

Exploring the duty of South African higher education institutions to integrate gender minorities as part of an inclusive pedagogy in the university classroom: A legal and policy perspective

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1 Introduction

The transformation of the higher education system to reflect the changes that are taking place in our society and to strengthen the values and practices of our new democracy is, as I have stated on many previous occasions, not negotiable.

Prof SME Bengu, MP, Minister of Education, White Paper, August 1997

Institutions of Higher Learning (IHL) have the power to transform the lives of students. They are *supposed* to provide a conducive environment where students are empowered to reach their full potential. Historically marginalised groups particularly students of diverse sexual orientations, gender identities, expressions, and sex characteristics (SOGIESC) have become more visible, yet they continue to be inadequately acknowledged in institutional practice. This includes being excluded from Higher Education at the point of access, and by the structures and cultures that permeate within universities.¹ This exclusion extends to sexual and gender minorities as homophobia is a prevalent and topical problem in South

1 C Leathwood & B Read 'Gender and the changing face of higher education: A feminized future' (2009).

Africa, and IHL are not immune from such stereotypes.² Sithole's study based on an institution of higher learning suggests that students from the gay, lesbian, bisexual and transgender community (GLBT)³ grapple with issues such as labelling, sexual abuse, discrimination/marginalisation and unfairness in the allocation of resources such as accommodation, ablution facilities amongst others.⁴ Some of the main themes that emerged from Sithole's study include labelling or name calling, exclusion by religious institutions, experiences of sexual abuse, exclusion and discrimination by fellow students, marginalisation by academic instructors, and, unequal access in as far as allocation of resources are concerned.⁵ For example, the study found that 25 per cent of respondents had been raped, and 33 per cent had faced harassment, indicating a significant prevalence of sexual abuse and harassment among GLBT students. These findings underscore the systemic challenges and discrimination that GLBT students encounter within higher education institutions in South Africa. On this basis, these challenges create obstacles that sexual minorities face to obtain quality education. Omodan advances that there are growing concerns about issues relating to equity, quality and equality for those who study within the country's higher education system.⁶ In addition the lack of security on campus and the lack of adequate hostel accommodation also contribute to the challenges that students encounter.⁷ All these combine to create a volatile situation resulting in widespread protests taking place at universities throughout South Africa.⁸ The prevalence

2 K Luvo *Experiences of homophobia by the lesbians, gays, bisexual, transgender, queer, intersex and asexual students in selected institutions of higher learning in OR Tambo District Municipality, Eastern Cape Province* (2021) (Doctoral dissertation, Walter Sisulu University).

3 S Sithole 'Challenges faced by gay, lesbian, bisexual and transgender (GLBT) students at a South African University' (2015) *The Journal for Transdisciplinary Research in Southern Africa* 11(4) 193. Sithole in his 2015 study uses the Gay, Lesbian, Bisexual, Transgender (GLBT) however there has been a shift from using terms like GLBT (or LGBT) to SOGIESC reflecting a broader, more inclusive and rights-based approach to discussing sexual and gender diversity, particularly within international human rights discourse and policy development.

4 As above, 193.

5 As above.

6 BI Omodan 'Deradicalising student unrest in South Africa using decolonial approach' 171.

7 S Mbhele & EK Sibanyoni 'A case study of student hooligan behaviour during protest action at the University of KwaZulu-Natal' (2022) *Journal of Student Affairs in Africa* 125.

8 Omodan (n 6) 172.

of protests suggests that there are underlying issues contributing to the dissatisfaction by students and until there are significant strides to intentionally cater for diversity and inclusivity there will always be some form of unrest with a component of the student community until there is meaningful changes for those who are marginalised. Sexual minorities also known through the SOGIESC which is a continually evolving acronym that refers to lesbian, gay, bisexual, transgender, intersex, queer and/or questioning and asexual and/or ally. The plus sign represents diverse sex, gender and sexual identities that lie outside of LGBTIQ+.⁹ Sexual minorities are prone to experience discrimination, marginalisation and gender-based violence and femicide (GBVF). GBVF is defined as any form of violence usually sexual, based on gender.¹⁰ The definitions of GBVF used by different governments and organisations have expanded to include violence against the lesbian, gay, trans, queer, intersex, asexual (SOGIESC) community, and sometimes violence against men and violence against SOGIESC is unfortunately common at IHL.¹¹

