



A Critical Analysis of the Enforcement of Human Rights in Addressing Workplace Discrimination Against the LGBTQIA+ Community in South Africa

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Declaration

I, Takalani Mashamba, hereby declare that the dissertation '*A critical analysis of enforcement of human rights in addressing workplace discrimination against the LGBTQI+ community in South Africa*', hereby submitted by me, has not previously been submitted for a degree at this or any other institution, and that this is my own work in design and execution and that all reference material contained therein have been duly acknowledged.

List of Abbreviations and Acronyms

CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act
GLBT	Gay Lesbian Bisexual and Transgender
HIV	Human Immunodeficiency Virus
LGBT	Lesbian Gay Bisexual and Transgender
LGBTQ	Lesbian Gay Bisexual Transgender and Queer
LGBTQI	Lesbian Gay Bisexual Transgender Queer Intersex
LGBTQIA+	Lesbian Gay Bisexual Transgender Queer Intersex Asexual and Others
NTT	National Task Team on Sexual Orientation Based Violence
SA	South Africa
SANDF	South African National Defence Force
SAPS	South African Police Service
US	United States of America

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Abstract

Section 9(3) of the Constitution of the Republic of South Africa indicates that everyone is equal before the law and no one should be discriminated against on the grounds of gender, sex, race, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, disability, age, religion, conscience, belief, culture, or language. Members of the LGBTQIA+ community are discriminated against in their homes, within their communities, and in their workplaces. This happens despite South Africa having progressive laws that support the LGBTQIA+ community compared to other countries around the world.

In order to answer the research questions, this study adopted the doctrinal research methodology for its effectiveness in critiquing, assessing, and developing law. The aim of the study was to examine the extent to which the LGBTQIA+ community is protected against discrimination based on their sexual orientation at their workplaces. The objectives of the study were to explore discrimination within the work environment, workplace policies, and all other legislation protecting the LGBTQIA+ community; to explore the nature and determine forms of discrimination and other human rights violations against the LGBTQIA+ community in the workplace; and to analyse LGBTQIA+ anti-discrimination provisions and court judgements from other jurisdictions.

The South African constitution and labour-related acts are there to ensure that the LGBTQIA+ community is protected from workplace discrimination. The Employment Equity Act, Promotion of Equality and Prevention of Unfair Discrimination Act, Labour Relations Act, and the Basic Conditions of Employment Act are available to prevent discrimination. However, LGBTQIA+ people still experience discrimination in the workplace.

When employees encounter discrimination because of their sexual orientation, they must first talk to their supervisor, and when no assistance has been provided, the employee must make use of the courts. The outreach awareness campaign for LGBTQIA+ rights in the workplace is also recommended. Equal pay for equal work done should apply to the LGBTQIA+ community in the workplace. Name-calling and

harassment should be treated with severe punishment among co-workers who inflict discrimination against the LGBTQIA+ community.

Chapter One

Introduction

1.1. Brief background

At least 87 countries formed part of the Organisation for Economic Cooperation and Development's 2012 Social Institutions and Gender Index, with South Africa ranking top in Africa and fourth in progressively implementing gender equality and women's rights.¹ Regardless of this, hatred and discrimination based on sexual orientation remain highly prevalent in South Africa.²

The constitutional and other legal protection provided to members of the lesbian, gay, bisexual, transgender, queer/questioning (one's sexual or gender identity), intersex, asexual, aromatic, and agender (Hereinafter referred to as LGBTQIA+) community against workplace discrimination remains meaningless to citizens of this country.³ The survey that was conducted in 2007 by the Human Sciences Research Council indicated that more than 80% of the South African population views homosexuality as 'always wrong'.⁴ These views and beliefs, which are homophobic, are largely connected to discrimination based on sexual orientation. The same views of the reported 80% of citizens not only lead to discrimination within communities but in workplaces as well. Such discriminatory views turn into violence against the LGBTQIA+ community. Many communities still consider same-sex relationships as not following the dominant societal norms, which consider heterosexuality as the only acceptable form of sexuality. It is the same views and perceptions by communities that often expose the LGBTQIA+ community to discrimination, which sometimes leads to violent behaviour that may cost them their lives.

The South African Human Rights Commission has also noted that, from a grassroots level, discrimination against the LGBTQIA+ community has been an existing challenge

¹ 'South Africa falling short in gender equality standards' *Mail and Guardian* 4 May 2015

² H Wells & L Polders 'Anti-Gay Hate Crimes in South Africa: Prevalence, Reporting Practices, and Experiences of the Police' (2006) *Agenda: Empowering Women for Gender Equity* 20.

³ Terms of Reference for National Task Team on Gender and Sexual Orientation-Based Violence Perpetrated Against Lgbti Persons. South African Department of Justice and Constitutional Development (2020).

⁴ n 3 Above

and a conduit to discrimination and violence perpetuated on the basis of one's sexual orientation and gender identity and expression.⁵ The gap between the law and the actual lived experiences of LGBTQIA+ community members is apparent enough. However, documentation of violence specific to LGBTIQ people has not been equally obvious. In the 2015 Gauteng City-Region Observation Quality of Life Survey, 14 percent of residents indicated supporting violence against members of the LGBTQIA+ community.⁶ At the time, the statistic represented at least 1.26 million people in the Gauteng province where the survey was conducted. In the same survey, only 56 percent of the participants indicated that they agreed with the notion that gays and lesbians were entitled to enjoy equal rights.⁷

Ratele and Suffla indicated that social, economic, cultural, and religious, factors have been identified as predictors of sexual orientation-based discrimination in South Africa.⁸ However, the issue of discrimination based on sexual orientation is not an easy one with regard to certain sexual minorities. The LGBTQIA+ group is a sexual minority community, and addressing sexual orientation-based discrimination for this group tends to be more ignored and complex due to the gender fluidity in this regard.

The rationale behind exploring this phenomenon of discrimination based on sexual orientation in the workplace is based on the fact that many, including Greef,⁹ have indicated that despite policies that protect the rights of the LGBTQIA+ community in South Africa, they are still faced with hostility and hatred because of their sexual orientation. Furthermore, any LGBTQIA+ person can be a victim of workplace discrimination based on their gender expression or sexual identity. South Africa is commended for implementing a comprehensive liberal legal framework empowered by the Constitution towards promoting equality and social justice, with a rounded protection for the LGBTIQ community.¹⁰ These laws include, among others, the Alteration of Sex Description and Sex Status Act 49 of 2003 and the Promotion of

⁵ n 3 Above.

⁶ C Culwick 'Quality of Life IV Survey (2015/16): City Benchmarking Report (Vol. 12)' Gauteng City Region Observatory (2018).

⁷ n 3 Above.

⁸ K Ratele & S Suffla *An international psychology of men: Theoretical advances, case studies, and clinical innovations* (2014).

⁹ K Greef 'The Unfulfilled Promise of LGBTQ Rights in South Africa', *The Atlantic* (2019).

¹⁰ 'Thematic Discussion Paper: Discrimination and Violence on the Basis of Sexual Orientation, Gender Identity and Expression (SOGUE) in South Africa (2017) *South African Human Rights Commission*.

Equality and Prevention of Unfair Discrimination Act 4 of 2000. The South African Human Rights Commission further notes that the policy framework to address 'sexual orientation, gender identity, expression-based violence, and discrimination' is inclusive and progressive.¹¹ In a news report, Powell reported in the Voice of America (VOA) in June 2020 that South Africa's sexual minorities (LGBTQIA+) are speaking out to seek recognition as victims of sexual orientation-based violence and discrimination.¹² In the article, Powell reports that in general, 'South Africa's epidemic of sexual based discrimination and violence is harrowing towards the nation's sexual minorities, who are reported to regularly experience violence based on their gender expression and sexual identities'.¹³ In the report, Powell further shows that activists for LGBTQIA+ rights noted that in the speeches and policies adopted to deal with sexual orientation based violence and discrimination, the inclusion of LGBTQIA+ was vague, showing that there is no sufficient spotlight to characterise homophobic-based violence and discrimination on the basis of sexuality. The report further shows that in the cases of homophobic-based violence against persons recognised as LGBTQIA+, it is easily characterised as a hate crime, yet the violence is not only propagated by hate but is most likely based on the sexual expression of the victim.¹⁴

The study by Hunt in 2010¹⁵ found that sexual harassment in the workplace needs to be tackled by the employing organisation as organisations have tendencies to capacitate individuals in an effort to deal with the issue of harassment. Sexual harassment in the workplace is often associated with certain psychological challenges, such as depression, increased job stress, reduced productivity, and high turnover within the organisation. This form of abuse in workplaces is mostly suffered by the marginalised few who disclose their sexual identity. Although the organisation might have legislation in place to deal with workplace harassment, there are low reporting

¹¹ n 9 above

¹² 'A Powell 'South Africa's Sexual Minorities Seek Recognition as Victims of Gender-Based Violence' reported' *VOA News* 19 June 2020.

¹³ n 11 Above

¹⁴ n 11 Above

¹⁵ CM Hunt et al. 'Reviewing sexual harassment in the workplace – an intervention model' (2010) 39 *Personnel Review* 655.

rates, which might be due to the unclear reporting pathways.¹⁶ This may worsen the situation for the victims instead of improving it.

A study conducted by Hlongwane indicates that the LGBTQIA+ community is unfairly discriminated against in South Africa. The writer further elaborates that incidents of physical and sexual violence and corrective rape against lesbians in South Africa are evidence reflecting the general sentiments held by South African society towards persons from the LGBTQIA+ community. The same notion is also affirmed by Melanie: in most townships, black lesbians are victims of targeted physical or sexual violence on the basis of their sexual expression.

Based on the brief background of this study, it appears that South Africa struggles with finding effective ways to address discrimination against the LGBTQIA+ community. Discrimination and violence against the LGBTQIA+ community is a uniquely compounded phenomenon, from the technical to the practical aspects and the intersection with the legal and ethical issues on the subject. A human rights-based approach (HRBA) is one of the key strategies that this study invokes to address LGBTQIA+ community discrimination in the workplace.

1.2. Research problem

The Bill of Rights in Section 9(3) of the Constitution of the Republic of South Africa indicates that everyone is equal before the law and no one should be discriminated against on the grounds of gender, sex, race, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, disability, age, religion, conscience, belief, culture and language.¹⁷ The Constitution also placed a duty on the government and its organs under Section 9(4) to put in place measures that seek to prevent discrimination from taking place.¹⁸ Everyone, as referred to in Section 9 of the Constitution, also includes members of the LGBTQIA+ community. Gaps, however, still exist between the legal protection afforded to the LGBTQIA+ community and the actual practice in workplaces

¹⁶ LR Siuta & ME Bergman 'Sexual Harassment in the Workplace' *Oxford Research Encyclopedia of Business and Management* (2019).

¹⁷ Constitution of the Republic of South Africa of 1996.

¹⁸ *The Constitution of the Republic of South Africa, 1996: as adopted on 8 May 1996 and amended on 11 October 1996 by the Constituent Assembly* (2015).

and society in South Africa.¹⁹ The LGBTQIA+ community is unfairly discriminated against in workplaces due to their sexual orientation, and this is against the spirit of the Constitution and various legislation.

Members of the LGBTQIA+ community are discriminated against in their homes, within their communities, and in their workplaces. This happens despite South Africa having progressive laws that support the LGBTQIA+ community compared to other countries around the world.²⁰ Geef highlights that, most people who flee their homophobic countries and come to South Africa expecting enjoyment of their sexual orientation experience hostility and discrimination in South Africa.²¹ The Gender Equality Law organisation indicated that about 41% of the people within the LGBTQIA+ community face discrimination at their workplace based on their sexual orientation.²² In *Atkins v Datacentrix*²³, the court held that an employee had his employment contract repudiated after two days of commencement. This followed the employee's disclosure that he was transsexual and was due to undergo sex change surgery. All these are evident of the challenges faced by the LGBTQIA+ community in workplaces.

1.3. Aim and objectives

1.3.1. Aim of study

This study aims to examine the extent to which the LGBTQIA+ community is protected against discrimination based on their sexual orientation at their workplaces. In order to do this, the following objectives will be fulfilled and the below research questions will be answered:

1.3.2. Objectives of the study

The objectives of this study are:

¹⁹ Hogan Lovells 'LGBT+ equality in the workplace' 15 July 2018
<https://www.hoganlovells.com/en/publications/lgbt-equality-in-the-workplace> (accessed 1 February 2023).

²⁰ K Greef 'The Unfulfilled Promise of LGBTQ Rights in South Africa', *The Atlantic* (2019).

²¹ n 20 Above.

²² genderequalitylaw.org 'LGBTQ DISCRIMINATION', *gender-equality-law*, 2015,

<<https://www.genderequalitylaw.org/lgbtq>> (accessed 27-2-2023).

²³ *Atkins v Datacentrix (Pty) Ltd, Frances J* (2009).

- To explore the discrimination within the work environment, workplace policies, and all other legislation protecting the LGBTQIA+ community.
- To explore the nature and determine forms of discrimination and other human rights violations against the LGBTQIA+ community in the workplace.
- To analyse LGBTQIA+ anti-discrimination provisions and court judgements from other jurisdictions.

1.4. Research questions

The main research question in this study is:

- How are the rights of the LGBTQIA+ protected in the workplace?

The following are the sub-questions: What are the forms of discrimination and other human rights crimes against the LGBTQI+ community in the workplace?

- What are the laws and policies protecting the LGBTQIA+ community in the workplace in South Africa?
- How best can employers align their policies and prescripts to the constitution to avoid discriminating against the LGBTQIA+ community at their workplaces in South Africa?

1.5. Preliminary literature review

Each person has his or her own identity, and hiding an identity is said to have a bad impact on a person's life. One cannot hide his or her identity forever as he or she will be living a lie. Eventually, one must show his or her true identity; even at the workplace colleagues must know the real person who is this colleague. Being true to oneself is important for inner peace. The challenge is that when one starts to reveal his or her identity, known as "coming out", the person is subjected to workplace discrimination, stigmatisation and abuse because he or she identifies himself or herself as LGBTQIA+.²⁴

²⁴ DD Marco et al. 'Discrimination and Exclusion on Grounds of Sexual and Gender Identity: Are LGBT People's Voices Heard at the Workplace?' (2021) 24 *The Spanish Journal of Psychology* e18.

Violence against women, or gender-based violence, regardless of where it is being done, is a violation of human rights and a major public health problem because of the implications it has on the physical and mental well-being of women and its social costs. When the employee is not going to work, it affects not only the individual and the family, but also the community as a whole.²⁵ Members of the LGBTQIA+ community suffer discrimination in many areas of their lives and the workplace is not spared from this discrimination. As such, managers, organisations and departments must come up with policies and legislation to guard against this behaviour of workplace discrimination and abuse by colleagues at the workplace.²⁶ It can also be indicated that work is stressful on its own, and when one is subjected to workplace discrimination and abuse, it becomes an added burden, and hence the individual starts to experience psychological problems and poor output at work.²⁷

Workplace abuse and discrimination not only harm employees but also negatively affect the department or company. The affected employee may be absent from work or have low productivity due to the discrimination they experience.²⁸ When the leader or manager is female in the workplace, there is less likelihood that the employee can be discriminated against or experience sexual harassment.²⁹ The majority of workplace discrimination and abuse occurs when the manager is male compared to when she is female.³⁰

Employees perceive less discrimination when there are policies and training to inform employees about anti-discrimination at the workplace, as well as the employer's effort to increase the number of minority groups at the workplace.³¹ When the employees are aware of the policies and procedures in place to guard against workplace

²⁵ N Escobar-Váquiro et al. 'Gender-based violence: Statistical data for four Colombian municipalities' (2022) 43 *Data in Brief* 108320.

²⁶ L-C Mara et al. 'Strategies for Coping with LGBT Discrimination at Work: a Systematic Literature Review' (2021) 18 *Sex Res Soc Policy* 339.

²⁷ CN Thoroughgood et al. 'Creating a Trans-Inclusive Workplace' (2020) *Harvard Business Review* 18.

²⁸ F Diez-Canseco et al. 'Systematic Review of Policies and Interventions to Prevent Sexual Harassment in the Workplace in Order to Prevent Depression' (2022) 19 *International Journal of Environmental Research and Public Health* 13278.

²⁹ O Folke & J Rickne 'Sexual Harassment and Gender Inequality in the Labor Market*' (2022) 137 *The Quarterly Journal of Economics* 2163.

³⁰ O Folke & J Rickne 'Sexual Harassment and Gender Inequality in the Labor Market*' (2022) 137 *The Quarterly Journal of Economics* 2163.

