrine furthermore suggests that certain religious practices are separately dealt with, and not entirely subject to constitutional scrutiny, unlike all other cultural practices. This is because the definition of what religion is, often do not cover some cultural practices that are both culture and religion.

The later instance should not be encouraged, and especially by the judiciary that is supposed to be the watchdog of the equal treatment of human beings, and in particular, regarding the religion they practice and the cultural belonging and practices they are related do. It is argued that the only way the judiciary can achieve this is through doing away with the doctrine of entanglement.

Section 31 of the Constitution[271] creates a situation where both the religious and cultural rights should be consistent with the provisions of the Bill of Rights. Therefore, it is argued that any principle, including the doctrine of entanglement that puts preference to certain religious practices, that does not uphold the values of the Constitution,[272] should not be supported. As Mokgoro argues, cultural practices should

[270] *Gauw* para 25.
[271] Section 31(2) of the Constitution of the Republic of South Africa, 1996.
[272] n 149 above.

receive equal treatment with other cultural practices, which are probably two-fold, in a sense that they are cultural and religious at the same time.[273]

On the basis that the constitution provides that everyone, including the government, is bound to respect the cultural practices and traditions of those who decide to live according to it, this study therefore argues that the constitution should be relied upon in deciding on religious disputes. If any reliance is based on the constitutional provisions, the doctrine of entanglement fails to fit in the picture because it does not promote the protection and respect for human rights. The Constitution should be the primary authority on which disputes that arise from cultural and religious practices are settled, and not the doctrine of entanglement. It is argued that religious doctrines cannot have an influence on how the Constitution should be applied or serve as a guide on how religious disputes should be resolved. This is the reasoning adopted in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.[274]

The application of the doctrine of entanglement may be an excellent route for the advocacy and protection of religious rights; however, not a good one regarding the preservation and protection of the rest of the fundamental human rights entrenched in the Bill of Rights. Specific reference is made to equality, freedom of association, and cultural practices, which are in fact religious but not recognised by the government through the judiciary and other organs that oversee religious practices. It is thus argued that the doctrine is relevant only in orthodox religious practices. Some cultural practices are also part of religion, and the doctrine fails to address same, as it is applied on those religions regarded as pure. Thus, it is submitted that it is not relevant in today's era where equality is the centre of all the fundamental rights in the Bill of Rights.

This emanates from the fact that almost all the African traditional cultural practices have the elements of religious practice.[275] This means the way in which the doctrine

[273] Y Mokgoro 'The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms' (1999) 52(1549) *Southern Methodist University Law Review* 1556.
[274] 1999 (1) SA 6 (CC).
[275] K Quashigah 'Religion and the republican state of Africa: The need for distanced relationship' (2014) 14(78) *African Human Rights Law Journal* 84.

was adopted, in basing its application on one of the reasons, being that the judiciary is trying to respect the religious institution and the practices thereto, does not include such cultural practices as religion, while in fact they should be treated with equality. Therefore, it is submitted that the doctrine of entanglement and the way it is interpreted and applied in South Africa does not uphold the constitutional values.

From the requirements set to identify if one falls under legitimate religion, is the spiritual leadership existence, as discussed in case law above, the cultural practices also have some spiritual guidance to those who practice it, hence the development of the term African traditional religion.[276] The court in *Pillay* outlined that religious and cultural practices do overlap and are informed not only by faith and belief, but by custom.[277]

While it is possible that a culture can be purely cultural and religion to be purely religious, it is also possible for each to be both cultural and religious. As a result, there should be equal treatment; however, it is not the same when courts use the doctrine of entanglement in the two practices. The avoidance of religious questions does not happen in cultural practices as it does in the so called pure religious practices. Therefore, an argument raised herein is the unconstitutional character of the doctrine of entanglement, its interpretation, and application in disputes by the South African judiciary.

Although it is claimed by the South African judiciary and religious rights activists, as depicted in this study's discussion, that the other purpose of the application of the doctrine of entanglement is to protect the religious institution and religious, it is argued that the application of the doctrine instead favours the mainstream religion practices. This can be seen from the *Prince* case. The case dealt with an argument based on a marginalised Rastafarian religion. The court did not invoke the doctrine of entanglement when it decided on the legitimacy of the defence. The reason behind this is because Rastafarian religion was and still is a marginalised type of religion. The

[276] N Mndende 'Law and religion in South Africa: An African traditional perspective' (2013) 54(1) *Dutch Reformed Theological Journal* 74.
[277] *Pillay* para 47.

court never concerned itself with being entangled in religious doctrine when it dealt with the matter.