Media reports continue to highlight how many institutions of higher learning (IHLs) fall short in creating physically and psychologically safe environments for SOGIESC students. These shortcomings contribute to unequal access to educational success and limit the full participation and progression of students whose identities and experiences remain insufficiently acknowledged within institutional cultures and support structures.¹² The White Paper 3,¹³ provides that all IHL ought to create systems that will establish a safe and secure climate that debilitates harassment or threatening conduct towards people or groups on any grounds.¹⁴ The hostility, discrimination, stigma and violence that

9 C Pedersen '70: LGBTIQ+ Identities' (2022) *The Encyclopedia of Rural Crime*. Bristol, UK: Bristol University Press. Retrieved Feb 19, 2025, from <https://doi.org/10.51952/9781529222036.ch074>.

10 KN Tlou, JT Mofokeng & DC Pfeiffer 'Illusive yet painful: Understanding gender-based violence and femicide at institutions of higher learning and possible interventions' (2022) 6 *International Journal* 62.

11 Tlou and others (n 10) 78.

12 Mail and Guardian 'LGBTIQ+ in Higher Education – What do We Know and What Have We Done about it?' <https://Mg.Co.Za/Article/2018-08-17-00-Lgbtiq-In-Higher-Education-What-Do-We-Know-And-What-Have-e-Done-About-It/> (accessed 12 December 2024).

13 In terms of section 3.42 of the White Paper 3: A Programme for the Transformation of Higher Education, the Ministry of Higher Education, Science and Innovation.

14 Education White Paper 3: A Programme for the Transformation of Higher Education, 1997.

SOGIESC students face show a gap between the rights as enshrined in the Constitution that call for equality and non-discrimination and the reality in which the SOGIESC community face.¹⁵ University leaders are under increased pressure to improve the quality of educational provision so that students may feel that they have received value for money in an increasingly competitive Higher Education marketplace.¹⁶

For example, this is evidenced in the language used in institutional policies, as well as the way infrastructure is arranged such as toilets, residences and other areas of impact evidence the lack of inclusivity of sexual minorities.¹⁷ IHL have a responsibility to create a safe and inclusive environment that supports SOGIESC students academically, physically, socially and emotionally,¹⁸ they are furthermore obligated to be inclusive towards SOGIESC students through their laws and rules on campus.¹⁹ Gender-based violence and femicide (GBVF) on university and college campuses constitute a serious public health and human rights concern. Recent studies indicate that approximately 20 per cent of women and 6 per cent of men report experiences of victimisation while attending institutions of higher learning (IHLs) in South Africa. However, these figures often exclude or underrepresent the experiences of non-binary and gender-diverse students, whose vulnerability to violence and discrimination remains insufficiently documented and addressed in institutional responses.²⁰

15 R Reading & LR Rubin 'Advocacy and Empowerment: Group therapy for LGBT asylum seekers' (2011) 17 *Traumatology* 86-98.

16 Stentiford, L. and Koutsouris, G., 2021. What are inclusive pedagogies in higher education? A systematic scoping review. *Studies in Higher Education*, 46(11), 2245.

17 University of South Africa 'LGBTI inclusivity in higher education', <https://www.unisa.ac.za/sites/corporate/default/colleges/human-sciences/news-&-events/articles/LGBTI-Inclusivity-In-Higher-Education> (accessed 1 December 2024).

18 H Cardinal 'Creating safe and inclusive schools for LGBTQ students' (2021) 13 *Journal of Graduate Studies In Education* 18.

19 L Radebe 'The duty for public higher education sector to integrate sexual orientation as a policy connect: A case of the North-West University's Potchefstroom Campus' Masters, NWU, (2022).

20 Tlou and others (n 10) 63.

2 The Legal duty for Institution of Higher Learning (IHL) to integrate inclusive pedagogy

2.1 The Constitution of the Republic of South Africa, 1996

Inclusive pedagogy is regarded as an institutional approach which is grounded on wider concerns about facilitating social justice and bringing about equity, in an educational sphere.²¹ To foster this inclusive approach, IHL must adopt clear, enforceable policies that protect SOGIESC students and employees from discrimination and harassment. These policies will help foster a campus culture of acceptance, where sexual orientation and gender identity are respected in both personal and professional contexts. The duty to provide an inclusive non-discriminatory environment may be read into the equality clause of the Constitution which provides that ‘that everyone is equal before the law and has the right to equal protection and benefit of the law’.²² Section 9(2) defines equality as the *full and equal enjoyment of all rights and freedoms*. To promote the achievement of equality, legislative measures may be taken to ‘protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.’ Sections 9 (3) and 9 (4) provide that no person or the State may directly or indirectly unfairly discriminate against anyone on one or more grounds. These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The South African constitutional dispensation, ushered in protections against racism, gender and sexual orientation. The Constitution was the first in Africa to provide protection against discrimination based on sexual orientation and to legalise same sex marriages.²³ Extending this duty entrenched in the Constitution, the policies of IHL must be underpinned by the values that recognise the rights of all people