³¹ MA Pitot et al. 'The Current State of Gender Discrimination and Sexual Harassment in the Radiology Workplace: A Survey' (2022) 29 *Academic Radiology* 416.

discrimination, they feel at ease knowing that they will be protected should there be a need to report any discrimination that they are subject to. Workplace discrimination based on gender is all over different departments and different sectors.³² The study findings regarding workplace discrimination in the military based on gender found that when the managers respond positively, the victim becomes an optimist, and this also leads to positive feelings about the ordeal that the victim came across.³³

The South African National Task Team on Sexual Orientation-based Violence (NTT), which was established to rapidly respond to any form of violence, including discrimination based on sexual orientation, gender identity, and expression notes that a key factor fuelling this problem is the gap between the justice system and LGBTQIA+ persons' interactions with the justice system.³⁴ The NTT noted that factors such as "deprioritisation, marginalisation, exclusion, and targeted victimisation by those public institutions intended to provide services and protection for LGBTQIA+ persons result in a lack of resources when crimes are reported and decline trust or generate fear to report such crimes when they occur."³⁵ This stemming as an entirely bigger topic on its own related to secondary victimisation by justice institutions was noted in the case of *The South African Human Rights Commission v Qwelane*, where a lesbian woman who reported to have been raped was turned away by South African police service (SAPS) officials with remarks that "lesbians are boys and boys cannot be raped."³⁶ In the United States, it is estimated that there are around 8 million people, or 3.5% of the population, who identify themselves as LGBTQIA+, and there are around 30 states that do not have legislation to protect against discrimination and abuse of the LGBTQIA+ community in the workplace. Employees who experience workplace discrimination and abuse are said to be less productive, and to prevent this, the UN High Commissioner for Human Rights released new standards of conduct to eliminate

³² R Steyn & L Jackson 'Gender-based discrimination in South Africa: A quantitative analysis of fairness of remuneration' (2015) 18 *South African Journal of Economic and Management Sciences* 190.

³³ S Daniel et al. 'The Impact of Leadership Responses to Sexual Harassment and Gender Discrimination Reports on Emotional Distress and Retention Intentions in Military Members' (2019) 20 *Journal of Trauma & Dissociation* 357.

³⁴ the doj & cd 'National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector'.

³⁵ n 31 Above.

³⁶ *Qwelane v The South African Human Rights Commission* (36314/13) [2014] ZAGPJHC 334.

discrimination against LGBT employees in the workplace.³⁷ These standards seek to make employers create a safe space for employees to work and to be productive.

Cruz and Klinger provide significant contributions to the literature on discrimination; their work focuses on violence in the workplace.³⁸ In so doing, they invoke the International Labour Organisation, laws and standards that are aligned with human rights legislation.³⁹ While their work shows the application of some key human rights instruments in dealing with the issue of discrimination and violence towards LGBTQIA+ persons, the literature, however, places its focus on communities in general and not on the workplace environment. In contrast, this study will look at discrimination in workplace incidents across sexual minorities and further explore the enforcement of human rights legal remedies.

Britton and Fish are also noteworthy as they provide some comprehensive notions on addressing violence against the LGBTQIA+ communities. The scholars note that human rights legal frameworks can indeed be explored as a mechanism to eradicate homophobia.⁴⁰ They further note that in this endeavour, the mere presence of LGBTQIA+ persons in political positions and talk of equality is not enough. This work aligns with Britton and Fish and emphasises the protection afforded to the LGBTQIA+ communities by different laws.

In a study conducted in Canada, it was found that sexual orientation discrimination is apparent in the field of medicine for those who associate themselves with the LGBTQIA+ community.⁴¹ For them to be treated without any form of discrimination, they must hide their identity, behave as if they are sexually attracted to people of different genders, and always show that they do not fall into the LGBTQIA+ community. While this research relates to the above-mentioned study, it focuses on discrimination against the LGBTQIA+ in South Africa, not just in the medical field but

³⁷ M Hossain et al. 'Do LGBT Workplace Diversity Policies Create Value for Firms?' (2020) 167 *J Bus Ethics* 775.

³⁸ A Cruz & S *Gender-based violence in the world of work: overview and selected International Labour Office* (2011).

³⁹ n 33 above.

⁴⁰ HE Britton 'Organising against gender violence in South Africa. (2006) 32(1) *Journal of Southern African Studies*.

⁴¹ N Nama, P MacPherson, M Sampson and HJ McMillan 'Medical students' perception of lesbian, gay, bisexual, and transgender (LGBT) discrimination in their learning environment and their self-reported comfort level for caring for LGBT patients: a survey study' (2017) 22(1) *Medical education* online.

in the workplace in general. In another study conducted in the United States, it was highlighted that workplace discrimination was high among black women compared to non-blacks and that it also varies between males and females.⁴² From the literature above, the majority of the studies have been conducted in developed nations, and little is known about workplace discrimination in the context of low- to middle-income countries, such as is the case with South Africa.

1.6. Research methodology

In order to answer the research questions, this study adopted the doctrinal research methodology for its effectiveness in critiquing, assessing, and developing law. This is the doctrinal or desk-based research methodology. This methodology allowed the researcher to use and review literature from primary and secondary sources of law. Primary sources of law include the constitution, legislation, international conventions and statutes, domestic or international legislation and case law. Secondary sources of law include journal articles, books, and other internet sources.

A desk-based method was used in this study. This type of research methodology has been explained as a research approach that aims at understanding events by discovering the meanings that human beings attribute to their behaviour and the world at large.⁴³ Desk-based research is concerned with the understanding of processes and the sociocultural contexts that influence various behavioural patterns.⁴⁴ The desk-based research method was suitable for the study because the intention of the study was to gain insights into and achieve a better understanding of discrimination in workplaces against the LGBTQIA+ community in South Africa.

A case study is an in-depth study of a particular situation. Along these lines, both Choy and Creswell assert that case studies explore and investigate real-life phenomena through a detailed analysis of situations and their relationships to shed light on that

⁴² D Fekedulegn et al. 'Prevalence of workplace discrimination and mistreatment in a national sample of older U.S. workers: The REGARDS cohort study' (2019) 8 SSM - Population Health 100444.

⁴³ P Aspers & U Corte 'What is qualitative in qualitative research?' (2019) 42(2) Qualitative sociology 139-160.

⁴⁴ K Elmusharaf Qualitative sampling techniques (2012) <https://www.gfmer.ch/SRH-Course-2012/research-methodology/pdf/Qualitative-sampling-techniques-Elmusharaf-2012.pdf> (Accessed on 24 April 2020).

phenomenon.⁴⁵ In this study, the case study approach was selected with the hope that it would provide an in-depth exploration of discrimination in workplaces against the LGBTQI+ community in South Africa. A case study enables the researcher to work in a bounded context.⁴⁶ In the case of this study, discrimination in workplaces against the LGBTQIA+ community in South Africa is probed contextually, and the selected case study is South African public sector workplaces.

All in all, this study looked at the international standards and practices of more progressive countries in order to propose solutions for South African employers. The researcher obtained information from secondary sources such as textbooks, state regulations, newspaper reports, decided court cases, websites, legislation, proposed bills, government gazettes, prescripts, academic articles, and journals. For the purposes of comparing South African cases of workplace discrimination towards the LGBTQIA+ community cases from foreign jurisdictions were consulted.

1.7. Definition of key/ technical concepts

Discrimination: refers to unequal treatment of people or groups of people.⁴⁷ Discrimination can be based on race, gender, or sexual orientation.

Lesbian, Gay, Bisexual, Transgender, Questioning, Intersex, Asexual + community: these are groups of people with sexual orientations that classify the participants based on same-sex sexual behaviour.⁴⁸ Every existing person has a sexual orientation that also helps in identifying such a person as a straight person, lesbian, gay, bisexual, transgender, questioning, or intersex.

⁴⁵ LT Choy 'The strengths and weaknesses of research methodology: Comparison and complimentary between qualitative and quantitative approaches' (2014) 19(4) *Journal of Humanities and Subsidy Science*, 99-104.

⁴⁶ P Gamache & KJ Lazear 'Asset-based approaches for lesbian, gay, bisexual, transgender, questioning, intersex, and two-spirit (LGBTQI2-S) youth and families in systems of care Lesbian, gay, bisexual, transgender, questioning, intersex, and two-spirit (LGBTQI2-S) youth and families in systems of care Asset-based approaches for LGBTQI2-S youth and families in systems of care' (2009).

⁴⁷ A Antonovsky 'The social meaning of discrimination' *Phylon* (1960-) 21(1) 81-95.

⁴⁸ P Gamache & KJ Lazear *Lesbian, Gay, Bisexual, Transgender, Questioning, Intersex, and Two-Spirit*.

Lesbians are said to be women who are physically, mentally, and emotionally attracted to other women.⁴⁹ One would also argue that these women are also romantically attracted to other women rather than to men, as one would expect.

Gays refer to people who are physically, mentally, and emotionally attracted to other people of the same gender.⁵⁰ However, this term is normally used to identify men or males who are sexually attracted to other men and not to women.

A **bisexual** person refers to a person who could be male or female and is sexually, emotionally, and mentally attracted to people of both genders.⁵¹ A male who would be sexually and emotionally attracted to males and also to females. This could also be a female person who is sexually, emotionally, and mentally attracted to both females and males.

Transgender is said to be a person whose self-identity as a man or woman differs from their anatomical sex determination at birth. The transgender term is usually referred to as “trans,” which could be referred to as an umbrella term that is used in describing a wide range of people's identities, including transsexual persons, cross-dressers, and other persons whose physical appearance and characteristics are perceived as gender atypical.⁵² In other words, trans-women are identified as women but were classified as male at their birth. Trans-men are identified as men but were classified as female at their birth. It is said and known that some transgender people would undergo surgery or take hormones to transform their physical bodies into their gender identity.

Intersex persons are born with an indeterminate sexual anatomy. Intersex persons can also be people who develop hormone patterns that are neither male nor female.⁵³ The sexual anatomy that these persons are born with are reproductive organs and hormone patterns that do not fit the typical definition of their gender as per their

⁴⁹ EB Hagai ‘Changes in Lesbian identity in the 21st century’ (2022) *Current opinion in psychology*.

⁵⁰ E Green and EN Peterson ‘LGBTTSQI terminology, (2006) Available from: <http://www.trans-academics.org/lgbttsqiterminology.pdf> (Accessed on 15 October 2022).

⁵¹ n 45 above.

⁵² <https://www.unfe.org/wp-content/uploads/2018/10/FAQs-English.pdf> (Accessed on 15 October 2022).

⁵³ n 44 above.

physical identity. A person can be born with such a condition or develop it later in their life.

Questioning refers to persons who are often in the adolescent stage of their lives and question their sexual orientation or their gender identity.⁵⁴ These persons are not sure if they should call themselves straight, gays, or lesbians.

Asexual persons are persons who do not experience sexual attraction. These people experience little to no romantic attraction and have little to no desire to form romantic relationships.⁵⁵

The + sign within the LGBTQIA+ community brings together all other sexualities, gender identities, and gender expressions within our communities that are different from mainstream assumptions on gender roles.⁵⁶

1.8. Ethical considerations

Researchers are guided by certain ethics when carrying out studies. Ethics exemplify individual and communal codes of conduct that require adherence to some principles.⁵⁷ Ethics offer rules and behavioural expectations about the most correct conduct towards participants. The researcher considered some ethical issues pertaining to the research data and the targeted audience for the research findings. In the context of working with an analysis of developing concepts of law, the study did not deal with any human or animal experiments, nor did it deal with empirical evaluations that need physical data collection. The following were seriously considered in identifying and utilising data for the study:

- Ensuring the quality and integrity of the research;
- Ensuring the privacy and confidentiality of any participants, if any;
- Ensuring that voluntary consumption of the results of the study is attained, no findings will be forced on anyone;

⁵⁴ n 44 above.

⁵⁵ Gay Centre 'Defining LGBTQIA+', (2020) <https://gaycenter.org/about/lgbtq/> [last accessed 3 January 2023].

⁵⁶ n 51 above.

⁵⁷ M Kruger, P Ndebele & L Horn *Research ethics in Africa: A resource for research ethics committees* (2014).

- Disclaiming any potential harm to anyone who may be directly or indirectly affected by the findings

1.9. Outline of the study

The study is divided into the following chapters:

Chapter One provided a brief background, i.e. justification, explanation/relevance of the study, research problem, aim and objectives of the study, research questions, preliminary literature survey (overview of the current state of knowledge in the field of proposed study), methodology, definition of key concepts, ethical considerations, outline of the study, and limitations of the study.

Chapter Two provides a definition of the LGBTQIA+ community and the difficulties that the LGBTQIA+ community come across in their workplace and within the community. This chapter is a formulation of a substantive exploration of what LGBTQIA+ entails and draws a clear picture of what discrimination against LGBTQIA+ persons entail. The chapter serves not only to draw on and define the LGBTQIA+ community but also to clearly paint the scope of the problem of discrimination against LGBTQIA+ persons in South African workplaces.

Chapter Three of the study provides an in-depth analysis of international law positions and provisions geared towards addressing discrimination against the LGBTQIA+ community in their workplace. The chapter develops further by conducting a similar analysis of South African legal mechanisms geared towards addressing discrimination against the LGBTQIA+ community in their workplace. The collocation of the discussion will be built further into a singular assessment of the effectiveness of these legal mechanisms in addressing discrimination against the LGBTQIA+ community in their workplace. Furthermore, court cases globally and within South Africa that have in the past dealt with cases of discrimination against the LGBTQIA+ community in their workplace are also be explored and analysed in this chapter.

Chapter Four presents and analyses the findings of the study. In this chapter, the researcher provides a comparative analysis of LGBTQIA+ anti-discrimination provisions and court judgements from different jurisdictions around the globe. The researcher also compared the constitutions of different countries with regard to

discrimination based on sexual orientation and drew from the United Nations human rights charter as well as the African Union convention on human rights.

Chapter Five presents the study's conclusion and recommendations. This chapter concludes the study, summarises the main findings, and makes recommendations as per the findings of the study. Recommendations aim to provide employers with a human rights approach to ensure that they do not discriminate against the LGBTI+ community.

1.11. Limitations of the study

The major limitation of the study is that more time would have been required to conduct a study analysing the enforcement of human rights in addressing discrimination in workplaces against the LGBTQIA+ community in South Africa. Given the limited period of the study, the researcher had to resort to analysing discrimination in workplaces against the LGBTQIA+ community in South Africa using a desktop method of research.

Chapter Two

Nature and extent of discrimination faced by the LGBTQIA+ community

2.1 Introduction

In the previous chapter, the researcher provided the background of this study along with the objectives of the study. A preliminary literature review was also done in the previous chapter, which revealed the need for this study to be conducted. This chapter seeks to introduce the readers to the nature and extent of discrimination faced by the lesbian, gay, bisexual, transgender, queer, intersex, asexual, and other (LGBTQIA+) communities at their workplaces. This was done in the quest to ensure the readers understand what the LGBTQIA+ community comes across at their workplaces. The chapter highlights the meaning of LGBTQIA+.

This chapter discusses the meaning and origin of the term LGBTQIA+, and from there, the researcher also discusses the workplace discrimination happening across the globe. The researcher also discusses a few cases in the LGBTQIA+ community that are related to the discrimination that they endured at their workplace. Within this very same chapter, the researcher also refers to other countries in comparing how the LGBTQIA+ community is treated in their workplaces.

2.2 The meaning of LGBTQIA+ and its origin

LGBTQIA is a term that collectively represents people who identify themselves as lesbian, gay, bisexual, transgender, queer (or those questioning their gender identity or sexual orientation), intersex, and asexual, plus others who are not sure where they belong.¹ In the case of *National Coalition for Gay and Lesbian Equality and*

¹ P Gamache & KJ Lazear 'Asset-based approaches for lesbian, gay, bisexual, transgender, questioning, intersex, and two-spirit (LGBTQI2-S) youth and families in systems of care Lesbian, gay, bisexual, transgender, questioning, intersex, and two-spirit (LGBTQI2-S) youth and families in systems of care Asset-based approaches for LGBTQI2-S youth and families in systems of care' (2009); Department of Justice and Constitutional development 'Terms of Reference for National Task Team on Gender and Sexual Orientation-Based Violence Perpetrated Against Lgbti Persons'; WHO 'Improving LGBTIQ+ health and well-being with consideration for SOGIESC',

Another v Minister of Justice and Others, persons referred to as lesbian, gay, bisexual, transgender, queer, intersex, and asexual were defined as referring to anyone who is erotically attracted to members of his or her own sex.² For example, a male person is erotically attracted to another man, or a female person is erotically attracted to another female. There are many longer variations of *LGBTQIA* that include letters representing those identified in different ways, such as those who are pansexual, transsexual, intergender, aromantic, nonbinary, and two-spirit.

Common and more limited terms include *LGBT* and *LGBTQ*.³ Sometimes, a plus sign is added after the letters *LGBTQIA* to represent any pertinent groups not represented by an acronym. There is no consensus about which term is best, and others are commonly used or have been proposed.⁴ In 1994, the National Coalition for Gay and Lesbian Equality (the coalition) was formed in South Africa. Its aim was to fight for the rights of the *LGBTQI+* community to be treated equally in South Africa.⁵

LGBTQIA+ has been prevalent in the community for many years. In South Africa, many men practised homosexuality in the 1950s while working at the mines as migrant workers. The men would leave their wives in their homelands and come to work in Johannesburg, so to satisfy their sexual needs, they would resort to homosexuality.⁶ In countries such as the United States of America, same-sex cases can be traced back to 1731, when a landowner indicated that he had caught two men in a sexual act.⁷

Sexual orientation is defined as the terminology determined by those to whom people are attracted sexually, physically, and emotionally.⁸ On the other hand, sexual

<<https://www.who.int/activities/improving-lgbtqi-health-and-well-being-with-consideration-for-sogiesc>> (accessed 29-7-2023).

² National Coalition for Gay and Lesbian Equality and *Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517

³ Gamache and Lazear ; Cosmopolitan 'Your guide to what all the *LGBTQIA+* terms mean' (2022) *Cosmopolitan*.