However, the Constitutional Court in the *Fourie* case accommodated homosexual marriage and outlined that even though the question brought before it has its foundation in the traditional institution having a religious foundation, its interference does not interfere with religious doctrine.[278] These remarks show that the court considered the doctrine of entanglement and concluded that interference will not be in violation of the doctrine of entanglement.

The reason the courts relied on when it decided to adopt the above approach, shows the elements of deference of courts towards mainstream religious practices. It is submitted that the application of the doctrine of entanglement means that the courts put preference of religious practices over cultural practices and other form of beliefs having some characteristics of religion, only that they are marginalised. We have seen the courts deciding on cultural practices in the cases of *Bhe and Others v Magistrate, Khayelitsha and Others,*[279] *Shibi v Sithole and Others*,[280] and *Shilubana and Others v Nwamitwa*[281] wherein cultural practices were approached on a constitutional basis. Therefore, it is argued that the courts can still deal with religious questions the same way they have been dealing with disputes that arise from cultural practices and reconsider the reliance on the doctrine of entanglement.

4.4.3 The constitutionality of the requirement of internal processes (arbitration) of religious disputes

It has been shown in the previous sections of this study that the courts, when interpreting and applying the doctrine of entanglement, held that disputes arising from religious doctrines should rather be dealt with in terms of the internal processes of respective religious organisations and not through formal courts. Through this, religious organisations are required to deal with internal disputes through arbitration as held in *de Lange case*.

[278] n 209 above.
[279] 2005 (1) SA 580 (CC).
[280] (CCT 50/03, CCT 69/03, CCT 49/03) [2004 ZACC 18.
[281] 2009 (2) SA 66 (CC).

A fictional scenario may be when one person who has subscribed to Christian religion applies for a leadership role job at a Christian church and eventually gets the job. Days after getting the job, the person receives a dismissal note stipulating that he or she is dismissed on the basis that he or she posted on his or her Facebook page that he or she believes people should be afforded equal treatment regardless of their sexuality, making specific reference to homosexuality, which is prohibited in terms of the Christian religion. Subsequent to the above-mentioned dismissal, the person approaches the high court alleging unfair dismissal and unfair discrimination on the ground of belief. In response, the court holds that the application for the same job had a requirement of bringing the dispute before an arbitration board instead of a formal court of law.

Upon attending the arbitration, the person realise that the arbitrator is a pastor of the same church or religion and when raising a complaint, the person is told that the application stipulated that the arbitration should be conducted by a Christian tribunal. And because the Christian laws allow for the discrimination that is the core cause of the dispute, the arbitration case is dismissed. After the dismissal, the court upholds the decision of the arbitration as they would be guided by the fact that the same person chose the religion and its procedures of dealing with disputes as provided by the religious laws, norms, and standards, and on the other hand, trying as much as possible to avoid being entangled with disputes arising from religious doctrines.

This fictional scenario aims to depict the implications of the courts in continuing to apply the doctrine of entanglement as it is currently applied, on the protection and respect of human rights in a democratic country like South Africa. The prevalence of violations of human rights within religious organisations should assist the courts in approaching religious disputes with caution that just following the ancient doctrine and its applicability. The argument raised herein is that the fact that the courts uphold the doctrine of entanglement with an idea that the internal process of the same church that violated human rights will correct them is unconstitutional, as it does not uphold the values of the Constitution. This is because this adoption of the doctrine of entanglement exposes the rights of the congregants against violation.

This section provides an overview of the arbitration of the constitutional rights alleged to have been violated within the religious arena, and then critique the idea behind the

doctrine of entanglement that in avoiding being entangled with religious questions by the courts, and eventually referring religious disputes to arbitration with a hope of protecting human rights and respecting the individuality of religion, is not as effective as it is made to look.

In the past, courts that adjudicated based on common law were hostile in their approach of arbitration agreements.[282] This is attributed to the fact that the arbitrators that dealt with religious disputes were not well informed of the law and the processes that need to be followed in order to balance human rights.[283] The court in this case outlined that even though a person is bound by an agreement to have his or her case dealt with through arbitration, there is no compelling reason why this person should be deprived of his or her right to have the matter dealt with in a court of law instead of arbitration tribunals.[284] In concluding remarks, the court above outlined that the courts should not force the execution of arbitration and the agreements thereto.[285]

The American court in *Gilmer v Interstate/ Johnson Lane Corp*[286] and *Circuit City Stores Inc v Adams*[287] serves as authority on which the South African judiciary have drawn inferences from regarding the referral of religious disputes to arbitration rather than dealing with them directly. These two cases have paved a way for the need to let civil rights disputes be dealt with according to the inherent church norms and standards that the state and church should remain separated, being the internal processes of arbitration.