21 L Stentiford & G Koutsouris ‘What are inclusive pedagogies in higher education? A systematic scoping review’ (2021) *Studies in Higher Education* 2246.

22 Section 9(1) of the Constitution.

23 *Minister of Home Affairs and Another v Fourier and Another* 2006 (1) SA 524 (CC).

regardless of sexual identities.²⁴ This includes the obligation to respect, protect and ensure the recognition of the human rights of all students within the IHL. Therefore, IHL ought to be transformed to meet the nation's changing needs, redress past inequalities and respond to new realities and opportunities of life.²⁵ This includes acknowledging the variability of human beings and the right to be different. Everyone is equal before the law and has a right to equal protection.²⁶

Section 9 (3) imposes a positive duty on the State to enact national legislation that prevents or prohibits unfair discrimination.²⁷ Equality does not imply homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference.²⁸ Everyone has inherent dignity and the right to have their dignity respected and protected.²⁹ This section 9 (3) is important to SOGIESC students as it affirms their right to live with dignity, free from discrimination and prejudice. The recognition of dignity is crucial in fostering safe space for all students, allowing them to fully express themselves without fear of stigma or violence.

The mere recognition and lack of proper policy implementation in relation to different identities, groups, and individuals is a form of inequality. Section 11 of the Constitution guarantees that everyone has the right to life, which underscores the importance of protecting sexual minorities from violence and hate crimes. IHL have a responsibility to ensure that SOGIESC students are safe from threats to their lives and well-being. Furthermore everyone has the right to freedom of conscience, religion, thought, belief and opinion.³⁰ The right to freedom of religion cannot be used as a justification for discriminating against individuals on the basis of their sexual orientation.³¹ This means that a sexual orientation policy cannot interfere in the intensely private religious sphere, while the

24 WJ van Vollenhoven & CJ EIS 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' (2013) 46 *De Jure* 263-284.

25 Education White Paper 3: A Programme for the Transformation of Higher Education, 1997.

26 Section 9(1) of the Constitution.

27 Section 9(4) of the Constitution.

28 *Minister of Home Affairs and Another v Fourier and Another* 2006 (1) SA 524 (CC) Para 60.

29 Section 10 of the Constitution.

30 Section 15(1) of the Constitution.

31 University of Cape Town, Inclusivity Policy for Sexual Orientation Document, 2017.

religious beliefs of some cannot be used as a justification for continuing to discriminate against sexual minorities, hence they ought to be a balance between the two.

In terms of section 16 of the Constitution, everyone has the right to freedom of expression, this includes the freedom to receive information. SOGIESC students or learners right to freedom of expression are violated if IHL pedagogy is couched in a way that denies their existence and refuses to include supportive life orientation content.³² Section 29 of the Constitution provides that everyone has a right to basic education, education must be available and accessible for all students without discrimination. IHL must make provision for an inclusive curriculum that does not discriminate but reflects the diversity of student identities and experiences. IHL should encourage critical thinking on gender and sexuality through pedagogical approaches that challenge heteronormative assumptions in academic content. As a result, IHL must develop and implement policies that promote inclusivity and diversity, create safe spaces for sexual minority students. Academic staff should adhere to university policies that protect against discrimination based on sex, sexual orientation and gender identity and gender expression.