⁴ Gamache and Lazear n 1 above.

⁵ Parliamentary Monitoring Group 'Gay and Lesbian Equality: briefing by National Coalition on Gay & Lesbian Equality | PMG', 1998, <<https://pmg.org.za/committee-meeting/6189/>> (accessed 29-7-2023).

⁶ D Pushparagavan 'The History of LGBT legislation | South African History Online', *The History of LGBT legislation*, <<https://www.sahistory.org.za/article/history-lgbt-legislation>> (accessed 27-7-2023).

⁷ MJ Murphy & B Bjorngaard *Living Out Loud: An Introduction to LGBTQ History, Society, and Culture* (2018).

⁸ DL Espelage et al. 'Homophobic Teasing, Psychological Outcomes, and Sexual Orientation Among High School Students: What Influence Do Parents and Schools Have?' (2008) 37 *School Psychology Review* 202.

orientation can also be defined in terms of inequality, wherein there is a manifestation of inequality in terms of status or when gays and lesbians are differently treated.⁹ Like other forms of prohibited discrimination, discrimination on the basis of sexual orientation has become an area of concern in the workplace. The law prohibits discrimination in whatever form and declares it unlawful to discriminate against people on the basis of sexual orientation.¹⁰ Employers, line managers, and supervisors, as well as agency and labour consultants, are faced with a great task to ensure that workplace discrimination based on sexual orientation becomes a thing of the past and there is inclusion and equality in the workplace.

Each letter in the acronym LGBTQIA+ has its own meaning and represents a certain identity of the LGBTQIA+ community.

The LGBTQIA+ community also has its own flag that represents them. The flag was introduced in 1977 and has changed several times since then. The flag was inspired by the rainbow.¹¹ The flag for LGBTQIA+ has six colours: red, which represents life and sexuality; orange, colour means healing and friendship; yellow, which means vitality and nature; green, which means serenity and nature; blue, which means harmony and artistry; and the last one, violet, which means spirit and gratitude.¹² LGBTQIA+ individuals are at a heightened risk for diverse and more severe mental health problems compared to their cisgender, heterosexual peers; they are prone to abuse at their workplace due to their sexual orientation.¹³

2.3. Discrimination

Discrimination refers to unfair treatment or arbitrary differentiation based on various factors such as race, sex, religion, nationality, ethnic origin, sexual orientation,

⁹ SM Tebele & KO Odeku 'An Analysis of Workplace Discrimination Based on Sexual Orientation' (2014) 18 *The Anthropologist* 609.

¹⁰ Tebele and Odeku *The Anthropologist* 18, 609; I Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN' (2004) 7 *Health and Human Rights* 48.

¹¹ R Dr Smith Wade 'LGBTQIA+ Identity Flags | Millersville University', 2023, <<https://www.millersville.edu/icse/services-and-initiatives/identity-flags.php>> (accessed 13-1-2023).

¹² Dr Smith Wade.

¹³ JA Fowler et al. 'A call for ACTION: A systematic review of empirical evidence for the use of Acceptance and Commitment Therapy (ACT) with LGBTQI+ individuals' (2022) 25 *Journal of Contextual Behavioral Science* 78.

disability, age, language, social origin, or other status.¹⁴ It can occur as isolated incidents affecting individuals or groups and may involve harassment or abuse of authority. Harassment is improper and unwelcome conduct that may offend or humiliate others through words, gestures, or actions, creating an unpleasant work environment.¹⁵ Sexual harassment specifically involves unwelcome sexual advances or behaviour that offends or humiliates someone and interferes with work. Both discrimination and harassment can involve a series of incidents but can also occur as single occurrences.¹⁶

The constitution of Uganda defines discrimination as the act of treating people differently based on characteristics such as sex, race, colour, ethnicity, tribe, birth, creed or religion, social or economic status, political opinion, or disability.¹⁷ Discrimination can take many different forms, including excluding people due to their sexual orientation or due to their mental health or addiction disabilities from housing, employment, or services, or imposing extra burdens that are not imposed on others.¹⁸

According to the Anti-Discrimination Board's annual report in Australia for 2007 - 2008, there were over 1000 formal complaints lodged during that time. The most common complaints alleged discrimination based on sex (242), disability (239), and race (211).¹⁹ Although there was a slight decrease in race-related complaints compared to the previous year, there was an increase in disability and sex-related discrimination complaints. The Board also received a significant number of inquiries about what constitutes an act of discrimination, with the majority being about sex and race. Overall, the increase in both inquiries and complaints suggests that many Australians struggle to understand and apply the existing legislation protecting them from discrimination. Australia currently has four federal antidiscrimination laws aimed at

¹⁴ United Nations 'Secretary-General's bulletin' (2008).

¹⁵ United Nations n 20 above.

¹⁶ United Nations n 20 above.

¹⁷ Uganda *The Constitution of the Republic of Uganda* Rev. ed.

¹⁸ Ontario Human Rights Commission '10. Forms of discrimination | Ontario Human Rights Commission', <<https://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/10-forms-discrimination>> (accessed 23-9-2023).

¹⁹ J Goodman-Delahunty et al. 'Evaluating claims for workplace discrimination: A five-stage model' in 'Evaluating claims for workplace discrimination: A five-stage model' (presented at the APS Forensic Psychology National Conference, Melbourne, Australia, 2011) 92.

protecting workers from discriminatory acts based on various factors such as race, colour, sex, religion, age, disability, nationality, etc.²⁰

2.3.1. Types of discrimination

There are two types of discrimination, which can either be fair discrimination or unfair discrimination. Fair discrimination is discrimination that can be justifiable by law, and it is at times referred to as affirmative action.²¹ Discrimination can be regarded as fair discrimination when the employer is practising affirmative action where the employer wants to ensure there is equal representation of both males and females or racial representation. Discrimination can be regarded as fair based on the job requirement, such as a job that requires good eyesight. Discrimination can also be fair based on the output of the employee when a hard-working employee is promoted.²²

Employees face unfair discrimination due to employment practices or policies that are based on various grounds such as race, gender, pregnancy, marital status, family responsibility, ethnicity, colour, sexual orientation, age, disability, religion, HIV status, conscience beliefs, political opinions, culture, language, and birth.²³ It is easy to identify direct discrimination, defined as differential treatment based on any grounds between employees and job applicants. For example, an employer follows a policy of reimbursing female employees on a lower scale, without justification, than male employees for doing the same or similar work with similar qualifications.²⁴

The unjust treatment of an employee, such as harassment, is considered unfair discrimination and is not allowed based on certain grounds. Medical testing by employers can only be done if it is permitted by law, required by law, or justified based on medical facts, employment conditions, social policy, a fair distribution of benefits, or job requirements. HIV testing can only be conducted if approved by the Labour Court. Psychometric testing or other assessments can only be carried out if they are

²⁰ Goodman-Delahunty et al. in 'Evaluating claims for workplace discrimination: A five-stage model' 92.

²¹ CCMA 'Discrimination info sheet' (2018).

²² CCMA Unfair discrimination info sheet (2023).

²³ CCMA n 28 above.

²⁴ CCMA n 28 above.

scientifically valid, fair to all employees, unbiased against any individual or group, and certified by the Health Professions Council of South Africa.²⁵

2.4 Workplace discrimination

Workplace discrimination is a common issue that employees have to deal with on a daily basis at their place of employment. Even with the organised labour union present, workplace discrimination still persists. There are different kinds of workplace discrimination, such as discrimination due to age, gender, religious affiliations, race and sexual orientation. In the United States of America, although discrimination has been prohibited by the Civil Rights Act of 1964, it persists.²⁶ This simply indicates that legislation alone cannot prevent discrimination, but there is also a need for such legislation and laws to be enforced in a quest to prevent discrimination from happening. South Africa is regarded as the first country to prohibit unfair discrimination based on sexual orientation. The Constitution of South Africa guarantees that every person must be treated fairly and not be discriminated against.²⁷ In the past, gays and lesbians were subjected to police brutality and injustices in all spheres of their lives.²⁸ South Africa had a law that prohibited homosexuality.²⁹

Cheung examined perceptions of workplace discrimination among immigrants and racial minorities revealed that immigrants who are recent immigrants to the country perceive workplace discrimination less frequently than immigrants who have lived there for several decades.³⁰ The study suggested that not only the LGBTQIA+ community is at risk of being discriminated against, but also immigrants in other countries. In addition, those with higher educational qualifications are more likely to perceive workplace discrimination.³¹ Those who are educated are able to identify

²⁵ CCMA n 28 above.

²⁶ HK Cheung et al. 'Understanding and Reducing Workplace Discrimination' in 'Understanding and Reducing Workplace Discrimination' *Research in Personnel and Human Resources Management* Research in Personnel and Human Resources Management 34 (2016) 101.

²⁷ Constitutional Court of South Africa 'Gay and lesbian rights', <<https://www.concourt.org.za/index.php/gay-and-lesbian-rights>> (accessed 23-7-2023). Section 9

²⁸ Coomb and king, Workplace

²⁹ Constitutional Court of South Africa.

³⁰ Cheung et al. in 'Understanding and Reducing Workplace Discrimination' *Research in Personnel and Human Resources Management* 101.

³¹ R Banerjee 'An examination of factors affecting perception of workplace discrimination' (2008) 29 *Journal of Labor Research*.

discrimination earlier or better than those who are less educated.³² Those with less education, due to the type of work that they are expected to do, are more likely to experience workplace discrimination.³³

Workplace discrimination is not only in one sector of employment, but it is found in all sectors of employment. In the medical field, it was found to be prevalent, with over 60% of the respondents believing that discrimination against international medical graduates was significant.³⁴ Teachers belonging to the LGBTQIA+ community within the education sector in South Africa also indicated that they were targets for discrimination by other teachers and the community, including the school principals.³⁵ Non-whites were more likely to report discrimination due to the colour of their skin, with 29% of white respondents believing that discrimination in the workplace was also significant.³⁶

Sexual minorities, such as LGBTQIA+ community, experience workplace discrimination that affects their well-being and their output at the workplace. The type of discrimination that they come across can either be conscious or unconscious, but it all has a negative impact on the victim.³⁷ When an employee is discriminated against in the workplace, morale will be low, and productivity will also be affected. Unconsciously, people tend to make fun of others due to their sexual orientation, and they might think it is funny, but to the victim, it might be painful and derogatory. Sexual minorities are more prone to workplace discrimination, and they find themselves an easy target for discrimination at their workplaces. There are several court cases that were reported in South Africa that prove that the LGBTQIA+ community is suffering discrimination at their workplaces. Such court cases include the following:

Laangemaat v Minister of Safety and Security, 1998, where a lesbian employee who worked for the South African Police Services wanted to add her life partner to her

³² R Banerjee 'An Examination of Factors Affecting Perception of Workplace Discrimination' (2008) 29 *J Labor Res* 380.

³³ Banerjee *J Labor Res* 29, 380.

³⁴ AAT Coombs & RK King 'Workplace discrimination: experiences of practicing physicians.' (2005) 97 *J Natl Med Assoc* 467.

³⁵ M Zagagana 'LGBTQ+ Educators Face Discrimination at Schools' Available from: LGBTQ+ Educators Face Discrimination at Schools (careersportal.co.za) (Accessed on 3 August 2023).

³⁶ AAT Coombs & RK King 'Workplace discrimination: experiences of practicing physicians' (2005) 97(4) *Journal of the National Medical Association*.

³⁷ER DeSouza et al 'Workplace discrimination against sexual minorities: Subtle and not-so-subtle' (2017) 34(2) *Canadian Journal of Administrative Sciences*.

medical aid as a dependent but had her application rejected.³⁸ The rejection was based on the fact that the police medical aid scheme had no provision for same-sex life partners. The Court ruled in favour of the applicant indicating that denying her the right to register her dependent was discrimination based on sexual orientation, which was unconstitutional. The ruling forced medical schemes to recognise same-sex dependents.³⁹ The court decision proved that the South African court system and the laws take the discrimination of the LGBTQIA+ community seriously and would do all in their power to avoid such and protect the minority employees.

In *Satchwell v the President of the Republic of South Africa and Other*, the Constitutional Court ruled in favour of the applicant, holding that Sections 8 and 9 of the Judges Remuneration and Conditions of Employment Act 88 of 1989 were unfairly discriminatory against the applicant's sexual orientation by denying her spouse the same benefits as heterosexual couples.⁴⁰ In the case of *Fourie v Minister of Home Affairs* on 1 December 2005, a same-sex union was legally recognised for the first time.⁴¹

In the August 2008 case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*, the Court found that the complainant had been unfairly discriminated against on the grounds of his sexual orientation.⁴² The Court ruled that the unfair dismissal constituted a violation of the complainant's rights as enshrined in the Equality Clause of the Constitution of South Africa.

A significant Labour Court judgement involved *Ehlers v Bohler-Uddeholm Africa (Pty) Ltd. in 2010*.⁴³ The applicant is a transsexual who brought an unfair dismissal dispute to the court in terms of Section 187(1)(f) of the Labour Relations Act 66 of 1995. The claimant argued that she had been unfairly dismissed based on her desire to undergo a sex change operation. The Court ruled in her favour, as the dismissal had breached

³⁸ *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) (1998).

³⁹ *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)

⁴⁰ *Satchwell v President of Republic of South Africa and Another* (CCT45/01) [2002] ZACC 18; 2002 (6) SA 1; 2002 (9) BCLR 986 (25 July 2002)

⁴¹ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC)

⁴² *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC)

⁴³ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (JS296/09) [2010] ZALC 117; (2010) 31 ILJ 2383 (LC)

her constitutional rights regarding sexual orientation.⁴⁴ The first states to enact statutes covering workplace abuse were California and Tennessee, and they were the first states to lead a procession of recent legal and policy initiatives concerning workplace abuse. This development was due to the increasing cases of workplace abuse by other employees.⁴⁵

By default, a person who is born is assigned one of the two sexual identities, which is either male or female. When the person starts to identify themselves as different from what was assigned to them at birth, the community starts to label those people and develop hate towards them.⁴⁶ It has also been identified that gay males earn 11 - 12% less than their heterosexual male counterparts, and lesbians also earn less than their heterosexual females, although other studies have found that females' partners staying with other female partners tend to earn more than the heterosexual females.⁴⁷

It was also noted that male homosexuals as well as female homosexuals are less likely to be employed compared to heterosexual males and females.⁴⁸ One of the reasons employers do not want to employ LGBTQIA+ people is that they associate it with being unholy, especially when they are Christians. Transgender people experience challenges in all areas of their lives, including the workplace environment. The challenge of earning less comes immediately when the individual starts to divulge his or her sexual identity.

Within the South African education sector, there also seem to be problems with discrimination against the LGBTQIA+ community. The Mail and Guardian have reported that transgender women were not allowed to use women's toilets.⁴⁹ Similarly, the study in Australia by Irwin found that teachers, educators, and academics who are from the LGBTQIA+ community experienced some form of discrimination at their workplaces, which included being ridiculed, being the target of homophobic jokes,

⁴⁴ PRIDE at work *PRIDE at work: a study on discrimination at work on the basis of sexual orientation and gender identity in South Africa* p. 9.

⁴⁵ DC Yamada 'Workplace bullying and the law: US legislative developments 2013-15' (2015).

⁴⁶ M Dietert & D Dentice 'Gender Identity Issues and Workplace Discrimination: The Transgender Experience' (2009) 14 *Journal of Workplace Rights* 121.

⁴⁷ M Dietert & D Dentice 'Gender identity issues and workplace discrimination: The transgender experience' (2009) 14(1) *Journal of Workplace Rights*.

⁴⁸ Dietert and Dentice *Journal of Workplace Rights* 14, 121.

⁴⁹ 'Trans toilet access still a struggle' *Mail & Guardian* 22 June 2018.

being sexually harassed, or extreme forms of having their property damaged.⁵⁰ The study went further to find that those who suffered discrimination at the workplace also suffered depression, and their personal relationships suffered due to the problems that they suffered at the workplace.⁵¹ It can be noted that although there is freedom of association, there is still a challenge for people to accept the LGBTQIA+ community within the community.

In a study of a male who transformed into a female, the person experienced discrimination at the workplace after disclosing that he was no longer a male but a female.⁵² The person was being refused to use the female bathrooms and was seen as a disgrace to the image of the company, while others even refused to work with the individual due to the sexual orientation of the individual.⁵³ Workplace discrimination among lesbian workers has been found to be present in the survey done in the early 1980s in New York. Although a high number of participants anticipated discrimination, it was lower than anticipated. The discrimination among lesbians is also the same in the gay community. Workplace discrimination among the LGBTQIA+ community is an issue of concern as they get discriminated against everywhere, and the workplace being a place where one spends most of the time becomes depressing.⁵⁴

The LGBTQIA+ community has always experienced workplace discrimination and continues to be subjected to workplace discrimination because of their sexual orientation. By 2011, there was no federal law explicitly prohibiting sexual orientation and gender identity discrimination against them in the United States of America.⁵⁵ Although the law has been introduced, the LGBTQIA+ community still continues to be subjected to workplace discrimination.

⁵⁰ J Irwin 'Discrimination against gay men, lesbians, and transgender people working in education' (2002) 14(2) *Journal of Gay and Lesbian Social Services*.

