

SAME-SEX MARRIAGE RIGHTS

Controversial bill an assault on everyone's right to be allowed to live in accordance with their beliefs

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THE rights of same-sex couples are already fully recognised but, by stark contrast, if the president signs into law the Civil Union Amendment Bill, conscientious objection rights will be destroyed, the writer says.

THE concern expressed by Freedom of Religion South Africa (FOR SA) and others regarding the unconstitutionality of the Civil Union Amendment Bill has caused controversy.

The bill was recently passed by the National Council of Provinces and now needs only the signature of the president to become law.

Should he choose to do so, the president will remove the constitutionally protected right to freedom of conscience from state-employed marriage officers and ex officio marriage officers such as magistrates.

They will then be compelled to solemnise same-sex unions, and their rights to conscientiously object to having to participate in this process will be eliminated.

In a recent post on his blog, constitutional law Professor Pierre de Vos strongly condemned FOR SA's views, stating that ours is "not a principled objection based on the right to freedom of religion; it is an objection based on (our) failure to accord LGBTQ people equal dignity and respect" and that any such objection automatically amounts to homophobic prejudice and "unfair discrimination".

This viewpoint is neither factually accurate nor legally valid. It is important to note there are some fundamental principles of constitutional law Professor De Vos unfortunately failed to mention.

In particular, section 9 in the South African Constitution's "Bill of Rights" protects everyone from being unfairly discriminated against on a number of grounds. These include "sexual orientation" as well as "conscience", "religion" and "belief".

Importantly, the Constitutional Court has stated categorically in various cases that "there is no hierarchy of rights" in our Constitution.

In other words, no one right automatically trumps another; neither does the exercise of one right automatically equate to unfair discrimination against another right. It is also important to note that discrimination is allowed in law. It is "unfair discrimination" that is prohibited.

Turning to the constitutionally protected rights of freedom of religion, conscience and belief (which also includes thought and opinion), the Constitutional Court has recognised that these have a broad application because they are inextricably linked to a person's human dignity. Significantly, the specific tenet of marriage and a person's sincere belief in its religious significance is critically important because "marriage" is the sole focus of the Civil Union Amendment Bill.

It is trite law that a person must be able to prove that a view they hold is a central tenet of their faith in order to have their sincere religious convictions protected. FOR SA has always clearly stated that you cannot use freedom of religion to discriminate against anyone simply because you do not "like" them.

We agree with Professor De Vos's assertion that this would otherwise be mere bigotry.

However, when people can show that their motivation for objecting to being compelled to solemnise a "marriage" is contrary to their sincerely held religious convictions, it is not unfair discrimination but rather the legitimate exercising of their Constitutionally protected rights.

When different rights are seemingly in conflict, the Constitutional Court has applied the "reasonable accommodation" principle, which means that sometimes the state/employer has to take positive measures and possibly incur hardship/expense to allow all people to participate and enjoy their rights equally.

Importantly, the Civil Union Amendment Bill does not confer any additional rights to same-sex couples.

Their rights are already fully recognised, given expression to and protected in the Civil Union Act. By stark contrast, conscientious objection rights will be destroyed.

Far from representing a reasonable accommodation of competing rights (which would have been easily achievable through practical solutions), this bill sets a highly regrettable "winner takes all" outcome, where the celebration of diversity envisaged in the Constitution is in grave danger of being replaced with forced conformity.

In conclusion, no one should have to make the "extremely painful and burdensome choice" between obeying their faith (and potentially suffering eternal consequences if they do not) or obeying the law (and potentially losing their livelihood if they do not). It would, therefore, be unconscionable for the state to place its own employees before this choice.

The bill is an assault not only on state-employed marriage officers' rights, it is an assault on everyone's right to be allowed to live in accordance with their beliefs.

Hence its unconstitutionality is why the president cannot sign it into law. Instead, he should exercise his prerogative under section 79(1) of the Constitution and "refer it back to the National Assembly for reconsideration".