2.2 The Higher Education Act (HEA)

The HEA was introduced with the aim to ensure that IHL provide quality education that meets national and international standards.³³ The HEA provides for restructuring and transformation of programs³⁴ It recognises the need to redress past discrimination and ensure representativity and equal access to all persons. This is crucial for rebuilding a fragmented education system that had been characterised by inequality and substandard educational offerings during Apartheid.³⁵ It aims to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.³⁶ The preamble of the HEA provides for respect of religion, belief and opinion and for pursuance of excellence, promotion of the full realisation of the potential of every

32 Van Vollenhoven (n 24).

33 The Higher Education Act 101 of 1997.

34 Preamble of the Higher Education Act.

35 As above.

36 As above.

student and employee, tolerance of ideas and appreciation of diversity. The championing of inclusive pedagogies as an instructional approach may be grounded in facilitating social justice and bringing about equity in the educational sphere.³⁷ Challenging societal norms related to gender and sexuality may help create a more inclusive environment and a more just, tolerant, and democratic society.³⁸ IHL should provide experiences that include all students to ensure that they are safe and have spaces that allow them to be themselves without being judged or discriminated against.³⁹

2.3 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

PEPUDA is built on a corrective and restorative justice model that aims to ensure that everyone in South Africa is able to enjoy their human rights and freedom fully. The preamble places a duty on the state to advance human rights for historically disadvantaged individuals, communities and social groups who may have been deprived of their human dignity and who continue to endure such consequences.⁴⁰ The preamble of the PEPUDA acknowledges South Africa's obligation to consider international instruments in relation to the field of human rights.⁴¹ Section 9 of the Constitution of the Republic of South Africa, 1996, guarantees the right to equality and freedom from unfair discrimination as Section 9(3) provides that, 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

PEPUDA was enacted to give effect to the section 9(4) of the Constitution and aims to promote equality and to prohibit, prevent and

37 L Stentiford & G Kotsouris 'What are inclusive pedagogies in higher education? A systematic scoping review' (2020) *Studies in Higher Education* 2245-2261.

38 CA Huertus Abril & FJ Palacios Hidalgo 'LGBTIQ+ education for making teaching inclusive? Voices of teaching from all around the world' (2023) *Environment and Social Psychology* 1-2.

39 J Butheledzi 'Inclusion experiences of transgender students in institutions of higher education' PhD Thesis, University of Johannesburg, (2022) 1.

40 Preamble of PEPUDA.

41 As above.

ultimately eliminate unfair discrimination, harassment and hate speech.⁴² PEPUDA provides that neither the state nor any person may unfairly discriminate against any person.⁴³ It also prohibits hate speech and harassment based on any of the prohibited grounds of discrimination.⁴⁴ PEPUDA defines unfair discrimination broadly, and includes listed grounds such as sexual orientation, gender identity and expression, disability, race and ethnicity and socio-economic status.⁴⁵ In order to establish whether the discrimination experienced by a person or group of people is justified or unfair, PEPUDA provides for a whole range of factors to be taken into account. Section 14 of PEPUDA states that the nature of discrimination needs to be determined within the context in which it is situated. PEPUDA provides that for discrimination to be considered fair, the differentiation must be reasonable and justifiable in lieu of objectively determinable criteria. PEPUDA provides a mechanism for the protection and attainment of the rights enshrined in Section 9 of the Constitution. Section 16 of PEPUDA establishes the Equality Courts of South Africa. Equality Courts are meant to hear and make judgments in cases of unfair discrimination, harassment and hate speech based on among others - sexual orientation, gender and sex. Courts assess unfairness based on factors such as the impact of the discrimination, the position of the complainant in society, and the purpose of the discrimination. For example, the case of *Harken v Lane NO and Others* 1998 (1) SA 300 (CC), offers the test for unfair discrimination used in interpreting equality rights. The Constitutional Court in *Harksen v Lane* established a three-stage test to determine whether a law or policy amounts to unfair discrimination under Section 9 (Equality Clause) of the Constitution. This test is widely used in assessing both direct and indirect discrimination and the following questions are asked: Does the provision differentiate between people or groups? If so, is there a rational connection to a legitimate purpose? If the differentiation amounts to discrimination, is it unfair? To this extent, when applying this to Higher Education, this test obliges institutions of higher learning to critically examine whether institutional policies or practices (including curricula,

42 Preamble of PEPUDA.

43 Section 6 of PEPUDA.

44 Section 10 of PEPUDA.

45 Section 8 and 9 of PEPUDA.

admissions, and classroom conduct) differentiate unfairly against gender-diverse or non-binary students even if unintentionally. In this case, the Court emphasised the importance of historical and social context in determining unfairness. If a policy impacts a vulnerable or historically marginalised group, it is more likely to be deemed unfair especially where there is a recognised systemic disadvantage and vulnerability. In relation to application to gender minorities, where gender-diverse students (including transgender, non-binary, and gender-nonconforming persons) often face structural marginalisation in higher educational spaces. Their historical exclusion strengthens the constitutional duty of higher education to integrate their experiences meaningfully into curricula and student life.