⁵¹ J Irwin 'Discrimination against gay men, lesbians, and transgender people working in education' (2002) 14(2) *Journal of Gay and Lesbian Social Services*.

⁵² A Tilcsik 'Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States' (2011) 117 *American Journal of Sociology* 586.

⁵³ JM Barclay & LJ Scott 'Transsexuals and workplace diversity: A case of "change" management' (2006) *Personnel Review*.

⁵⁴ JM Barclay & LJ Scott 'Transsexuals and workplace diversity: A case of "change" management' (2006) 35 *Personnel Review* 487.

⁵⁵ JC Pizer et al. 'Evidence of Persistent and Pervasive Workplace Discrimination against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits' (2011) 45 *Loy. L. A. L. Rev.* 715.

Workplace discrimination can also be about the religious identity that one affiliates with or associates with. A survey study by Padela et al. found that those who are more religious were more likely to be subjected to discrimination due to their Muslim identity.⁵⁶ Although this research focuses on discrimination by sexual orientation, it can be noted that discrimination can be caused by several aspects. Although there is legislation in place to ensure that all employees are treated fairly and equally, there is still discrimination that the LGBTQI+ community continues to face on a daily basis. Developed countries such as the US, UK, and Australia are not immune to this workplace discrimination, which emanates from the hatred that individuals have concerning other people's sexual stances.⁵⁷

Remarkable progress has been made towards the recognition of sexual minorities in Africa, even though there are still increasing cases of abuse against sexual minorities. People still face challenges in coming out due to the consequences that usually follow after disclosing their sexual orientation. Those who advocate for sexual minorities are faced with hatred and seen as leading Western ideologies.⁵⁸ The laws about workplace discrimination must include sexual orientation and gender identity so that they can also cater to the LGBTQIA+ community.⁵⁹

There has not been any specific law or regulation that seeks to fight workplace discrimination based on sexual orientation, such as in the case of the LGBTQIA+ community.⁶⁰ It can also be said that workplace discrimination in Turkey has not received much-needed attention with regard to sexual minorities in the form of LGBTQIA+. It has been noticed that there is a lack of tolerance for sexual orientation amongst co-workers, managers, or employers who find out about the sexual orientation of the employee. This becomes a problem due to cultural norms.⁶¹ Gay, lesbian, bisexual, and transgender (GLBT) employees constitute one of the largest but

⁵⁶ Al Padela et al. 'Religious identity and workplace discrimination: A national survey of American Muslim physicians' (2016) 7 *AJOB Empirical Bioethics* 149.

⁵⁷ F Perales 'Improving the wellbeing of LGBTQ+ employees: Do workplace diversity training and ally networks make a difference?' (2022) 161 *Preventive Medicine* 107113.

⁵⁸ M Epprecht 'Sexual minorities, human rights and public health strategies in Africa' (2012) (111)443 *African Affairs*.

⁵⁹ T Reece-Nguyen et al. 'Burnout, Mental Health, and Workplace Discrimination in Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, and Asexual Anesthesiologists' (2022) 40 *Anesthesiology Clinics* 245.

⁶⁰ E Ozeren 'Sexual Orientation Discrimination in the Workplace: A Systematic Review of Literature' (2014) 109 *Procedia - Social and Behavioral Sciences* 1203.

⁶¹ Ozeren *Procedia - Social and Behavioral Sciences* 109, 1203.

least studied minority groups in the workforce. Diversity scholars tend to study workplace discrimination based on race, gender, and ethnicity and pay less attention to sexual orientation. Workforce who are members of the LGBTQIA+ community have not disclosed their sexual orientation identity.⁶² In South Africa, the government form for applying for employment only asks if one is female or male but does not have a field for other sexual orientations, which, is a form of discrimination; there is no inclusion for sexual minorities like LGBTQIA+.

In SA, it was found that gay and lesbian applications received lower ratings compared to heterosexual men, but higher ratings compared to heterosexual women. The findings indicate that LGBTQIA+ people need to remain silent about their sexual orientation to prevent being discriminated against, which means that they must live a secret life.⁶³ In a study responding to clerical vacancies in the greater Vienna area, it was found that the resume that was assigned to a volunteer in a gay and lesbian movement was less likely to be called for an interview compared to those that were not associated with the gay and lesbian movement.⁶⁴ Those resumes with involvement in LGBTQIA+ had a less than 14% success rate in their applications compared to those that didn't have involvement in the gay and lesbian movement.⁶⁵

The challenge with not declaring sexual orientation is that when employees decide to come out at a later stage in life, they are usually subjected to discrimination due to their sexual orientation, and some employees refuse to work with them, as was the case in one of the studies. The US census revealed that more than 86% of men and women who are in same-sex marriage are employed, although the probability of employment for same-sex couples is less than that of heterosexual marriages.⁶⁶

The workplace is where the majority of the employees spend most of their time, and they need to be comfortable and work in a peaceful and harmonious environment. In South Africa, with its diverse background, the workplace needs to be managed so that

⁶² E Ozeren 'Sexual orientation discrimination in the workplace: A systematic review of literature' (2013) 109(2014) *Procedia-Social and Behavioral Sciences*.

⁶³ A Tilcsik 'Pride and prejudice: Employment discrimination against openly gay men' (2011) 117(2) *Journal of Sociology*.

⁶⁴ A Tilcsik 'Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States' (2011) 117 *American Journal of Sociology* 586.

⁶⁵ Tilcsik *American Journal of Sociology* 117, 586.

⁶⁶ MP Bell et al. 'Voice, silence, and diversity in 21st century organizations: Strategies for inclusion of gay, lesbian, bisexual, and transgender employees' (2011) 50 *Hum. Resour. Manage.* 131.

none of the employees feel discriminated against. Although the Constitution of the Republic of South Africa is against workplace discrimination, more still needs to be done to ensure that the law is being applied in all spheres of government. Employees must be aware of the law and how it seeks to protect them.⁶⁷ They must be aware of how they are expected to report workplace discrimination based on sexual orientation and how they will be protected against the perpetrator.

There has been an international agreement on the fundamental importance of ending discrimination in the workplace, with commitments to ending discrimination in the workplace embedded in Sustainable Development Goals numbers 5, 10, and 16.⁶⁸ Sustainable Development Goal number 5 strives for gender equality, number 10 is reduced inequality, and 16 is peace, justice, and strong institutions within the country. The Sustainable Development Goals are indicated to be the global call to ensure that people in South Africa and other parts of the world enjoy living in peace. There is evidence that workplace discrimination continues to cause problems in people's daily lives.

The court cases mentioned above are an indication that the LGBTQIA+ community faces challenges at their workplace. Heymann suggested that to deal with workplace discrimination, it must be banned legally altogether.⁶⁹ Workplace discrimination is found across different countries and among different demographic characteristics. The anti-discrimination laws across the globe have had a positive impact on sexual minorities regarding earnings. Employees working the same job are expected to earn the same wage regardless of their gender identity and sexual orientation.⁷⁰

Although it can be noted that anti-discrimination law does have an impact in other ways, in small companies it was found not to be the case. Small companies tend not to comply with the regulations prescribed with regard to workplace discrimination.⁷¹

⁶⁷ N Gae & DM Mello "Implementation Of Legislation Preventing Discrimination In A South African Provincial Government Department' (2021) 35(1) *Loyola Journal of Social Sciences*.

⁶⁸ LM Fonseca et al. 'Mapping the Sustainable Development Goals Relationships' (2020) 12 *Sustainability* 3359.

⁶⁹ J Heymann *et al* 'Legislative approaches to non-discrimination at work: a comparative analysis across 13 groups in 193 countries: Equality, Diversity and Inclusion' (2021) 40(3) *An International Journal*.

⁷⁰ J Heymann et al. 'Legislative approaches to nondiscrimination at work: a comparative analysis across 13 groups in 193 countries' (2020) 40 *Equality, Diversity and Inclusion: An International Journal* 225.

⁷¹ Heymann et al. n 75 above.

Those who report the case against another employee are prone to further discrimination, as they are not protected after reporting such cases. If victims are offered some sort of protection after reporting such cases, more people can be open and report such cases.⁷²

In another study conducted by Stephenson and Persadie, it was found that despite the existence of anti-discriminatory laws, discrimination was still being reported.⁷³ In Trinidad and Tobago, they also have the Equal Opportunity Commission and Tribunal which are functioning, but employees still continue to face discrimination of different kinds in their workplace.⁷⁴ Although discrimination is not the same as harassment and bullying, the researcher felt that it was imperative to bring it to the attention of the reader. The victims of discrimination at the workplace also endure either physical, verbal, or sexual harassment from the perpetrator of discrimination because of their sexual orientation.

The difference between harassment and bullying includes that:⁷⁵ Harassment and bullying are two different forms of abuse that can affect people's well-being and mental health. Harassment usually involves unwanted physical contact, such as touching, grabbing, pushing, or hitting, as well as invading someone's personal space or damaging their belongings. Bullying, on the other hand, is more often psychological and emotional, such as insulting, threatening, spreading rumours, or isolating someone. However, bullying can also escalate to physical violence over time.⁷⁶ Harassment typically targets individuals based on their specific characteristics (such as sexual orientation, gender, race, disability, etc.), while bullying focuses on individuals who are competent, skilled, or popular. Harassment is motivated by discrimination against protected characteristics, such as gender and race. Bullies,

⁷² Heymann et al. n 75 above.

⁷³ J Stephenson & N Persadie 'Anti-discrimination legislation in the Caribbean: is everyone protected?' (2019) 38 *Equality, Diversity and Inclusion: An International Journal* 779.

⁷⁴ J Stephenson & N Persadie 'Anti-discrimination legislation in the Caribbean: is everyone protected?' (2019) *Equality, Diversity and Inclusion: an International Journal*.

⁷⁵ SJ Coldwell 'Addressing Workplace Bullying and Harassment in Canada, Research, Legislation, and Stakeholder Overview: Profiling a Union Program' in 'Addressing Workplace Bullying and Harassment in Canada, Research, Legislation, and Stakeholder Overview: Profiling a Union Program' *Workplace Bullying and Harassment* (presented at the 2013 JILPT Seminar on Workplace Bullying and Harassment, Japan, 2013).

⁷⁶ Coldwell in 'Addressing Workplace Bullying and Harassment in Canada, Research, Legislation, and Stakeholder Overview: Profiling a Union Program' *Workplace Bullying and Harassment*.

although biased, target individuals based on personal attributes like competence (envy) and popularity.

Although bullying is not the same as workplace discrimination, it also harms the employee's mental well-being. Discrimination based on sexual orientation is a problem for the LGBTQIA+ community, especially when they come out and disclose their sexual orientation. Those who disclose are subjected to harassment or are dismissed from their work due to their sexual orientation.⁷⁷ Although the laws prohibit such activities and have declared them unlawful, people continue to be subjected to discrimination.⁷⁸

It can be noted that having a law or legislation to prevent or fight against workplace discrimination due to the employee's sexual identity is the first step towards realising a workplace that is free from discrimination for the LGBTQIA+ community. The law enforcement and the workplace inspector in the case of South Africa must ensure that the laws are being implemented and those that break the law are being punished accordingly to set an example that other people who intend to do it can be discouraged.

The legal case for sexual orientation is still a relatively new and weaker concept compared to other forms of anti-discrimination. In the United Kingdom, the legislation was introduced in December 2003.⁷⁹ More and more countries are coming on board to introduce legislation that seeks to fight and prevent workplace discrimination based on employee's sexual orientation. Although the introduction of legislation, policies and guidelines is one thing, the enforcement of such regulations is another thing that countries with low and middle incomes are unable to enforce due to a shortage of resources and manpower.

2.5 Conclusion

The discussions in this chapter suggest that employees who refer to themselves as falling under the LGBTQIA+ community do encounter discrimination challenges at their workplaces. Others are failing to get employment due to their association with the

⁷⁷ Tebele and Odeku *The Anthropologist* 18, 609.

⁷⁸ Tebele and Odeku *The Anthropologist* 18, 609.

⁷⁹ Bell et al. *Hum. Resour. Manage.* 50, 131.

LGBTQIA+ community. Although there is legislation to ensure that employees are not discriminated against at the workplace, employees continue to face discrimination due to their sexual orientation in South Africa. The South African courts of law need to continuously set an example to ensure that employers as well as colleagues comply with the legislation and refrain from discrimination of any form. South Africa has led the way with regard to protecting the rights of the LGBTQIA+ community with the Employment Equity Act and Labour Relations Act and was the first country to legalise same-sex marriage, which the researcher is to discuss in the next chapter.⁸⁰

Most scholars have focused their research on workplace discrimination concerning wage inequality and have produced little direct evidence about the difficulties that the LGBTQIA+ community might face in obtaining a job.⁸¹ More research needs to be conducted with regard to workplace discrimination due to sexual orientation. In the next chapter, the researcher is to lay down and discuss the policies and legislation that are available to protect the LGBTQIA+ community from workplace discrimination based on their sexual orientation.

⁸⁰ M Byrn 'Same-Sex Marriage in South Africa: A Constitutional Possibility' (2002) *Faculty Scholarship*.

⁸¹ Tilcsik *American Journal of Sociology* 117, 586.

Chapter Three

The legal framework protecting the rights of the LGBTQIA+ community in the workplace

3.1 Introduction

All employers are legally accountable for upholding a workplace environment that is free from any form of discrimination.¹ Employers need to protect those who are vulnerable to being discriminated against. Those vulnerable include the minority lesbian, gay, bisexual, transgender, queer, intersex, asexual, and other (LGBTQIA+) communities. Chapter Two of this study has elaborated on the types of workplace discrimination that are faced by the LGBTQIA+ community.

As already elaborated, it is a given fact that people who identify themselves as members of the LGBTQIA+ community face discrimination at their workplaces.² With employers being the ones who have to ensure that the workplace environment is free from any kind of discrimination, there should be guidelines that assist them in upholding a workplace environment that is free from discrimination.

According to Badgett and Frank³, the issue of sexual orientation is a concept that was recently introduced within the Human Rights Law and is considered to be a controversial political issue around the world. Various governments around the world, including the South African government, have put in place various laws to protect the LGBTQIA+ community from any form of discrimination. The Network of African National Human Rights Institutions⁴ on the information sheet, which they have released with the help of the Network of African National Human Rights Institutions argued that despite the legal protections, most people within the LGBTIQ+ community still face discrimination based on their sexual orientation. With many countries having

¹ E Berrey, *et al. Rights on trial: How workplace discrimination law perpetuates inequality*. 2017

² PT Kim & MT Bodie 'Artificial intelligence and the challenges of workplace discrimination and privacy' (2021) 35(2), *Journal of Labor and Employment Law*.

³ ML Badgett and L Frank *Sexual orientation discrimination* (2007).

⁴ The Network of African National Human Rights Institutions 'In - Country Meeting On Sexual Orientation, Gender Identity and Expression' (2017)

<https://www.sahrc.org.za/home/21/files/South%20Africa%20Incountry%20Meeting%20Report.pdf> (Accessed on 22 January 2023).

legal frameworks that fight against discriminating against the LGBTQIA+ community, Bejzyk⁵ posits that there are some laws from various governments that specifically dictate to the citizens that they should adhere to their gender identity as per the traditional belief of a male and female binary.

In this chapter, the research elaborates on the legal framework, policies, and legislation that are available to protect the LGBTQIA+ community from workplace discrimination based on their sexual orientation.

3.2 Legal Framework protecting the victims of LGBTQIA+ in the workplace

Since organisations have observed that there is a growing tendency for employees to be abused or discriminated against, there is a need for legislation to fight against workplace abuse and discrimination. They have also realised that when employees experience workplace abuse, they become unproductive. Organisations are now working with consultants to develop policies to counter the negative effects associated with workplace abuse or discrimination.⁶

3.2.1 The Constitution of the Republic of South Africa

The South African Constitution made great advances in LGBTIAQ rights in terms of Section 9, which states that “everyone is equal before the law and has the right to equal protection and benefit of the law” and that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including sexual orientation”.⁷

According to Wizarat,⁸ the apartheid government brought about discriminatory laws that were mostly based on gender and race. The Constitution of the Republic of South Africa demonstrated foresight as it became the first Constitution around the world to

⁵ M Bejzyk ‘Criminalization on the basis of sexual orientation and gender identity: Reframing the dominant human rights discourse to include freedom from torture and inhuman and degrading treatment’ (2017) 29(2) *Canadian journal of women and the law*.

⁶ M Duffy ‘Preventing workplace mobbing and bullying with effective organizational consultation, policies, and legislation’ (2009) 61(3) *Consulting Psychology Journal: Practice and Research*.

⁷ Constitution of SA Section 9

⁸ TA Wizarat ‘Apartheid and Racial Discrimination in South Africa: An Overview of the Control Network’ (1980) 33(4) *Pakistan Horizon*.

ban unfair discrimination on the grounds of sexual orientation.⁹ The apartheid government in South Africa used the Population Registration Act of 1950 to implement the racial discrimination that the government was most concerned with.¹⁰ The Act classified people as Bantu, Coloured or White. The LGBTQIA+ community seemed to have not been affected by the recent years of apartheid government. The discrimination was based more on the skin colour of the citizens. Only around the 1960s did the apartheid government use the Immorality Act of 1957 to prohibit same-sex relationships or homosexuality. People were arrested for being involved in same-sex relationships or acting as females while they were males. Gevisser¹¹ reported that one weekend in 1966 January, the South African police arrested nine male individuals who were pretending to be females.