The rationale behind the adoption of the arbitration needs on civil rights may be seen from the remarks by the court in *EEOC v Waffle House Inc,*[288] when the court outlined that the submission on a dispute on rights does not mean the rights concerned are not taken seriously, it only means that an arbitral route was termed to be the first process that was preferred to deal with the dispute. The court also outlined in *Shearson/Am*

[282] NH Aragaki 'Arbitration's suspect status' (2011) 1233(1) *University of Pennsylvania Law Review* 159.
[283] *Tobey v Country of Bristol* 23 F.Case 1313 (C.C.D Mass. 1845) (No 14065) (hereinafter '*Tobey*')
[284] *Tobey* 1320.
[285] *Tobey* 1321-1322.
[286] 500 US 20(1991).
[287] 532 US 105 (2001).
[288] 534 US 279 no 10 (2002).

Express Inc v McMahon[289] that the arbitrators should be trusted with the correct application of the law in a dispute of civil rights violations.

From the above, it can be concluded that the adoption of this principle primarily rests on the idea that arbitrators, like judges, have the same potential of applying the law to the best they can to protect human rights and the victims of human rights violations. However, it is submitted that the fact that same people from the same religious organisations are expected to chair the arbitration process on the basis that they best understand the principles concerned does not address the problem at hand. There is more harm likely to occur than the one arising from the conduct alleged to be violation of human rights.

It is argued that religious arbitration poses risks of human violation on top of violation that exists and is supposed to be addressed. The issue is not entirely the fact that the arbitrators are not well-vested with legal knowledge, as some of the arbitrators are attorneys and advocates, but the fact that they are under a certain religious belief alleged to have caused violation of human rights, means that this person will have to be guided by the principles of that religion, which might compromise the neutrality that is expected of an arbitrator.

The fact that courts prefer that religious organisations should deal with disputes arising out of religious doctrine, means that preference is given to religious laws and principles over constitutional rights. This means that the arbitration tribunals could have their decision endorsed even if it is against the tenets of the Constitution,[290] if the decision was made with reference to the laws and policies of the religion concerned. Thus, it is argued that religious arbitration of alleged violation of human rights poses further risk of human rights violations, while the primary violation of human rights has not been addressed.

4.5 Judicial competence to decide on religious questions

The main claim that the South African courts have outlined in a set of case law discussed that they do not decide on religious matters, remains superficial in the sense

[289] 482 US 220-232 (1987).
[290] n 149 above.

that when examined, the practice of the same courts suggest otherwise. For the courts to decide whether certain questions fall under a religious doctrine, they need to use a factual inquiry into what makes a certain religion concerned.

This point of view may be seen in the American case of *United States v Meyers,*[291] where the court had to decide on the following set of facts: Meyer was charged with possession of dagga as it was prohibited in the United States of America. The accused relied on a defence of religion for the possession of dagga. The court, in trying to determine whether the defence of religion, it had to enter a factual inquiry to determine whether the religion the accused relied on was in fact a real religion recognised in the United States of America. The court used prior case law that required that for a religion to be a recognised religion in the United States of America, it must address the ideas of humanity, whether this religion includes beliefs concerned with the reality, whether the said religion includes rules and principles founded on morality and ethics, whether the beliefs of that religion seeks to provide answers to those who choose to follow, and lastly, whether the religion has recognised spiritual leaders.[292]

It is argued that the above inquiry into the sensitive aspects of the religious expose the courts to dealing with religious doctrine. When adopting the western doctrine of entanglement by the South African judiciary, the courts had to follow the same test to determine whether it is a religion or not before they could accept to adjudicate on disputes arising thereto. Therefore, it is argued that the courts, before they even announce whether they will be adjudicating on a matter, have already adjudicated on the primary religious doctrine as to whether there is any religion or religious issue involved in a dispute, and as such it can be said that the purpose of following the doctrine of entanglement falls away. The very step they take in such inquiry suggests that the courts are in fact capable of deciding on a dispute arising from religious doctrines without tempering the right to religious freedom.

From the set of facts discussed in this study, it is submitted that for the courts to support the continuation of the way they interpret and apply the doctrine of entanglement in religious disputes, there must be a standard used to determine which

[291] 906 F.Supp 1494 (D.Wyo 1995).
[292] *Meyers* 1502.

questions falls under religious doctrine and therefore should not be decided by the courts, but to date, no court has pronounced on same. This should be done the same way the court in *Baker v Carr*[293] has set criteria for identifying those questions that are political questions under the political question doctrine.