2.4 The Protection from Harassment Act 17 of 2011

The Protection from Harassment Act seeks to protect victims of harassment.⁴⁶ It provides for the issuing of protection orders against harassment and to afford victims of harassment with an effective remedy against such behaviour.⁴⁷ The Protection from Harassment Act aims to ensure that the rights in the Constitution such as the right to equality, privacy, dignity, freedom and security of the person are not infringed.⁴⁸

2.5 Domestic Violence Act 116 of 1998 (DVA)

The DVA recognises that victims of domestic violence are among the most vulnerable members of society.⁴⁹ It further recognises that domestic violence can occur in various forms and within different types of relationships, thereby extending its protective measures to all individuals regardless of their sexual orientation or gender identity.⁵⁰ It acknowledges that domestic violence is not limited to heterosexual relationships but can occur in same-sex partnerships as well.⁵¹ The DVA makes provision for protection orders.⁵² Any individual who experiences

⁴⁶ Preamble of the Protection from Harassment Act.

⁴⁷ The remedy in terms of Protection orders.

⁴⁸ Preamble of the Protection from Harassment Act.

⁴⁹ Preamble of the Domestic Violence Act.

⁵⁰ As above.

⁵¹ Section 1 of DVA.

⁵² Section 4(1) (a) of DVA.

domestic violence can apply for a protection order against their abuser. This includes SOGIESC individuals who may be subjected to violence by intimate partners or family members. The process is designed to be accessible and does not require legal representation.⁵³ This makes it easier for victims from marginalised communities to seek assistance.

3 The international legal framework

International law has played a significant role in the development, protection, and promotion of human rights. The Constitution of South Africa strives to ensure that South African law is in accordance with international law, therefore it encourages a friendly approach to foreign as well as international law. The Constitution provides that a court, tribunal, or forum must consider international law when interpreting the Bill of Rights.⁵⁴ Therefore, the Constitution underlines the importance of international law when interpreting any provision in the Bill of Rights. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament.⁵⁵

International law instruments only become legally binding on South Africa, once they have been ratified or acceded to, that is, once they have been approved by resolution in both the National Assembly and National Council of Provinces in terms of section 232(2) of the Constitution. Section 232(2) strengthens this interpretive framework by requiring that 'every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' This provision reinforces the principle of harmonisation with international law and provides a constitutional gateway for incorporating human rights standards into statutory interpretation. South Africa is a signatory to key international and regional human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on Human and Peoples' Rights (ACHPR). These instruments not only provide substantive

53 Section 4(2) of DVA.

54 Section 39(1)(b) of the Constitution.

55 Section 232 of the Constitution.

rights but also establish enforcement mechanisms, such as treaty-monitoring bodies and periodic state reporting systems, which South Africa is expected to comply with. Engagement with such mechanisms strengthens accountability and supports a more robust interpretation of rights under the Constitution. In this context, South African courts are constitutionally obliged to adopt an internationalist approach to human rights interpretation one that respects the country's international legal obligations and leverages international jurisprudence to advance dignity, equality, and freedom domestically.

Human rights are inherent in everyone by virtue of being a human being and they cannot be taken away.⁵⁶ Inclusion of gender minorities in higher education involves drawing on the foundational principles of dignity, equality, and non-discrimination, and applying them to educational contexts where gender-diverse students often face systemic exclusion. The Universal Declaration of Human Rights outlines the rights and freedoms of every human being. It guarantees that all human beings are born free and equal in dignity and rights.⁵⁷ It also provides that everyone is equal regardless of race, colour, sex, language, religion, politics, or where they were born.⁵⁸ Human rights are for everyone and without exception, this includes the SOGIESC community. States must also proactively tackle barriers to the enjoyment of human rights, including violence and discriminatory attitudes and practices.⁵⁹ Under the Sustainable Development Goal for Quality Education,⁶⁰ states commit to ensure inclusive and equitable quality education and promote lifelong learning opportunities.⁶¹ These instruments contribute to the recognition and protection of rights of gender minorities in South Africa and globally. States have a positive duty to proactively dismantle barriers that impede the full enjoyment of human rights, particularly those rooted in violence, prejudice, and discriminatory practices. This

56 R Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 1-32.

57 Article 1 of the UDHR.

58 Article 2 of the UDHR.

59 Office of The High Commissioner For Human Rights 'Born free and equal' https://www.ohchr.org/sites/default/files/documents/publications/born_free_and_equal_web.pdf (Accessed 9 December 2024).