There was widespread workplace discrimination against the LGBTQIA community before the constitution was enacted. It has been reported that the South African National Defence Force (SANDF) did not recognise that people by nature belong to the LGBTQIA+ community.¹² It is reported that hundreds of people within the SANDF during the years 1971 to 1989 were forcefully operated on to be corrected from being lesbians or gays.¹³ However, it had been reported that none of the surgeries were successful.¹⁴ This act by the apartheid government shows the greatest workplace discrimination by the employer.

It is for some of these reasons that the South African Constitution was promulgated. The LGBTQIA+ community needs to be protected against any form of discrimination within the corporate world and the communities as they live their social lives. The preamble of the constitution further indicates that its objectives also include providing healing to the divisions of people that were caused by the past. To create social justice within the economic spheres, that will also create fundamental human rights. This includes ensuring that the LGBTQIA+ community is also not discriminated against

⁹ Crehan P, Daly F, Fletcher L and Pichler S 'A Global Examination of LGBT Workplace Equality Indices.' (2020)

¹⁰ Wizarat n 8 Above

¹¹ M Gevisser and E Cameron *Defiant Desire* (1995).

¹² 'Mutilation by the military' *Mail & Guardian* 28 July 2000.

¹³ *Mail & Guardian* n 12 Above.

¹⁴ *Mail & Guardian* n 12 Above.

when it comes to job opportunities and that their treatment at the workplace is as equal as that of people who are not in the LGBTQIA+ community.

The Constitution was also promulgated to ensure that the foundations for a democratic and open society are laid down clearly. With this, the foundation is also laid for the government, and the South African government is based on what the people wish for its country. Furthermore, this creates an environment that suggests that every citizen is equally protected by South African law. Within the Constitution, there are sections that promote equality in the workplace, regardless of one's sexual orientation. The writer is of the opinion that the Constitution represents exactly what the citizens desire. The preamble of the Constitution further elaborates that it is the supreme law of the Republic of South Africa. Limbach, J., has indicated that the supremacy of the Constitution refers to the fact that the Constitution is the highest law of the country.¹⁵ It is, therefore, not expected for any employer to have policies that are contrary to the Constitution, as those will be regarded as void.

In Chapter Two of the Constitution, in the Bill of Rights, these rights are to be enjoyed by every citizen of the land. The Bill of Rights has been argued to be the cornerstone of the South African democratic government that brought peace and harmony within the country. The Constitution vests the burden on the state to ensure that the rights of citizens, as indicated in the Bill of Rights, are respected, protected, promoted, and fulfilled. In this instance, the state uses the judiciary system to ensure that such rights are enjoyed by the citizens. However, Section 8(1) indicates that the Bill of Rights is binding on everyone, including the judiciary and all the organs of the state. Section 8(2) of the Constitution also indicates that juristic persons are also bound to adhere to the Bill of Rights. This then suggests that companies cannot discriminate against anyone based either on their policies or procedures.

The Bill of Rights in Section 9 of the Constitution promotes equality. In this sense, the Constitution indicates that every person is equal before the law of this land and should benefit from equal protection. It is, therefore, required for each company's legislation with regard to its human resources management to promote the achievement of equality. Section 9(2) of the Constitution further indicates that organisational prescripts

¹⁵ L Limbach 'The Concept of the Supremacy of the Constitution' (2001) 64(1). *The Modern Law Review*.

need to devise measures that will be taken to protect those who could be disadvantaged by any kind of unfair discrimination that can happen to them. Such people include those within the LGBTQIA+ community. They also need to be protected from any form of discrimination. As per Section 9(4), no person in this land may unfairly discriminate either directly or indirectly against any person, including those within the LGBTQIA+ community. The Constitution further indicates that no one should be discriminated against based on their gender, sexual orientation, colour, social origin, race, sex, pregnancy, marital status, disability, religion, belief, culture, language, birth, or conscience. Those within the LGBTQIA+ community are considered to have a sexual orientation that is different from how we biologically perceive females and males. Despite this, the LGBTQIA+ community need not be discriminated against, and the laws of this land and those of organisations need to protect them in adherence to the constitution.

As indicated in Chapter One, a transgender person is a person who has undergone surgery to transform them from being female to being male, or vice versa. Section 12(2)(b) of the Constitution indicates that everyone has the right to control their body. Should any member of the LGBTQIA+ community feel that they have been unfairly discriminated against for the mere fact that they have different sexual orientations, Section 34 of the Constitution gives them the right to approach any court of law and have their matter heard. In conclusion, in the discussion of the Constitution and LGBTQIA+ human rights issues, it should be noted that the Constitution indicates that the issue of discrimination on the grounds of sex or sexual orientation is a non-derogable right.

3.2.2 Employment Equity Act No. 55 of 1998

Altman and Sanders indicated that equity refers to statistical equality with regard to each employee's salary and the people employed.¹⁶ Equity in the workplace means everyone from every angle needs to be represented within each organisation. This is one of the principles of democracy: equity should be promoted from all angles. During the apartheid era in South Africa, discrimination was ordered by the government, and policies from all angles promoted discrimination, which is the opposite of equity.

¹⁶ JC Altman & W Sanders 'Government initiatives for Aboriginal employment: Equity, equality and policy realism' (2000) *Aboriginal Employment Equity by the year*.

According to Horwitz and Jain, in South Africa, the government introduced the Employment Equity Act No. 55 of 1998 in the quest to redress the workplace discrimination planted by the apartheid government.¹⁷

The workplace discrimination that the Employment Equity Act No. 55 of 1998 addresses is based on gender, sex, race, and disability. It is, therefore, expected with the introduction of Employment Equity Act No. 55 of 1998 that no one in South Africa should in any way feel, or find themselves being discriminated against. One should not be discriminated against for having different views of life or for choosing to be in the LGBTQIA+ community. Everyone should be seen and treated equally at their workplace, regardless of their views or life choices. It is also therefore expected that the Employment Equity Act No. 55 of 1998 should also protect the LGBTQIA+ community against any form of discrimination at their workplaces.

The preamble of the Employment Equity Act No. 55 of 1998 states that the Act was formulated to ensure that the constitutional right to equality is enjoyed and exercised in a proper and acceptable manner.¹⁸ The Act is also there to ensure that unfair discrimination in the workplace is eliminated. Furthermore, the Act was promulgated to ensure that the diverse communities within South Africa are all equally represented within the workforce. As per Section 2(a) of the Employment Equity Act No. 55 of 1998, the Act has the purpose of ensuring that fair treatment and equal opportunity in employment are promoted in order to eliminate unfair discrimination.¹⁹

Section 5 of the same Employment Equity Act No. 55 of 1998 puts it on each and every employer to take reasonable steps to ensure that there should be equal opportunities for everyone in the workplace. Employers should do this by ensuring that unfair discrimination is eliminated by organisational policies. This section, therefore, ensures that the LGBTQIA+ community is protected or should be protected by organisational policies. The South African Public Service Code of Conduct, in Section 3, indicates that no public servant should discriminate against anyone, including fellow employees, based on colour, race, sex, gender, social origin, age, religion, disability,

¹⁷ FM Horwitz & H Jain 'An assessment of employment equity and broad based black economic empowerment developments in South Africa' (2011) *Equality, Diversity and Inclusion: An International Journal*.

¹⁸ Employment Equity Act 55 of 1998.

¹⁹ Employment Equity Act 55 of 1998 Secs 2(a).

or sexual orientation.²⁰ This is therefore, an example of the employer's policy that is in support of the Employment Equity Act No. 55 of 1998.

The Employment Equity Act No. 55 of 1998, therefore, provides the LGBTQIA+ community with protection in their workplace against any sexual orientation discrimination.

3.2.3 Labour Relations Act 66 of 1995

The Labour Relations Act 66 of 1995 was promulgated in South Africa to ensure that the public international law obligations of employers relating to labour relations are upheld.²¹ The purpose of the Labour Relations Act 66 of 1995 was also to amend and repeal those laws relating to labour relations that are unconstitutional or discriminatory. Section 185 of the Labour Relations Act 66 of 1995 prohibits anyone, including those within the LGBTQIA+ community, from being subjected to direct or indirect discrimination based on their sexual orientation.²²

It will therefore be not only against the Constitution but also against the Labour Relations Act 66 of 1995 to discriminate against LGBTQIA+ community members at their workplaces. The protection of the LGBTQIA+ community and all other persons in the workplace does not only happen when one is employed by the organisation. Section 4 of the Labour Relations Act 66 of 1995 indicates that even job seekers need to be protected against unfair labour practices.²³ The Labour Relations Act 66 of 1995 indicates that no employer or their employees should discriminate against another employee and disturb them from enjoying the rights that the Labour Relations Act 66 of 1995 offers them. According to Section 86 of the Labour Relations Act 66 of 1995, the employer should ensure that there is a proper means by which the persons who suffered unfair discrimination shall be protected. It is also evident from Section 187 of the Labour Relations Act 66 of 1995 that unfair dismissals are not allowed. A person can be unfairly dismissed if they were dismissed for the reason that they participated in a protest action. It is also the same Section 187 of the Labour Relations Act 66 of

²⁰ Government Notice/Gazette: Regulation Gazette 5947, No. R. 825, on June 10 1997.

²¹ Labour Relations Act 66 of 1995

²² Labour Relations Act 66 of 1995 Secs 185

²³ Labour Relations Act 66 of 1995 Secs 4

1995 that states that all employers should not unfairly discriminate against anyone who works for an organisation on the grounds of either sex, gender, belief, sexual orientation, or culture. An employee should therefore not be dismissed from their duties for the reason that they fall within the LGBTQIA+ The Labour Relations Act 66 of 1995 therefore protects the LGBTQIA+ community against discrimination. The LGBTQIA+ community should therefore not be afraid to disclose that their sexual orientation is different from their physical appearance. According to the Labour Relations Act 66 of 1995, the person should not be dismissed from work for disclosing that they regard themselves as female while their physical appearance indicates they are male. Similarly, for those who undergo sexual change surgery, employers should not discriminate against them or dismiss them from their work duties.

3.2.4 Employment of Educators Act 76 of 1998

The Employment of Educators Act 76 of 1998 was enacted to give effect to Section 9(4) of the Constitution of the Republic of South Africa.²⁴ For this reason, the EEA has to be relied on by employees who are alleging unfair discrimination, not the Constitution. The Employment of Educators Act 76 of 1998 was promulgated for the purpose of ensuring that the employment of educators is provided for.²⁵ It is in the same Act that the educator's condition of service up to their retirement is regulated. The most important part of the Act that the researcher is interested in that is related to this study is Section 7(1) of the Employment of Educators Act 76 of 1998, which makes provision that when employing an educator, the principles of democracy should be upheld. The processes of educator employment should be made taking into consideration equality and equity. Discrimination should not be used when hiring educators. With this statement, the LGBTQIA+ community should not be discriminated against when seeking educator employment for the reason of their sexual orientation.

3.2.5 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

According to Section 29(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000, it is considered discrimination in the

²⁴ The Employment Equity Act 55 of 1998.

²⁵ Employment of Educators Act 76 of 1998

workplace if the employer uses certain recruitment and selection procedures to create barriers to equal access. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was established in South Africa to ensure that Section 9 of the Constitution is adhered to.²⁶ Section 9(1) of the Constitution indicates that everyone, including those within the LGBTQIA+ community, must be given equal treatment everywhere in this country. Equal treatment should also be given to LGBTQIA+ at the workplace. It is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 that makes provision for the prevention of harassment and unfair discrimination.

The introduction of this Act is there to prevent unfair discrimination and suggests to us that there is a presence of fair discrimination within our communities and at workplaces. Section 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 indicates that discrimination is not considered to be unfair if such an act of discrimination is taken to protect those who have previously suffered from unfair discrimination. The apartheid government policies gave supremacy to the white minority and gave them the most preferences to benefit, even at work. Women were also not given opportunities to occupy high-ranking positions in companies. Policies to redress such past discrimination by giving preferences to previously discriminated individuals are considered to be fair policy even though they discriminate. A further example of fair discrimination would be that of school teams grouping sports teams according to the gender and age of the team members. Such grouping is referred to as gender and age discrimination. However, such discrimination is fair, as people would not want to mix girls and boys on one soccer team, and we would not want to see an 18-year-old boy playing soccer with a 10-year-old boy.²⁷ That would not be fair. One would have observed that in the LGBTQIA+ community, there are lesbians who consider themselves to be males or have physical structures built stronger than those of males while they are physically females. The Guardian has reported that a female runner by the name of Caster Semenya has been found to have a condition known as “hyperandrogenism.”²⁸ In this condition, a female will have higher than usual levels of testosterone. Testosterone is a hormone found in the human body

²⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Secs 9(1) & 29(1).

²⁷ C McConnachie 'Equality and unfair discrimination in education' (2017).

²⁸ 'Caster Semenya offered to show officials her vagina to prove she is female' *The Guardian* 24 May 2022.

that increases muscle mass, strength, and the body's ability to use oxygen. The Court of Arbitration in Sport ruled that Caster should lower her testosterone when she competes with other women. Ordinarily, Caster Semenya is being discriminated against as she is physically female.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Section 24, gave the government and its entities a mandate to always achieve equality in their dealings with people. Apart from the government, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 gave every citizen a responsibility to uphold equality. The state should continuously hold information sessions with the citizens and make the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 popular with the people. The researcher is of the opinion that such campaigns about the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 should be specific, for example dealing with the discrimination of the LGBTQIA+ community.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 further indicates that the South African constitutional institutions should at all times assist all the complainants by facilitating such complaints in the equality courts. Section 3(b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 requires every employer to provide a report on a regular basis that will provide information, including the investigation outcome of the reported discrimination cases. Furthermore, each and every person or employer who is contracting with the state should establish proper equality plans and mechanisms to ensure that equality is promoted. Moreover, equality is about having an equal number of people represented within the organisational structures. Should there be ten males in management positions, the organisation should strive to also have ten females in similar positions. Organisations should, however, apply the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to include lesbians and gays in the organisational structures. It is more debated that everyone should be treated with equality irrespective of their sexual orientation, but most policies and other legislation are quite about inclusivity and equality.

3.2.6 Alteration of Sex Description and Sex Status Act 49 of 2003

The Alteration of Sex Description and Sex Status Act 49 of 2003 was promulgated in South Africa in order to allow for those individuals within the LGBTQIA+ community to amend their sex description in their Birth and Death Registration Act, 1992.²⁹ The Alteration of Sex Description and Sex Status Act allows, which means a person can change their sex description on their identity documents from either being male to female or vice versa. It is, therefore, for employers to allow or recognise such changes and affect them in their employee database. Should the employer refuse to effect such changes and recognise an employee in the sex that they prefer, it would be against Section 9 of the Constitution. According to Section 1 of the Alteration of Sex Description and Sex Status Act of 2003, a person's gender does not only refer to their biological characteristics.³⁰

A person's gender is also defined by how they dress or their style of dressing. The Alteration of Sex Description and Sex Status Act 49 of 2003 also indicates that a person's gender is also determined by the prostheses that such a person wears. The employer and all other people are obliged to recognise such a person in the way that they prefer to be seen. Should a biological male wear artificial breasts, that tells us such a person prefers to be recognised as a female person. It is for the employer to also allow those biological male employees who prefer to be recognised as females to wear clothes such as blouses, skirts, hair weaves, and long nails at their workplace.

What a person wears or dresses represents an expression, and such expression could be their sexual orientation or beliefs. Section 16 of the Constitution indicates that everyone has freedom of expression. For the employer to prohibit a biological male employee from wearing makeup or stiletto heels would be considered unconstitutional and discriminatory. Furthermore, an employee is allowed by the Alteration of Sex Description and Sex Status Act 49 of 2003 to undergo any process, including surgical processes, to reassign their sex. The process can be done through physiological change or any other sexual characteristic. The LGBTQIA+ community is also protected by the Alteration of Sex Description and Sex Status Act 49 of 2003, as its Section 3(2) indicates that should a person successfully change their sex description,

²⁹ Alteration of Sex Description and Sex Status Act 49 of 2003

³⁰ Alteration of Sex Description and Sex Status Act 49 of 2003 Secs 1

they should be deemed to have all benefits to the person with the sex description that is changed to.³¹

3.2.7. Basic conditions of employment Act 75 of 1997

The basic conditions of employment set out the conditions that every employee must work under. The basic condition of employment ensures that all employees work under favourable conditions. The Act, under Section 78 Section C, provides for the rights of the employee. It is stated that every employee has the right to (a) file a complaint with a trade union representative, trade union official, or labour inspector if their employer fails to comply with this Act; (b) discuss their employment conditions with fellow employees, the employer, or any other person; (c) refuse to follow instructions that go against this Act or any sectoral determination; (d) refuse any employment term or condition that contradicts this Act or any sectoral determination; (e) access and review records related to their employment as per this Act; (f) take part in legal proceedings under this Act; and (g) request a trade union representative or labour inspector to inspect relevant records kept according to this Act. Additionally, trade union representatives can inspect employee-related records upon an employee's request.³²

Under Section 79 of the Act, it makes provision for the protection of the employees' rights. It states that nobody can discriminate against an employee for using a right given by this part. It is not allowed to do the following: (a) ask an employee to not use a right given by this part; (b) prevent an employee from using a right given by this part; or (c) treat an employee unfairly because of their past, present, or expected actions related to their job duties, disclosing information they are legally obligated to share with someone else, or exercising a right granted by this part. Furthermore, it is not allowed for anyone to show preference or make a commitment to showing preference towards an employee in return for them not utilizing a right granted by this section. However, the parties involved in a dispute can still agree to settle it despite these rules.³³

³¹ Alteration of Sex Description and Sex Status Act 49 of 2003 Secs 3(2)

³² Basic Conditions of Employment Act 75 of 1997 (BCEA) Basic Conditions of Employment Act 75 of 1997 (BCEA) (1997).