It is argued that the courts, in applying the doctrine of entanglement, do not rely on identifiable analysis to assist them whether to decide on a dispute or not. Regardless of the lack of any authority proved to be effective, they just distinguish between those questions which might be dealt with judicially, and those that are prohibited religious questions. Again, on the above fact, this study argues that the interpretation and the application of the doctrine of entanglement does not have compelling grounds why it should continue being applied in the South African context.

Another reason for the prohibition of the judiciary to adjudicate relates to the assertion that the courts do not have the necessary competence to extensively deal and resolve certain difficult religious questions.[294] This opinion formed part of the reasoning of the court in *Watson*.[295] However, a counteract argument in this study is that while an attempt to resolve religious questions such as the validity of a religion or belief and the effectiveness thereof may be beyond the judicial competence, some positive questions such as the religious perspective on certain issues, in this case, the consideration of other fundamental human rights, may not be beyond the scope of the judicial powers. This would mean that the interpretation and application of the doctrine of entanglement needs to be backed up by the requirements the courts rely on when deciding whether the dispute brought before it will instead result in the courts acting beyond its powers. As a result of absence of such, the interpretation and application of the doctrine of entanglement as executed in South Africa, does not instil relevance, but only the continuation of human rights violation.

[293] 369 US 186 (1962).
[294] JA Goldstein 'Is there a religious question doctrine? Judicial authority to examine religious practices and beliefs' (2005) 2(54) *Catholic University Law Review* 533.
[295] n 96 above.

4.6 Conclusion

This chapter focused on the question whether the way the South African judiciary interprets and applies the doctrine of entanglement, and the doctrine itself, is still relevant in the current South Africa founded on constitutional supremacy and democratic values such as equality, transparency, human dignity, and which encompasses full protection of the law to everyone. Through South African case law, the way the doctrine of entanglement is interpreted and applied in South Africa was outlined, specifically reference to the case of *De Lange*. Following that was an analysis of the reasoning of the court regarding the adoption of the doctrine of entanglement in the South African constitutional jurisprudence.

It was outlined that the adoption followed the weighing up of religious rights and institutional principles, beliefs, the other fundamental constitutional rights, and the competence of courts in deciding on religious questions. Furthermore, in accessing the reasons behind the continuing reference to the doctrine of entanglement whenever the courts are faced with a task of pronouncing on religious rights and the other fundamental rights in conflict, the study showed that the interpretation and application of the doctrine and the doctrine itself is no longer relevant in the democratic and constitutional supremacy governed South Africa. This view is taken after accessing the religious practices and their prevalent human rights violation, the limitation clause in the Constitution, and the need to protect human rights, both from the national and international perspective.

Chapter 5

Conclusions and Recommendations

5.1 Introduction

The Constitution[296] recognises a variety of rights in its Bill of Rights. It also provides that international law must be recognised when interpreting the Bill of Rights. South Africa, being member state to the international instruments discussed in this study, is bound to consider their provisions. In the context of this study, the Constitution, and the international instruments discussed requires that states create legislative measures aimed at protecting and respective religious and equality rights. Regardless of this level of human rights recognition, there still exists violation of rights within different institutions across South Africa. The way in which the Courts interpret and apply the doctrine of entanglement, as well as the doctrine itself, are attributed to such violation of human rights. This chapter draws conclusions from discussions made in the context of the above-mentioned issue, and then make recommendations to address the problem at hand.

5.2 Conclusions

This study focused on the doctrine of entanglement, its interpretation, and application by the South African judiciary. In laying the basis, a discussion on its origin was outlined to understand the historical background in its application. Reference was made to the interpretation and application by the courts in the United States of America as well as in the Indian and the United Kingdom jurisdictions. It was shown that the way in which South African judiciary applies and interpret the doctrine of entanglement, is the same as interpreted and applied in the United States of America, but slightly differs with how it has been applied in Indian and the United Kingdom.

The doctrine of entanglement entails the reluctance of courts to interfere or adjudicate on disputes that arise from the religious practice. The different jurisdictions discussed in this study have relied on this doctrine to avoid entanglement with religious matters, on the basis that the religious institution is sacred and should be left to function

[296] n 149 above.

independently. A conclusion is made further that the doctrine is a full doctrine and not a principle of law, and this should not prevent the courts from protecting human rights. Furthermore, it was argued that religion is a constitutional right, and therefore, the courts cannot discharge themselves from their duty of ensuring that there is no violation of human rights.