60 SDG Goal 4.

61 United Nation 'Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all' <https://unstats.un.org/sdgs/report/2017/goal-04/> (accessed 29 December 2024).

obligation extends to addressing systemic inequalities that affect gender minorities, including individuals with diverse sexual orientations, gender identities, expressions, and sex characteristics (SOGIESC). In line with this, Sustainable Development Goal 4 (SDG 4) commits states to ensuring inclusive and equitable quality education and to promoting lifelong learning opportunities for all. This includes an explicit focus on marginalised and vulnerable populations who have historically been excluded from mainstream educational systems

International human rights instruments such as the Universal Declaration of Human Rights (UDHR), CEDAW, ICCPR, and the ICESCR contribute significantly to the recognition, protection, and promotion of the rights of gender minorities. These instruments not only affirm the principles of equality, dignity, and non-discrimination, but also call on states to take affirmative and corrective measures to ensure that educational institutions are safe, inclusive, and affirming for all students, regardless of their gender identity or expression.

In the South African context, these international obligations are reinforced by constitutional values and the legislative framework, placing a clear duty on the state and by extension, higher education institutions to create learning environments where gender-diverse students can thrive academically and socially, free from stigma, violence, or exclusion.

4 Link between the inclusive pedagogy, teacher and students

There is a link between what is being taught and how it is received by students. The pedagogy plays a crucial role in shaping students understanding and attitudes.⁶² An inclusive pedagogy is one that incorporates diverse perspectives and assists in creating a respectful and accepting environment.⁶³ To this extent an inclusive pedagogy ensures that educational contentment reflects and validates the experiences of all students, contributing to a more inclusive atmosphere. Methods of teaching are connected to culture and as such cultural values are prone to influence how the teachers deliver the content and how students receive

62 SR Omolara & RA Oanite 'Teachers' attitudes: A great influence on teaching and learning of social studies' (2015) 42 *JL Pol'y & Globalization* 131.

63 H Cardinal 'Creating safe and inclusive schools for LGTBQ students' (2021) 13 *Journal of Graduate Studies In Education* 18.

the content delivered.⁶⁴ An example of how culture can contribute negatively, would be where a teacher perceives a student who identifies as a sexual minority, as demonically possessed, sinners, mentally disturbed or a weak person.⁶⁵

Bhana relates instances where gender minorities are mocked in lecture halls where derogatory or homophobic remarks are made and in this instance, the behaviour may consciously or unknowingly propagate discrimination.⁶⁶ To illustrate the impact of such derogatory and homophobic utterances, an example from a high school is used in this instance where a grade 6 learner,⁶⁷ committed suicide after a teacher allegedly told him that he should leave his 'gay tendencies at home'. In as much as this example used is that of a 12-year-old and not a university student, it shows how derogative comments can impact negatively on a person and how teachers may contribute to the discrimination by failing to accept sexual minorities. It further highlights the fact that training on inclusivity and diversity is required so that teachers know how to deal with students who identify differently to promote a more inclusive environment. Teachers should be custodians of human right protections and promote anti-bullying practices. They should advocate for the implementation of policies that promote the protection of sexual minorities including any other minorities represented in a campus. Teachers regardless of the level or subject they teach need to be properly trained to bring SOGIESC related issues into the classroom. Doing so they will also be promoting an inclusive environment and educating the democratic citizens of tomorrow.

64 M Base 'Exploring heterosexual students attitudes towards students who identify as gay and lesbian at the Howard College Campus' Master's Thesis, University of Kwazulu-Natal (2022) 30.

65 DA Francis 'Homophobia and sexuality diversity in South African schools' (2017) 14 *Journal of LGBT Youth* 12.

66 D Bhana 'Understanding and addressing homophobia in schools: A view from teachers' (2012) 32 (3) *South African Journal of Education* 309.