³³ Basic Conditions of Employment Act 75 of 1997 (BCEA) *Basic Conditions of Employment Act 75 of 1997 (BCEA)*.

The Act under Section 80 went on to provide guidance on what the victim can do if he or she feels that he or she was a victim of discrimination or was subjected to unfair treatment at the workplace. If there is a disagreement about how this section should be understood or applied, any party involved can write to either a council (if they fall under its jurisdiction) or the CCMA (if no council has jurisdiction). The party initiating the dispute must prove that they have sent a copy of the written complaint to all other parties involved. The council, or CCMA, will try to resolve the dispute through conciliation. If they are unable to do so, any party can take the matter to the Labour Court for a decision. The relevant provisions of Part C of Chapter VII of the Labour Relations Act, 1995, apply with necessary changes in this situation.³⁴

Chapter three of the Act talks about the leave that every employee is entitled to, which includes annual leave, sick leave, maternity leave, and family responsibility leave. The LGBTQIA+ community is supposed to be treated the same as any other person at the workplace, and this Act seeks to ensure that everyone is treated fairly and not discriminated against.³⁵

3.2.8. Occupational Health and Safety Act 85 of 1993

The Occupational Health and Safety Act requires employers to protect their employees. Section 8 states that employers must provide a safe and healthy working environment for their employees. This includes maintaining safe systems of work, machinery, and equipment. Employers should take steps to eliminate or reduce hazards before relying on personal protective equipment. They are also responsible for ensuring safety in the production, handling, and storage of articles or substances. Employers must identify potential health and safety hazards in their business activities and establish precautionary measures to protect employees' health and safety. Providing necessary information, instructions, training, and supervision is essential to ensuring employees' health and safety at work. Employers should not allow employees to engage in any work or use any equipment unless proper precautionary measures have been taken. It is the employer's responsibility to ensure compliance with health and safety regulations by everyone under their control. They must enforce

³⁴ Basic Conditions of Employment Act 75 of 1997 (BCEA) *Basic Conditions of Employment Act 75 of 1997 (BCEA)*.

³⁵ Basic Conditions of Employment Act 75 of 1997 (BCEA) *Basic Conditions of Employment Act 75 of 1997 (BCEA)*.

necessary measures for health and safety purposes, ensure that trained individuals supervise work activities involving hazardous elements, and inform employees about their authority according to Section 37(1)(b).³⁶

Section 26 of the Act provides protection to employees. It states that employers cannot dismiss an employee, decrease their pay rate, change their employment terms or conditions to be less favourable, or disadvantage them compared to other employees because the employee has provided information to the Minister or any person responsible for administering the Act, complied with a lawful prohibition or requirement from an inspector, given evidence in court, fulfilled obligations under the Act, or refused to do something prohibited by the Act.³⁷

3.2.9. Compensation of Occupational Injuries and Disease Act 130 of 1993

The Compensation of Occupational Injuries Act seeks to ensure that all employees who sustain an injury on duty are compensated, and in case they pass away, their dependents are compensated. Section 22 of the Act states that if an employee is disabled or dies due to an accident, they or their dependents are entitled to benefits under this Act. No payments will be made for temporary disablement lasting three days or less. If the accident is caused by serious misconduct by the employee, compensation may not be payable unless it results in serious disablement, or death, leaving a dependent financially dependent on them. The commissioner can order the employer to pay for medical aid if necessary. An accident is considered work-related even if the employee was acting against any employment laws or orders, as long as it was in connection with their employer's business. Providing transportation to and from work using a vehicle provided by the employer is also considered part of employment. This Act offers provisions that also cover LGBTQIA+ dependents or spouses, and the Act ensures that they receive what is due to them.³⁸

³⁶ Occupational Health and Safety Act 85 of 1993, 337, 14918 (1993).

³⁷ Occupational Health and Safety Act 85 of 1993.

³⁸ compensation of occupational injuries and disease act 130 of 1993, 340, 15158 (1993).

Section 37 of the Act ensures protection for employees against threats. It states that anyone who threatens or forces an employee to do something that deprives them of their rights under this Act will be considered guilty of an offence.³⁹

3.2.10. Unemployment Insurance Act, 63 of 2001

The Unemployment Insurance Act seeks to ensure that an employee must get remuneration during extended periods from work. When an employee is on maternity leave, the employer might get a temporary reliever, but the employee will still get a salary to look after his or her needs. The Act offers the new mothers the opportunity to raise their young ones and not rush back to work post-delivery or even post-adoption; this allows the new member of the family to settle in.⁴⁰

3.3 Conclusion

It is evident from the discussion above that there are laws in South Africa that protect the LGBTQIA+ community at their workplaces and within their community against being discriminated against for who they are. The legal frameworks also support the change of one's sex, either surgically or by the use of any other medical measures available. The legal frameworks also support one's choice to become the sex they prefer and to continue dressing in relation to their chosen sex.

In this chapter, the researcher has discussed the South African legal frameworks that discourage discrimination against the LGBTQIA+ community. Such legislations discussed include the Constitution, the Alteration of Sex Description and Sex Status Act 49 of 2003, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Employment of Educators Act 76 of 1998, the Labour Relations Act 66 of 1995, and the Employment Equity Act No. 55 of 1998.

In the next chapter, the researcher will discuss the challenges faced by LGBTQIA+ community at the workplace and applicable remedies in South Africa and internationally.

³⁹ compensation of occupational injuries and disease act 130 of 1993.

⁴⁰ *Unemployment insurance act, 63 of 2001*, 439 (2002).

Chapter Four

Comparative analysis for workplace discrimination

4.1. Introduction

In this chapter, the researcher will be discussing the legislation that is present in South Africa that is meant to protect and enforce the rights of the lesbian, gay, bisexual, transgender, queer, asexual, intersex, and others (LGBTQAI+) community and comparing them with legislation in several African countries. The researcher will also discuss the laws that seek to prevent discrimination at the workplace, whether it is direct or indirect. Workplace discrimination has been a long-standing problem and still is a problem at the current moment. Although the challenges have evolved from the 1960s to recent times, other types of discrimination have received attention over the years. Workplace discrimination based on sexual orientation has received the least attention. It has also been documented that gays and lesbians are disadvantaged when it comes to income and employment.¹

In Australia, the Victorian Gay and Lesbian Rights Lobby group has indicated that out of the 23% of the sampled LGBTQIA+ individuals, they have experienced discrimination when seeking health care.² This just indicates the extent of the discrimination that the community has towards the LGBTQIA+ community. One will expect the health care professional to be sensitised and treat the LGBTQIA+ community with respect. The United Nations (UN) as well as the African Union (AU) have covenants and declarations that seek to curb the discrimination in member countries, but the discrimination still persists.

4.2. UN Declaration of Human Rights

The Universal Declaration of Human Rights serves as the basis for human rights around the world. South Africa is one of the countries that has signed and ratified the

¹ RL Dipboye & A Colella *Discrimination at Work: The Psychological and Organizational Bases* (2013).

² I Smith et al. 'The Australian corporate closet, why it's still so full: a review of incidence rates for sexual orientation discrimination gender identity discrimination in the workplace' (2013) 9 *Gay and Lesbian Issues and Psychology Review* 51.

Universal Declaration of Human Rights. It is the cornerstone of human rights around the globe. Although it is not a treaty or a statute, many countries have incorporated it into their constitutions. It has given rise to several treaties under the United Nations. The Universal Declaration of Human Rights in Chapter 2 states that everyone deserves all the rights and freedoms listed in the declaration, regardless of race, colour, sex, language, religion, political views, national or social origin, property ownership, birth, or other status.³ Additionally, there will be no differentiation based on a person's political, jurisdictional, or international status. This applies regardless of whether the person belongs to an independent country, a trust territory, a non-self-governing area, or any other form of limited sovereignty. The bill also emphasises that everyone is equal under the law and has the right to equal protection without any discrimination.⁴ The bill did not make any exceptions based on these factors. This Declaration affirms that any form of discrimination that violates its principles is unacceptable and must be prevented. It also condemns any actions or words that may encourage or justify such discrimination.⁵ However, it can be noted that the international bill of rights is not an act but a declaration that makes countries aware of human rights and incorporates them into their constitutions. All countries under the United Nations are expected to incorporate the Bill of Human Rights into their respective countries' constitutions and legislation. The universal declaration of human rights has given rise to the International Covenant on Civil and Political Rights of 1967. South Africa is one of the countries that are signatories to this covenant, and South Africa has also ratified this covenant. The International Covenant on Civil and Political Rights of 1969 has received overwhelming support from many countries through signature, ratification, and assertion. South Africa is one of the countries that apply international law. In 1994, when the United Nations Human Rights Committee ruled in favour of Nicholas Toonen *in Toonen v Australia*, the Australian government was ordered to remedy the constitution so that it could protect the LGBTQIA+ community as indicated by the international covenant on civil and political rights.⁶ The case paved the way for other cases, such as *Lawrence v Texas* in 2003, in which Lawrence was arrested for engaging in sexual acts with a same-sex couple in the United States of

³ United Nations *Universal Declaration of Human Rights* (1948).

⁴ United Nations *Universal Declaration of Human Rights*.

⁵ United Nations *Universal Declaration of Human Rights*.

⁶ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). (1994).

America.⁷ The Supreme Court of the United States found that Lawrence was unfairly discriminated against, and the law of sodomy needs to be scrapped as it prevents same-sex couples from enjoying their sexuality and also infringes on their privacy.⁸

Section 39(1)(b) of the South African constitution states that “when interpreting the Bill of Rights, a court, tribunal, or forum must take international law into account”.⁹ Meanwhile, Section 39(1)(c) allows such a court, tribunal, or forum to consider foreign law. Although the courts are empowered to consider foreign law, they are also not obliged to do so.¹⁰

4.3. African Charter on Human and people’s rights

African countries have a charter that seeks to guide all the countries that are member states. South Africa, as well as other African countries, has signed and ratified the African Charter on human and people’s rights. Of all the African countries at the time, the only country that did not sign or ratify the African Charter on Human and People’s Rights was Morocco. All other countries except Morocco either signed or ratified the charter. All the countries must enforce human rights in their countries, guided by the African Union. Article 2 of the charter states that everyone has the right to enjoy the rights and freedoms recognised in the charter without any discrimination based on race, ethnicity, colour, sex, language, religion, political or other opinions, national or social origin, wealth, birth, or other status. It also guarantees that everyone is equal before the law and entitled to equal protection under the law. Additionally, Article 15 ensures that individuals have the right to work under fair conditions and receive equal pay for equal work.¹¹ If all African states adopt the African Charter, all countries in Africa will be fighting against discrimination based on sexual orientation. Although the charter does not explicitly say discrimination based on sexual orientation, it is against discrimination of all forms.

⁷ *Lawrence v. Texas* (2003).

⁸ *LAWRENCE et al v TEXAS* (2003).

⁹ *The Constitution of the Republic of South Africa, 1996: as adopted on 8 May 1996 and amended on 11 October 1996 by the Constituent Assembly* (2015).

¹⁰ *The Constitution of the Republic of South Africa, 1996: as adopted on 8 May 1996 and amended on 11 October 1996 by the Constituent Assembly* (2015).

¹¹ Organisation of African Unity *African Charter on Human and Peoples Rights* (1981).

4.4. The Constitution of the Republic of South Africa

In the Constitution of the Republic of South Africa, under Chapter 2 of the Bill of Rights, Section 9 on equality, it is stated that everyone is equal before the law, and it goes further to indicate that no person may unfairly discriminate against anyone on the basis of race, gender, sexual orientation, cultures, language, or birth.¹² This bill of rights was the first in Africa to protect the LGBTQIA+ community against discrimination based on their sexual orientation. South Africa acted as a role model for all African countries to have laws that protect against discrimination based on sexual orientation. It can also be noted that the Constitution of South Africa has been adapted from the United Nations Convention on Human Rights, which seeks to ensure that all countries that adopt it can fight discrimination of all forms in their countries. South Africa has signed and ratified both the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights.

4.5. Countries with constitution against LGBTQIA+

The researcher chose two countries whose constitutions are against the LGBTQIA+ community. These two countries were all under the British government before they gained their independence, as was South Africa. Although these two countries gained independence much earlier than South Africa, Uganda gained independence in 1962, followed by Kenya in 1963. These two countries are found in sub-Saharan Africa, the same as South Africa.

4.5.1 The Constitution of the Republic of Kenya

Kenya is one of the countries that ratified both the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. Although the country has ratified both the covenants, they still have reservations for the LGBTQIA+ community. The LGBTQIA+ community is being discriminated against based on their sexual orientation. This is completely against the AU and UN human rights covenants. Although they are not binding, the fact that they have been ratified means that the country was supposed to recognise the rights of LGBTQIA+ and

¹² *The Constitution of the Republic of South Africa, 1996: as adopted on 8 May 1996 and amended on 11 October 1996 by the Constituent Assembly* (2015).

protect all its citizens against discrimination, whether in the community or the workplace.

The Constitution of the Republic of Kenya, states in Chapter 4, Article 27, in Subsection 1 that the law must treat everyone the same way and give everyone the same rights and benefits. The law also does not allow the state to treat anyone unfairly or differently because of their “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth”. This applies to both direct and indirect discrimination.¹³ In subsection 5 under Article 27, the constitution says that the law does offer protection to the citizens from being discriminated against, but it does not explicitly say that sexual orientation, as is the case in the South African Bill of Rights. The Constitution of Kenya only recognises marriage of the opposite sex in Chapter 4, Section 45 of the Constitution. The constitution went further to indicate that the parties in a marriage are entitled to equal rights throughout their marriage stages. Not recognising the marriage of the same sex on its own is direct discrimination, and the bill is against direct or indirect discrimination. Individuals of same-sex marriage will not be able to enjoy the benefits that are due to them because they are not recognised as a married couple as the constitution does not recognise them. The benefit that they are supposed to receive from their employer will be voided.

4.5.2 The Constitution of the Republic of Uganda

Uganda is also one of the countries that have ratified both the African Charter on Human and People’s Rights and the International Covenant on Civil and Political Rights, and its constitution is not in line with both the African Charter and the International Covenant on Civil and Political Rights with regard to measures to prevent discrimination based on an individual’s sexual orientation. Although it can be said that the AU and UN covenants are not binding and each country is at liberty to adopt part or whole of the covenant, the countries should have high regard for human rights and adopt them to curb discrimination based on sexual orientation.

The Constitution of the Republic of Uganda, in Chapter 4 of the Constitution in Section 21, talks about equality and freedom from discrimination, and in Subsections 1- 3, it

¹³ Kenya: The Constitution of Kenya (2010).

says that the law must treat everyone the same, no matter who they are or what they do, in every aspect of life, from politics to culture. It also says that everyone has the right to be protected by the law.¹⁴ In Sub-section 2, it went further to indicate that a person shall not be discriminated against based on their “religion, race, colour, ethnic group, tribe, birth, creed or religion, social or economic standing”.¹⁵ In subsection 4, the concept of discrimination is explained as treating people differently based on their “sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion, or disability”. These are the factors that should not affect how people are treated.¹⁶ The Constitution of Uganda is also silent on discrimination based on sexual orientation; it also talks about discrimination based on sex, which usually refers to either male or female and does not include how other people associate themselves.

Recently, the government of Uganda passed the anti-homosexuality bill for 2023. This bill has sparked fears among the LGBTQIA+ community, as now they will be discriminated against. The anti-homosexuality bill is intended to safeguard Uganda's culture, legal and religious values, traditional family values, and protect against the influence of sexual rights activists promoting sexual promiscuity.

4.6. Countries that protect LGBTQIA+

The researcher chose two African countries that allow same-sex marriage in their constitutions. These countries protect the rights of the LGBTQIA+ community. These two countries have all ratified the International Covenant on Civil and Political Rights of 1967 as well as the African Charter on Human and People's Rights.

4.6.1. The Constitution of Angola

The constitution of Angola, under title ii on the fundamental rights and duties in Chapter 1 of General Principles, indicates that “each and every person must respect and be considerate of others without discrimination of any kind and maintain relations that promote, safeguard, and reinforce mutual respect and tolerance”.¹⁷ This Article 22(3b)

¹⁴ Uganda: The Constitution of the Republic of Uganda (Rev. ed edn, 1984).

¹⁵ Uganda The Constitution of the Republic of Uganda Rev. ed.

¹⁶ Uganda The Constitution of the Republic of Uganda Rev. ed.