In analysing the application of the doctrine of entanglement, this study found that other fundamental human rights such as the right to equality, freedom of association, and cultural rights are violated. This study further outlined different tests used to determine if there exists violation of the constitutional rights mentioned above. The limitation clause was thus considered to establish if the interference with religious rights was too extreme and resulted in violation of religious rights or not. It was shown that courts' interference with religious doctrines would not violate or threaten the religious institution; rather it would ensure quality protection of human rights. This is because the violation of human rights within religious institutions would be reduced through judicial pronouncement of issues related to constitutional rights. It is therefore concluded that even when relying on the limitation clause, the applicability of the doctrine of entanglement within a constitutional dispensed and a democratic country like South Africa is not viable.

Weighing the violation of rights that occurs within religious institutions and the doctrine of entanglement, it is concluded that the doctrine of entanglement does not promote the constitutional values founded on equality, non-racialism, and non-sexism. This is because not affording the victims of human rights violation a chance to refer the matter to court as a first step, and instead, refer the matters to the same bodies belonging to the religious organisation that violated one's rights, means that no justice will be served. The doctrine itself therefore, does not fit into the South African constitutional dispensation.

5.3 Recommendations

The main problem addressed in this study is the doctrine of entanglement as interpreted and applied by the South African judiciary. The South African judiciary, as the gatekeeper of the constitutional provisions, has the duty to ensure that anything that serves as a threat to constitutional rights is eliminated. This study recommends

that the South African judiciary should revisit the doctrine of entanglement and critique the basis upon which it was adopted by the South African judiciary. Therefore, this study recommends that constitutional provisions relating to the right to equality, religious rights, and the promotion of justice must be considered.

This study further recommends that the South African judiciary should start treating each dispute brought before court, regardless of the nature, be it political, religious, or emanating from social issues. This is supported by a reasoning in the United States of American case of *Epperson v Arkansas*,[297] where it was held that the government ought to be neutral on matters of religious theory[298] Furthermore, it is recommended that Courts should develop the law relating to arbitration of religious matters, to allow a referral to arbitration by those who choose the arbitration route. However, that should not prevent the courts from dealing with a matter on the basis that there is arbitration option available.

Relying on the Indian case of *Indian Young Lawyers Association & Others v The State of Kerala &* Others[299] it is recommended that the judiciary should adopt the reasoning of the court when it held that the element of unfair discrimination existed the minute women of age group 10 to 50 were excluded from accessing the temple. That was even after the court held that there needs to be a determination if a certain practice forms part of essential practices of a certain religion.

Given the way courts differentiate between religion and culture as discussed in this study, courts should rely on section 9 of the Constitution[300] to introduce measures which will result in equal treatment of disputes arising from both religious and cultural rules. However, as much as equal treatment of disputes would be afforded upon considering the right to equality where culture and religion are concerned, further reliance on the doctrine of entanglement remains the biggest problem, considering the violation of human rights that occurs within religious organisations.

[297] 393 US 97 (1968).
[298] *Epperson* 103-104.
[299] n 114 above.
[300] As above.

The doctrine of entanglement, being just a religious doctrine and not the principle of law, cannot be relied upon to decide on constitutional rights. Therefore, it is recommended that a total abolition of courts' reliance on the doctrine of entanglement should be adopted. This would be done in accordance with section 36 of the Constitution,[301] which serves as a guiding provision for limitation of rights, in this context, the right to religious freedom. The South African judiciary should consider the reasoning in *Indian Young Lawyers Association & Others*[302] case, in implementing the limitation of religious rights. The court held that if a religious principle or rule is not in accordance with the constitutional provisions, this rule or principle must be struck off. This reasoning should be adopted by the South African courts in limiting religious rights on the doctrine of judicial non-interference in religious matters is concerned.

In the *Prince* case, the court held that believers of a certain religion cannot claim to be exempted from the law of the land mainly because their religion provides for a rule contrary to the law of the land, hiding under the right to religious freedom.[303] The judiciary should also create awareness to the public that they should consider having their disputes dealt with by competent courts. This will assist in allowing victims of human rights violation by religious organisations to come forward to seek justice.

5.4 Suggestion for future study

This study was conducted to examine the court's reluctance to interfere with religious matters and its impact on the protection of human rights. This was done in consideration of the constitutional provisions that aim at promoting and protecting human rights. This aim has been achieved as it was shown that the way the South African courts apply the doctrine of entanglement adversely affects human rights. The study suggested further that there should be equal treatment of religions by the courts when faced with disputes. A future study could focus on different ways the courts could deal with disputes arising from doctrinal questions of different religious denominations.

[WORDS: 29 707]

[301] n 160 above.
[302] n 114 above.
[303] *Prince* para 115.

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