67 News24 'Deputy Principal accused of homophobic bullying implicated in 12-year-old pupil's suicide' <https://www.news24.com/news24/southafrica/news/deputy-principal-accused-of-homophobic-bullying-implicated-in-12-year-old-pupils-suicide-20231116> (accessed 01 December 2024)

5 Possible causes of hate crimes against SOGIESC community

5.1 Religious communities

In South Africa are often violent towards the SOGIESC community. They misrecognise SOGIESC people based on their sexual orientation, gender identity and gender expression.⁶⁸ When religious leaders preach against SOGIESC identities, they legitimise discriminatory attitudes among their followers, potentially leading to acts of violence or harassment against gender minorities. By promoting teachings that misrepresent SOGIESC identities as sinful or unnatural, they perpetuate ignorance and fear among communities. Furthermore, when educational materials fail to present accurate information about sexual orientation and gender identity, they reinforce harmful stereotypes that contribute to a culture of hate. Religious Institutions use the story of Sodom and Gomorrah in Genesis 19 as an example of divine condemnation of homosexuality. It reinforces negative stereotypes, and this can lead to internalised shame and guilt among SOGIESC people who may feel alienated from their faith communities.

African traditional religions, while there is a clear understanding of what homosexuality and bisexuality are, there is still a negative outlook on homosexual relationships in African societies as they hold strong beliefs that same-sex relationships have never existed in the past, it is believed that they are an import from the West, and are a disgrace to the African culture.⁶⁹ Van Klinken and Chitando contend that there exists a belief amongst Africans that homosexuality is caused by evil forces and witchcraft, all because some societies refuse to accept homosexuality as normal.⁷⁰

68 Safer Spaces 'Religious organisations should help combat violence against the LGBTQIA+ community' <https://www.saferpaces.org.za/blog/entry/religious-organisations-should-help-combat-violence-against-the-lgbtqia-com> (accessed 29 December 2024).

69 KRM Mynadi 'The influence of ancestral spirits on sexual identity amongst traditional healers (iZangoma) in South Africa: A discourse analysis' (2020) *Sabinet African Journal*.

70 A Van Klinken & E Chitando 'Public religion and the politics of homosexuality in Africa' (2016) *Public Religion* 3.

5.2 Health Institutions

Such as clinics, hospitals have prevalent practices that discriminate and this may result in SOGIESC people receiving poor health care services and this forces them to seek other alternative care.⁷¹ Many healthcare practitioners receive limited training on SOGIESC health issues and the specific needs of this community. Without proper education on how to interact with and treat SOGIESC patients sensitively, health care practitioners may unintentionally perpetuate stigma or engage in discriminatory behaviour.

5.3 Criminal justice system

The process of reporting hate crimes in South Africa presents challenges to people experiencing them, and there is often hesitation in reaching out to law enforcement officers when reporting crimes.⁷² People who experience hate crimes may also experience self-blaming attitudes, where they may start to believe that they are the cause of their negative experiences, which results in them being embarrassed to speak to other people. The fear of retaliation from those who perpetrate hate crimes is also a constant fear of people reporting hate crime.⁷³ One of the primary failures is the overburdened court system, which struggles to effectively process cases involving hate crimes. There is often a lack of support services tailored specifically for SOGIESC victims within law enforcement agencies. For instance, many police departments do not have dedicated resources or personnel trained in dealing with SOGIESC issues, which can leave victims feeling unsupported when they seek help after experiencing a hate crime. Despite these drawbacks, there are some advances that have been made as illustrated through the following cases:

Qwelane v South African Human Rights Commission and Another,⁷⁴ provides an example where a South African journalist

71 AD Guidal, D Celikkaya, S Bozdog & T Gunvar 'Healthcare services experiences of LGBTI individuals: A qualitative research' (2019) 10 *Journal of Turkish Family Physician*.

72 DN Dayal 'The paradox of constitutional protection and prejudice experienced by LGBTQ+ people in South Africa' (2022) *Gender Violence, the Law, and Society* 111.

73 Dayal (n 72).

74 *Qwelane v South African Human Rights Commission and another* 2021 (6) SA 579.

published a homophobic article titled ‘Call me names but gay is NOT okay.’⁷⁵ The facts are that Qwelane, a journalist, compared gay and lesbian people to animals and postulated that they were responsible for the rapid degeneration of values in society.⁷⁶ Following the publication of the article, the South African Human Rights Commission (SAHRC) received complaints about the article.⁷⁷ The SAHRC instituted proceedings in the Equality Court in terms of the PEPUDA, arguing that the newspaper article constituted hate speech in terms of section 10(1). The offending statements were declared to be harmful, and to incite harm and propagate hatred and amount to hate speech as envisaged in section 10(1).