¹⁷ Constitution of Angola *Constitution of Angola* (2010).

indicates that each and every person must not be discriminated against in the Republic of Angola. The principle of equality, stated in Article 23, prohibits any form of discrimination, privilege, right deprivation, or duty exemption based on any of the following factors: “origin, gender, race, ethnicity, colour, disability, language, birthplace, religion, political, ideological, or philosophical views, education level, or economic, social, or professional situation”.¹⁸ The constitution does not explicitly talk about sex orientation; it only talks about discrimination based on sex.¹⁹

The constitution outlines the rights and duties related to work in Chapter III. Employees have the right to vocational training, fair wages, days off for rest and holidays, legal protection, and a safe and healthy workplace according to Article 76(2). Additionally, Article 76(3b) states that the state must promote equal opportunities in choosing a profession or type of work without discrimination. Lastly, under Article 76(3c), it is stated that unjust dismissal is illegal, and employers have to provide fair compensation as per the law for dismissed workers.²⁰

Under the general labour law of Angola, it is indicated that the employment contract will be regarded as null and void and that if the employee was discriminated against, then the employer will be expected to compensate the employee due to discrimination practices or unfair labour practices. Angola is one of the countries that allows same-sex marriage. Same sex marriage was allowed in Angola in January 2021.²¹ The country's law allowing same-sex marriage allows the LGBTQIA+ community to come out and no longer live in hiding.

4.6.2. The Constitution of Botswana

The Botswana constitution guarantees fundamental rights and freedoms to all individuals in the country, regardless of their race, place of origin, political opinions, colour, creed, or sex. It prohibits any discriminatory provisions or treatment based on these factors, whether by law or by individuals in positions of authority. Discrimination

¹⁸ Constitution of Angola *Constitution of Angola* (2010).

¹⁹ Constitution of Angola *Constitution of Angola* (2010).

²⁰ Constitution of Angola *Constitution of Angola* (2010).

²¹ Human Rights Watch ‘Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year | Human Rights Watch’, 22 June 2022, <<https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year>> (accessed 21-2-2024).

is defined as treating people differently based on these characteristics, leading to disadvantages for one group and privileges for another.²²

The first case that sought to challenge the constitution with regard to the same sex in Botswana was *Kanane v. the State of Botswana* in 2003.²³ Although Kanane was not able to make the constitution change, it set the tone for the preceding court cases. Botswana's High Court made a historic decision in 2019 by legalising same-sex relationships for both men and women. This replaced a law from 1965, during the country's British rule, which prohibited intimate relations that were considered unnatural and carried a maximum penalty of seven years in prison.²⁴ The Botswana Court of Appeal made a ruling on 29 November 2021, in the case of *Attorney General v Motshidiemang*.²⁵ They found that the Penal Code's ban on consensual same-sex relations is unconstitutional. The decriminalisation of same-sex activity in Africa has happened for the second time, with Botswana's Court of Appeal making the decision. The first instance occurred in South Africa's Constitutional Court in 1999. The Attorney General of Botswana, Advocate Abraham Keetshabe, announced that the government will implement the court's ruling. He stressed the importance of following court decisions to maintain democracy and uphold the rule of law in Botswana.²⁶

Botswana, like South Africa, has the Employment Equity Act to guide employers and employees in the workplace. This Act prevents unfair treatment of employees by prohibiting employers from terminating employment contracts based on certain grounds, such as trade union membership or activities, seeking office or acting as an employees' representative, making a good faith complaint against the employer, or discrimination based on "race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour, or creed".²⁷

²² *Constitution of Botswana* (1966).

²³ *Kanane v. the state of Botswana* (2003).

²⁴ A Rakhetsi '6 Countries in Africa That Have Legalized Same-Sex Relationships in the Past 10 Years', *Global Citizen*, 25 February 2021, <<https://www.globalcitizen.org/en/content/countries-legalized-same-sex-relationships-africa/>> (accessed 21-2-2024).

²⁵ T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)' (2019) 19 *African Human Rights Law Journal* 843.

²⁶ S Writer 'The Botswana Court of Appeal's decriminalisation judgment explained', *Southern Africa Litigation Centre*, 6 December 2021, <<https://www.southernafricalitigationcentre.org/2021/12/06/the-botswana-court-of-appeals-decriminalisation-judgment-explained/>> (accessed 21-2-2024).

²⁷ Government of Botswana *Employment Act 29 of 1982* (1982).

4.7. Labour laws present to curb workplace discrimination across different countries

The Labour Relations Act of 1996 safeguards employees from unfair dismissal and discriminatory practices by employers based on various factors such as “race, gender, ethnicity, sexual orientation, age, disability, religion, political opinion, culture, language, marital status, or family responsibility”.²⁸

According to the Employment Equity Act 55 of 1998, employers have a duty to ensure that their employees are treated fairly and have equal access to opportunities in the workplace. The Act forbids any form of discrimination based on race, gender, disability, or any other grounds in any employment policy or practice. The employer must also take proactive measures to eliminate any unfair discrimination that may exist in the workplace.²⁹ The Act also states that “it is not allowed to unfairly discriminate against an employee based on various factors, such as race, gender, marital status, disability, religion, and more”.³⁰ The same Act in Chapter 2, Section 6, Subsection 3, also indicates that “harassment of an employee is a form of unfair discrimination, and it is prohibited on any one or a combination of grounds of unfair discrimination”.³¹ The Employment Equity Act 55 of 1998 also requires that the employer make reasonable accommodations in order to make the designated group comfortable so that they can enjoy equal opportunities at the workplace. In the case of the LGBTQIA+ community, the employer must consider all the employees for promotion, and if they have to retrench, they must make use of a policy that will be inclusive and not discriminatory on its own.³² The International Labour Organisation (ILO) Equal Remuneration Convention 1951 requires countries to ensure equal pay for men and women performing work of equal value. South Africa ratified this convention in 2000, which means employers must apply fair pay policies without discrimination based on listed or arbitrary grounds.³³ Employees working on the same job with the same

²⁸ Government of South Africa *Labour Relations Act 66 of 1995* (1995).

²⁹ Government Gazette *Employment Equity Act 1998*, 19370, 400 (1998).

³⁰ Government Gazette *Employment Equity Act 1998*.

³¹ Government Gazette *Employment Equity Act 1998*.

³² Government Gazette *Employment Equity Act 1998*.

³³ Government Gazette *Employment Equity Act 1998*.

qualifications must earn the same salary with the same benefits regardless of their sexual orientation, race, or gender.

The Kenyan constitution states in Chapter 4, Section 41 of the bill that everyone has the right to fair treatment at work, including fair pay and reasonable working conditions.³⁴ Since the constitution of the Republic of Kenya does not recognise the LGBTQIA+ community, although the constitution is against unfair labour practices, they are prone to discrimination at work as the constitution does not recognise them and is against them identifying themselves as LGBTQIA+.

The legal recognition and protection of sexual orientation is a relatively recent and less robust concept compared to other forms of anti-discrimination, of which in the United Kingdom the legislation was introduced in December 2003.³⁵ More and more countries are coming on board to introduce legislation that seeks to fight and prevent workplace discrimination based on an employee's sexual orientation. Although the introduction of legislation, or policies, and guidelines is one thing, the enforcement of such regulations is another thing that countries with low and middle incomes are unable to enforce due to a shortage of resources and manpower. In the United States of America, although discrimination has been prohibited by the Civil Rights Act of 1964, it persists.³⁶ This simply indicates that legislation alone cannot prevent discrimination, but there is also a need for such legislation and laws to be enforced in a quest to prevent discrimination from happening.

4.8. Cases across different countries that relate to workplace discrimination

Gary Shane Allpass vs Mooikloof Estate (PTY) LTD, t/a Mooikloof Equestrian, the applicant Mr. Allpass was unfairly discriminated against in South Africa due to his HIV status and also because he was in a same-sex marriage.³⁷ The applicant was made to fill out forms that other employees were not given but were given to employees who are in same-sex marriage. The applicant was then unfairly dismissed based on his

³⁴ Kenya: *The Constitution of Kenya*.

³⁵ Bell et al. *Hum. Resour. Manage.* 50, 131.

³⁶ Cheung et al. in 'Understanding and Reducing Workplace Discrimination' *Research in Personnel and Human Resources Management* 101.

³⁷ J. Erasmus *ALLPASS v MOOIKLOOF ESTATE (PTY) LTD t/a MOOIKLOOF EQUESTRIAN CENTRE* (2011).

HIV status, for which the court awarded the judgement in his favour and ordered the respondent to pay 12 months of remuneration to the applicant.³⁸

In the case of *Solidarity obo A Oosthuizen v The South African Police Service*.³⁹ In January 2023, the Labour Court decided that the South African Police Service (SAPS) failed to adequately safeguard Colonel Oosthuizen from racial mistreatment by her subordinates. As a result, the court ordered SAPS to compensate Colonel Oosthuizen with R300 000 for the harassment she experienced under the EEA.⁴⁰ Although the Employment Equity Act seeks to ensure that there is equal representation of different ethnic groups, it also has some challenges when not applied fairly. The employer must also look at merit and not only look at racial representation.

In the case of *South African Police Service v Solidarity obo Barnard*, the employee was unfairly discriminated against based on the colour of her skin, and she did not get the promotion because of the colour of her skin, although, in the end, she ended up being promoted to a senior position.⁴¹ In this case, the Employment Equity Act was used to disadvantage Ms Barnard but the labour court corrected it and had her promoted to the position that she qualified for.

In Bostock v Clayton, County Georgia, United States of America, the employee was unfairly discriminated against due to his sexual orientation.⁴² The employee was fired because he started to participate in gay sports and disclosed to the employer that he was gay. The court found that the employer unfairly discriminated against the employee due to his sexual orientation, and the employer was instructed to reinstate the employee.⁴³

Altitude Express v. Zarda: Don Zarda lost his job at a skydiving company after telling a customer about his sexual orientation.⁴⁴ The U.S. Court of Appeals for the Second Circuit ruled that it was against the law to discriminate based on sexual orientation in the workplace. Don Zarda passed away before the court made its decision, but his

³⁸ J Erasmus *ALLPASS v MOOIKLOOF ESTATE (PTY) LTD t/a MOOIKLOOF EQUESTRIAN CENTRE* (2011).

³⁹ *Solidarity obo A Oosthuizen v The South African Police Service, Imraan Mahomed* (2023).

⁴⁰ *Solidarity obo A Oosthuizen v The South African Police Service, Imraan Mahomed* (2023).

⁴¹ *South African Police Service v Solidarity obo Barnard* (2014).

⁴² *BOSTOCK v. CLAYTON COUNTY, GEORGIA* (2020). n34 above

⁴³ *BOSTOCK v. CLAYTON COUNTY, GEORGIA* (2020). n34 above

⁴⁴ *Altitude Express, Inc. v. Zarda* (2020).

partner and sister continued the lawsuit to seek compensation from his former employer.⁴⁵

R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens, Aimee Stephens was a funeral director in Michigan.⁴⁶ After informing her employer that she identifies as a transgender woman and would like to work as such, the funeral home fired her, deeming it unacceptable. The U.S. Court of Appeals for the Sixth Circuit ruled that this Act was discriminatory based on sexual orientation and violated Title VII of the U.S. Constitution. Unfortunately, Aimee Stephens passed away shortly before the Supreme Court ruled in her favour.⁴⁷

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the case acknowledged that the common-law crime of sodomy contradicted the South African Constitution.⁴⁸ The court stated that this crime is inconsistent with the Constitution because it only criminalises acts between men and not between women or a man and a woman. Other related laws were also considered inconsistent with the Constitution and therefore not valid. The judge directed that the issue be referred to the Constitutional Court for confirmation.⁴⁹ This ruling paved the way for same-sex marriages and ensured that spouses of same-sex marriages were afforded the same benefits as heterosexual marriages.

In *Smith v Kit Kat Group (Pty) Ltd.*, the applicant was unfairly treated based on his disabilities.⁵⁰ The respondent was ordered to pay the applicant R1,540,199.40 within 10 days of the judgment. The respondent must also assist the applicant in withdrawing from their provident fund and receiving their funds. The respondent was responsible for paying the applicant's costs.⁵¹

⁴⁵ *Altitude Express v. Zarda* (2020).

⁴⁶ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (2020).

⁴⁷ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, 590 U.S. (2020).

⁴⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998).

⁴⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998).

⁵⁰ *Smith v Kit kat Group (Pty) Ltd* (2016).

⁵¹ *Smith v Kit kat Group (Pty) Ltd* (JS787/14) [2016] ZALCJHB 362; [2016] 12 BLLR 1239 (LC); (2017) 38 ILJ 483 (LC) (2016).

Wallace v Du Toit: in this case, Wallace was unfairly dismissed when she fell pregnant.⁵² After informing the employer that she is expecting, the employer unfairly discriminates against her. She then approached the Labour Court, which found that she was unfairly dismissed, and that the respondent was ordered to compensate her with R71 500.00, and to pay for the legal fees for the applicant.⁵³

In *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others*, the applicant was unfairly discriminated against at the workplace.⁵⁴ The employee reported unfair discrimination to the supervisor, but no remedy was given. The initial respondent has been determined to have infringed on the applicant's right to fair labour practices, as stated in Section 23(1) of the Constitution. The respondent was ordered to pay the applicant R45 000 for the constitutional damage that the applicant has suffered.⁵⁵

4.9. Identified gaps across different countries in relation to workplace discrimination

Although in Kenya the constitution is against either direct or indirect discrimination, the constitution on its own incites discrimination against the LGBTQIA+ community. The fact that same-sex marriage is not recognised is a challenge and is a direct form of discrimination against the LGBTQIA+ community in Kenya. The employee who falls under the LGBTQIA+ community will not have any say when they are overlooked for promotion or if they are unfairly retrenched by their employer. This is so because their constitution does not recognise the LGBTQIA+ community. The spouse or life partner of the employee will be excluded from receiving the benefits of their life partner either from their policies after passing away or from the employer while they are still alive.

The constitution of Uganda also does not recognise marriages of the same sex; it only recognises marriages between men and women. The constitution also discriminates directly against the LGBTQIA+ community, and they are not going to receive the full benefits of a married partner, as in the case between the marriage of a man and a woman. The partner of the same-sex marriage couple will be discriminated against at the workplace, as the constitution of the country does not recognise such a union

⁵² *Wallace v Du Toit* (2006).

⁵³ AJ Pillemer *Wallace v Du Toit* (2006).

⁵⁴ *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others* (2006).

⁵⁵ A Nel *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others* (2006).

between two same-sex individuals. If the employee is discriminated against at their workplace or unfairly treated, the employee might not be able to approach the court as the court does not recognise the LGBTQIA+ community. The employee might be paid less than other heterosexuals, and instead of the court helping the employee, the employee might be subjected to further discrimination or imprisoned because of being gay or lesbian.

Of the three countries in which the researcher has looked at their constitutions, South Africa is the only country that prohibits discrimination based on sexual orientation and has acts that seek to enforce anti-discrimination in the workplace. Although the South Africa Employment Equity Act can be used to discriminate fairly by correcting the wrongs that were done during apartheid, The act can be used to discriminate fairly in cases of gender parity or race parity at the workplace. The Employment Equity Act seeks to ensure that there is equal representation of all people of different races and genders in the workplace. Those careers that are male-dominated will see more women employed and males overlooked to ensure gender-equal representation.

Several countries have either implemented or contemplated new measures to make consensual same-sex relationships illegal. In Ghana, a bill that aimed to further criminalise LGBTI individuals was still awaiting approval in parliament. Equatorial Guinea was preparing draft legislation that would regulate the rights of LGBTI people. However, in Senegal, the proposed bill to criminalise LGBTI individuals was rejected by the National Assembly.⁵⁶

In Nigeria, LGBTQIA+ people had limited protection in national courts, as three gay men were sentenced to death by a Sharia court. Eswatini's High Court supported the registrar of companies' decision to refuse registration of an advocacy group for sexual and gender minorities. Namibia's High Court rejected immigration status regularisation for spouses of Namibian citizens based on same-sex marriages conducted abroad. At the regional level, observer status applications from three organisations focused on LGBTQIA+ rights were rejected by the African Commission on Human and Peoples' Rights.⁵⁷

⁵⁶ Amnesty International 'Human rights in Africa Regional Overview', *Amnesty International*, 2022, <<https://www.amnesty.org/en/location/africa/report-africa/>> (accessed 3-9-2023).

⁵⁷ Amnesty International *Amnesty International*.

The labour union plays a pivotal role in fighting workplace discrimination for the LGBTQIA+ community. Countries with strong labour movements, such as South Africa, Spain, and Canada, assisted in fighting LGBTQIA+ discrimination. However, in countries like the United States of America, the labour unions have not supported the LGBTQIA+ movement to do away with workplace discrimination based on sexual orientation. The non-support of the labour movement for anti-workplace discrimination against LGBTQIA+ was because of the masculine structures of the United States labour movement. LGBTQIA+ activists around the world in their respective countries have fought to have laws that protect LGBTQIA+ rights and to do away with workplace discrimination. In some countries, they have fought to have the same marriage recognised by the law and by the employer. In doing so, it ensures that same sex marriage employees are not discriminated against and receive the same benefits as heterosexual couples.⁵⁸

It is estimated that around 3 -17% of the United States (US) labour force are LGBTQIA+. It is also indicated that 45% of people in the US regard LGBTQIA+ as a sin, and as such, they don't want to be associated with the LGBTQIA+ community. Disclosing one's sexual orientation is important to receive emotional support and for colleagues to understand that employee. But it also comes with the undesired effects of stigma, discrimination, and unfair treatment. The negative effects are even worse when there is no legislation to protect the LGBTQIA+ community against discrimination, as is the case in Kenya and Uganda.⁵⁹

Different groups have urged Hong Kong to make laws against workplace discrimination based on sexual orientation. The government has proposed using data on discrimination to guide discussions on this issue.⁶⁰ They surveyed 792 individuals in Hong Kong who identified as sexual orientation minorities. They looked at the following: (1) how often discrimination based on sexual orientation occurs; (2) factors that increase the likelihood of experiencing discrimination; and (3) the connection between experiencing employment discrimination and its impact on mental well-

⁵⁸ NA Naples *Companion to sexuality studies* (2020).

⁵⁹ JR Webster et al. 'Workplace contextual supports for LGBT employees: A review, meta-analysis, and agenda for future research' (2018) 57 *Human Resource Management* 193.

⁶⁰ H Lau & RL Stotzer 'Employment Discrimination Based on Sexual Orientation: A Hong Kong Study' (2011) 23 *Employ Respons Rights J* 17.

being.⁶¹ About one-third of participants reported facing discriminatory treatment. The rates of discrimination varied depending on age, level of education, and whether or not one disclosed their sexual orientation. Reports of discrimination were associated with negative psychological outcomes.⁶²

According to the American Community Survey, women in same-sex couples experience a double-gender pay gap. Even though they have high participation in the labour force, their personal income is lower compared to men in same-sex couples, and their family income is the lowest among all types of couples.⁶³ It can also be highlighted that in the United States of America, transgender people were not allowed to serve in the military until 2002. The 2020 Supreme Court ruling in *Bostock v. Clayton County* made it illegal to discriminate against LGBTQ people.⁶⁴ This ruling stated that such discrimination is a form of sex discrimination, which is prohibited under Title VII of the Civil Rights Act of 1964. The ruling confirmed the Equal Employment Opportunity Commission's 2013 decision to consider complaints about sexual orientation and gender identity as charges of sex discrimination. This extended protection against discrimination nationwide, even in states without laws specifically addressing sexual orientation and/or gender identity discrimination in employment.⁶⁵

Most studies show that LGBTQIA+ job candidates face greater difficulty being invited for interviews or offered jobs. Experimental studies reveal possible reasons behind this discrimination, suggesting that employers may be biased against employing LGBTQ individuals by treating them differently from equally qualified applicants. Some studies also investigate statistical discrimination, where employers make assumptions about job-related qualities based on an applicant's LGBTQIA+ status.⁶⁶

Multiple research reviews have shown that gay/bisexual men tend to earn less than heterosexual men, even when accounting for factors such as education, age, race, marital status, and geographic location. On average, the earnings gap between gay/bisexual men and heterosexual men is about 11 percent. Recent reviews in 2019

⁶¹ Lau and Stotzer *Employ Respons Rights J* 23, 17.

⁶² Lau and Stotzer *Employ Respons Rights J* 23, 17.

⁶³ MVL Badgett et al. 'LGBTQ Economics' (2021) 35 *Journal of Economic Perspectives* 141.

⁶⁴ *BOSTOCK v. CLAYTON COUNTY, GEORGIA* (2020).

⁶⁵ Badgett et al. *Journal of Economic Perspectives* 35, 141.

⁶⁶ Badgett et al. *Journal of Economic Perspectives* 35, 141.

also support these findings and suggest that bisexual men may face even larger earnings gaps compared to gay men.⁶⁷

Research by Klawitter (2015) and Valfort (2017) found that women of different sexual orientations have varying earnings compared to men. The gender wage gap persists across all groups of cisgender women, regardless of sexual orientation. However, studies show that lesbian/bisexual women tend to have higher incomes compared to heterosexual women. In particular, lesbians have an average wage premium of 9 percent, according to Klawitter's meta-analysis, and studies using data from the 1990 and 2000 Census show that women in same-sex couples earned wages that were 7-8 percent higher.⁶⁸

A different study that compared Dutch tax records and population registries to examine transgender people before and after transitioning discovered that transgender individuals who transitioned from female to male earned significantly less per hour prior to transitioning compared to cisgender men. However, their earnings remained relatively unchanged after transitioning. On the other hand, transgender individuals who transitioned from male to female had similar hourly earnings as cisgender men before transitioning but experienced a significant decline in earnings and working hours after transitioning.⁶⁹

There are also differences in workplace-related benefits. In the US, employers usually provide health insurance for opposite-sex spouses of employees, but not always for same-sex partners, which is unfair discrimination against the LGBTQIA+ community by the employer.⁷⁰ LGBTQIA+ workers face higher chances of facing discrimination in hiring and wages, as well as negative treatment by co-workers and supervisors, compared to non-LGBTQ colleagues. More than half of Americans still hold some level of prejudice against non-heterosexual, transgender, and gender non-binary individuals, which often results in biased treatment towards LGBTQIA+ colleagues.⁷¹

⁶⁷ Badgett et al. *Journal of Economic Perspectives* 35, 141.

⁶⁸ Badgett et al. *Journal of Economic Perspectives* 35, 141.

⁶⁹ Badgett et al. *Journal of Economic Perspectives* 35, 141.

⁷⁰ Badgett et al. *Journal of Economic Perspectives* 35, 141.

⁷¹ EA Cech & TJ Waidzunus 'Systemic inequalities for LGBTQ professionals in STEM' (2021) 7 *Science Advances* eabe0933.

LGBTQ individuals felt that they were seen as less competent professionals compared to their colleagues. These higher chances of professional devaluation were often experienced by LGBTQIA+ individuals with similar backgrounds and qualifications as their non-LGBTQIA+ peers. In other words, LGBTQ professionals were 20.2% more likely than their non-LGBTQIA+ peers to agree that they had been devalued in at least one aspect measured on the professional devaluation scale.⁷² LGBTQIA+ professionals face social marginalisation and exclusion by their colleagues. 32.9% of LGBTQIA+ science, technology, engineering, and maths (STEM) professionals experience social exclusion, compared to 22.7% of non-LGBTQIA+ peers. LGBTQIA+ STEM professionals are also about 30% more likely to have experienced workplace harassment in the past year.⁷³

Klawitter (2015) and Valfort (2017) found that there is a pay difference between gay men and heterosexual men with heterosexual men, earning more, and also that heterosexual women on average tend to earn more than lesbians. This implies that there might be labour market discrimination against gay men but not against lesbians.⁷⁴ LGBTQIA+ individuals in the United States continue to face human rights violations in areas such as employment, poverty, health, and hate crime. Particularly vulnerable are sexual minority youth and transgender individuals. Additionally, law enforcement sometimes fails to protect LGBTQIA+ people and can even contribute to discrimination. The ongoing unequal treatment and obstacles to justice suggest that the United States is not meeting its obligations under the 2010 universal periodic review.⁷⁵

The LGBTQIA+ community represents a substantial proportion of the US workforce. State and local governments employ approximately one million LGBTQIA+ individuals, while the federal government employs over two hundred thousand. Additionally, there are nearly seven million LGBTQIA+ workers in the private sector. This accounts for about four percent of the labour force in America. A significant number of lesbian, gay, and transgender individuals report facing workplace harassment and discrimination, but federal law does not explicitly protect them from employment discrimination based

⁷² Cech and Waidzunus *Science Advances* 7, eabe0933.

⁷³ Cech and Waidzunus *Science Advances* 7, eabe0933.

⁷⁴ M Folch 'The LGBTQ+ Gap' (2022).

⁷⁵ A Park & F Halawi 'Lack of Equal Treatment and Access to Equal Opportunity for LGTBQ People in the United States' (2014).

on sexual orientation or gender identity. Only a minority of workers live in jurisdictions where such discrimination is prohibited by law. Even public or governmental employees have limited constitutional protections in this regard. By making straightforward changes to federal and state policies, we can help ensure access to fair workplaces as a basic human right.⁷⁶

Of the hate crimes reported in the United States of America, 30 percent were directed at people based on their sexual orientation, which is alarming considering that LGBT individuals in the American population constitute only about 3.5 percent. However, these figures might be lower than the actual number of hate crimes against this community due to underreporting by state and local agencies. Moreover, many victims within the LGBT community opt not to report their victimisation due to fear of additional harm.⁷⁷

4.10. Conclusion

According to the constitutions of the countries discussed above, the South African constitution is the leader in terms of ensuring that citizens are protected from all forms of discrimination. The LGBTQIA+ community is still experiencing discrimination due to their sexual orientation. According to the minority stress theory, people who identify as LGBTQ+ experience more stress at work because they are a marginalised group. This review focuses on factors like perceived organisational working climate and turnover intentions, using the minority stress model as a basis.⁷⁸ China stated in its 2005 White Paper on Gender Equality that it provides women workers with full protection of their rights and interests through its legal system. However, new forms of gender discrimination have emerged at the workplace, often disguised as protection measures for women, after the authorities banned traditional forms of gender-based prejudice.⁷⁹

When one is true to oneself and colleagues at the workplace, it is associated with a positive outcome and more job satisfaction. European transgenders perceive

⁷⁶ Park and Halawi.

⁷⁷ Park and Halawi.

⁷⁸ MC Steffens et al. 'Discrimination at Work on the Basis of Sexual Orientation: Subjective Experience, Experimental Evidence, and Interventions' in T Köllen (ed) *Sexual Orientation and Transgender Issues in Organizations: Global Perspectives on LGBT Workforce Diversity* (2016) 367.

⁷⁹ S Yang & A Li 'Legal protection against gender discrimination in the workplace in China' (2009) 17 *Gender & Development* 295.

discrimination when looking for employment. LGBTQIA+ employees are twice as prone to bullying and harassment compared to their heterosexual coworkers. Research based on gender and sexual orientation identity discrimination in organisations indicates that 20% of LGBTQIA+ employees feel they are subjected to discrimination. Despite the progress made by numerous countries in acknowledging LGBTQIA+ rights, negative opinions may still exist, both consciously and unconsciously, and may be subtly expressed to avoid societal disapproval. An example of this would be using offensive language, making rude or sexual jokes, asking personal and inappropriate questions, and not using the correct pronouns to refer to transgender colleagues. Organisations often condemn obvious acts of aggression and mistreatment towards minority groups like LGBTQIA+ people, but they often overlook more subtle actions that indirectly contribute to normalising discrimination.⁸⁰

⁸⁰ D Di Marco et al. 'Discrimination and Exclusion on Grounds of Sexual and Gender Identity: Are LGBT People's Voices Heard at the Workplace?' (2021) 24 *Span. J. Psychol.* e18.

Chapter Five

Conclusion and recommendations

5.1. Introduction

In the previous chapter, the researcher discussed the constitution and some acts available in South Africa and across other countries. Findings from this study suggest that the LGBTQIA+ community is faced with discrimination at their workplace. The South African constitution and laws serve as a good example of how countries must accommodate the LGBTQIA+ community. There are still many countries that are against the LGBTQIA+ community, and as such, they are still subjected to discrimination. The organised labour union offers a voice to the voiceless. In this chapter, the researcher will discuss what individuals can do to deal with workplace discrimination and what strategies organisations can employ to curb it.

Over the past 20 years, support for LGBT rights has grown, but there are still differences between countries. Workplace discrimination against LGBT people is common across the world. It is even worse in countries without legal protections for LGBT persons. However, many organisations have implemented policies to support LGBT employees in recent years. The workplace climate has a significant impact on the well-being of LGBTQIA+ employees, as it can either be hostile or supportive.

5.2. Strategies to accommodate the LGBTQIA+ community at the workplace

For the LGBTQIA+ community to be accepted in the community, the public must be taught so that they can understand them better. When the public is not in the know, they will continue to subject the LGTBQIA+ community to constant workplace discrimination as well as general discrimination and harassment. Some companies and universities have started to introduce unisex restrooms so that LGBTQIA+ communities can use them with ease, along with heterosexuals. There is still debate on unisex restrooms, with other people not preferring them or wanting to make use of male- only or female- only restrooms.

Managers are expected to create a conducive environment that is healthy and welcoming for everyday work. Employers must have policies and legislation that seek to prevent workplace discrimination of all kinds. There are major types of voice-related mechanisms at work that might be used by LBTQIA+ employees, which are: 1. Articulation of individual dissatisfaction (here the manager or employee creates an anonymous tip-off mechanism where victims can complain and an assessment of the laws and policies to see if they prevent workplace discrimination) 2. Expression of the collective organisation (ensure inclusion of the LGBTQIA+ employees in the organised labour to be able to raise concerns of the LGBTQIA+ employees as they say nothing about us without us) 3. Contribution to management decision-making (before decisions are made, the LGBTQIA+ must be involved and request comments before implementation) 4. Mutuality (allow external people to come and scrutinise the workplace and the laws and policies about workplace discrimination).

5.3 Measures to ensure the LGBTQIA+ community is free at the workplace

For the LGBTQIA+ community to be accepted in the community, the public must be taught so that they can understand them better. When the public is not in the know, they will continue to subject the LGTBQIA+ community to constant workplace discrimination as well as general discrimination and harassment. Some companies and universities have started to introduce unisex restrooms so that LGBTQIA+ communities can be able to use them with ease together with heterosexuals. There is still debate on unisex restrooms with other people not preferring it or wanting to make use of male- only or female- only restrooms.

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without us) 3. Contribution to management decision-making (before decisions are made, the LGBTQIA+ must be involved and request comments before implementation) 4. Mutuality (allow external people to come and scrutinise the workplace and the laws and policies about workplace discrimination).

5.4. Recommendations to deal with workplace discrimination

Both the employee and the employer have a role to play in dealing with workplace discrimination. If employees leave it unreported, the perpetrator will continue to discriminate against the employees.

5.4.1. Personal level

When an individual encounters discrimination at the workplace, the easy way out might be to resign and seek employment elsewhere. With the current economic condition and high unemployment rate of 31.2% in South Africa, one has to face discrimination head-on. It has been indicated that when one encounters discrimination, to deal with it, one must develop a positive outlook about the situation. When employees encounter discrimination because of their sexual orientation, they must first talk to their supervisor, and when no assistance has been provided, the employee must make use of the courts. There is the Commission for Conciliation, Mediation, and Arbitration (CCMA) that the employee can approach when discriminated against at the workplace. When CCMA fails, an employee can make use of the labour court. When the labour court fails to provide a solution, the employee can make use of the constitutional court.

5.4.2. Organisational level

Supportive policies for the LGBT community must be connected to the perceptions of support provided by the organisation, both directly and indirectly, through the diversity climate and perceptions of fairness in various aspects. The model suggests that employees are likely to feel more supported and fairly treated in companies with LGBT-supportive policies and practices, which can lead to reciprocal feelings. Numerous American companies have implemented policies against discrimination for their LGBT employees, even though the LGBT community is not legally protected from employment discrimination at a national level. Companies that prioritise diversity and

equality tend to consider the concerns of the LGBT community, even without legal requirements.

The organisation needs to establish a friendly environment in which the LGBTQIA+ community will feel welcomed. The organisation must adopt zero tolerance towards workplace discrimination. Incorporate the anti-discriminatory act and legislation into the organisation's rules and regulations. Companies must also conduct audits when employing and promoting employees to ensure that no one is overlooked due to their gender conformity or sexual orientation. The Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act require the employer to take reasonable steps to prevent discrimination at the workplace to prevent being liable for an omission, and as such, the employer must have policies and guidelines that prevent workplace discrimination. Training for the managers is recommended so that the managers need to be conscientious about the LGBTQIA community rights in the workplace. The outreach awareness campaign for LGBTQIA+ rights in the workplace is also recommended. Equal pay for equal work done should apply to the LGBTQIA+ community in the workplace. Name-calling and harassment should be treated with severe punishment amongst co-workers who inflict discrimination against the LGBTQIA+ community.

5.4.3. The Government

The governments of different countries need to first acknowledge that the LGBTQIA+ community exists within the community. Government laws that seek to punish citizens for falling under the LGBTQIA+ umbrella are counter revolutionary. The sensitisation programme that some government departments have introduced has been found to be helpful, as public servants no longer judge their clients because they are from the LGBTQIA+ community. The Western Cape Provincial Government for Social Development launched the sensitisation programme for the community in 2020 August through a victim empowerment programme. The program seeks to alert the community on how to interact with the LGBTQIA+ community and to avoid using derogatory words and discrimination towards the LGBTQIA+ community.

All countries need to adopt the United Nations Convention on Human Rights; this will ensure that the rights of LGBTQIA+ community members are protected. The

government must have laws that prohibit workplace discrimination based on sexual orientation. Where an employer was found to have discriminated against the employee unfairly, the employee must be paid the damages as a corrective action to punish the employer against unfair discrimination. Where an employee was overlooked for promotion or employment, the employee must be given the same position or a favourable position with the same benefits as a corrective measure and as part of redress.

5.5. Recommendations for future research

This study looked at the cases, acts, and study findings from past research. There is a need to interview the LGBTQIA+ community in their workplace environment in South Africa, as many studies were carried out abroad to understand how they cope and also how they perceive workplace discrimination based on sexual orientation. South Africa is one of the countries with laws that seek to prohibit workplace discrimination. It is also important to understand from the LGBTQIA+ community if the laws are having an effect on protecting them from workplace discrimination.

5.6. Conclusion

In this chapter, the researcher discussed some of the strategies that employees, employers, and the government can use to deal with workplace discrimination. The researcher also suggested the path that future researchers can take.

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