In the High Court, Qwelane argued that section 10(1) read with sections 1, 11, and 12 of PEPUDA were too broad in that they unjustifiably limited the right to freedom of expression. He further argued that section 10(1) was vague. The High Court dismissed the vagueness challenge. It reasoned that section 10(1) of the Equality Act was not overbroad because it could be read in conformity with section 16(2) (c) of the Constitution, and passed the limitations test pursuant to section 36 of the Constitution. Hence, the High Court found that the SAHRC had succeeded in proving that the article was hurtful and harmful and had the potential to incite harm and promote hatred against the SOGIESC community. As a result, it held that the newspaper article constituted hate speech as provided by section 10(1) of PEPUDA and ordered Qwelane to tender a written apology to members of the SOGIESC community.⁷⁸

Dissatisfied with the High Court’s decision, Qwelane appealed to the SCA.⁷⁹ The SCA upheld the finding and held that the impugned section was inconsistent with the provisions of section 16 of the Constitution and was therefore invalid. Aggrieved with the outcome, Qwelane approached the CC, which held that Qwelane’s, article constituted hate speech, as it had clearly been harmful and incited hatred. The CC reasoned that Qwelane was advocating hatred, as the article plainly constitutes detestation and vilification of homosexuals on the grounds

75 *Qwelane* (n 74) para 3.

76 *Qwelane* (n 74) para 4.

77 *Qwelane* (n 74) para 6.

78 *Qwelane* (n 74) para 19.

79 [2020] 2 All SA 530 (SCA).

of sexual orientation.⁸⁰ The CC's decision emphasises that while freedom of expression is a fundamental right protected under section 16 of the Constitution, it is not absolute. The court affirmed that hate speech can be subject to limitations if it poses a threat to the dignity and rights of individuals or groups, particularly marginalized communities such as the SOGIESC community. This case depicts that there is a need for clear definitions especially in legislation concerning minority groups such as SOGIESC groups. The CC found that the term 'hurtful' within section 10(1) of PEPUDA was vague, leading to its unconstitutionality. This case emphasizes that laws must be formulated with clarity to avoid arbitrary enforcement and ensure that individuals understand what constitutes hate speech.

6 Conclusion and recommendation

This chapter aimed to explore the duty of IHL to integrate sexual orientation as part of an inclusive pedagogy and institutional policies. It highlighted that there is a legal duty on IHL to take positive steps towards the creation of an environment that fosters inclusivity and creates safe spaces for SOGIESC students on campus. This chapter recognised that the Constitution and other international instruments celebrate diversity and protect all people from discrimination. However, it has been argued in this chapter that there is a gap between the values and principles entrenched in the Constitution and the lived experiences of SOGIESC communities.

To give meaningful effect to their constitutional and international obligations, South African higher education institutions must adopt targeted legal and policy reforms that centre the dignity and inclusion of students with diverse SOGIESC identities. First, institutional anti-discrimination policies must be revised to explicitly include sexual orientation, gender identity, gender expression, and sex characteristics as protected grounds, in alignment with Section 9 of the Constitution, PEPUDA, and relevant provisions of the ICCPR, ICESCR, and CEDAW. Second, universities should develop and implement SOGIESC

80 The CC declared that section 10(1) of PEPUDA is inconsistent with sections 1(c) and 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word 'hurtful' in the prohibition against hate speech.

inclusion framework that guides academic departments, student services, residences, and campus security in preventing discrimination, ensuring equal access to resources, and responding effectively to reports of harassment and violence.

In terms of curriculum transformation, faculties should be encouraged to review course content to identify gaps and opportunities for integrating perspectives that reflect gender and sexual diversity, particularly in fields like education, law, social sciences, and health. This includes the adoption of inclusive pedagogy that affirms SOGIESC students and promotes critical engagement with power, identity, and human rights. Additionally, universities should establish dedicated support structures, such as gender and sexuality resource centres, counselling services trained in SOGIESC student needs, and platforms for student-led advocacy and peer support.

Finally, the development of staff training programs grounded in constitutional values and international human rights principles should be prioritised to equip academic and administrative staff with the knowledge, language, and tools needed to support SOGIESC-inclusive teaching and learning. These reforms are essential not only for compliance, but for affirming higher education's role in promoting equality, dignity, and social transformation in post-apartheid South Africa and the broader African region.