

1-1-2014

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Recommended Citation

Shaun de Freitas, *Religious Associational Rights and Sexual Conduct in South Africa: Towards the Furtherance of the Accommodation of a Diversity of Beliefs*, 2013 BYU L. Rev. 421 (2014).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2013/iss3/3>

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Religious Associational Rights and Sexual Conduct in South Africa: Towards the Furtherance of the Accommodation of a Diversity of Beliefs

*Shaun de Freitas**

I. INTRODUCTION

Michel Rosenfeld speaks of a radical post-modern attack on the Enlightenment tenet, namely the clear separation between the realm of reason and that of faith. The post-modern challenge builds on the “disenchantment of reason” associated with the perception that reason as the means to the implantation of a universally justified rational order gives way to purely instrumental reason (the use of reason for purposes of advancing the narrow interests of the powerful).¹ With the rise of religion and also the disenchantment of reason, religion finds more room to project its truth as absolute and exclusive.² This gives way to the realization that, just as there are different beliefs, there are also different forms of reason coupled to these different beliefs. Human rights protection includes the necessity to agree upon certain fundamentals. This, however, should not negate circumstances that allow for a more sensitive and accommodative approach regarding a diversity of supportive arguments pertaining to moral matters. In this regard, how we understand concepts such as “equality,”³ “human dignity”⁴ and

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1. Michel Rosenfeld, *Introduction: Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religious Revival?*, 30 CARDOZO L. REV. 2333, 2335 (2009).

2. *Id.* at 2336.

3. *See, e.g.*, STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 29–30 (2010); ROGER TRIGG, *EQUALITY, FREEDOM, AND RELIGION* 152 (2012).

4. *See, e.g.*, SMITH, *supra* note 3, at 177–82.

“freedom”⁵ may differ from believer to believer and from one group of believers sharing the same core beliefs to another group of believers sharing the same core beliefs. For example, there are those of the view that equality necessitates that religious associations may not deny membership to persons practicing same-sex sexual conduct, even where such conduct is in violation of the core tenets of such associations. However, such an understanding of equality does not enjoy universal support (or universal persuasion). Society is composed of many sub-communities of various institutional kinds, and the liberty of these many sub-communities to exist and to operate according to the kinds of communities they are should be protected.⁶

Johan van der Vyver recently commented that there is much stress placed on the self-determination of religious associations regarding their internal functioning. Van der Vyver adds that: “Religious perceptions and practices that have lost touch with the times can best be remedied through deliberation and persuasion; legal coercion in matters of faith is bound to be counterproductive.”⁷ Van der Vyver made this statement in the context of current approaches in German jurisprudence where the labor courts are only required to take account of the effect of the dismissal of an employee on his or her personal and family life and to ask whether the consequences of the employee’s conduct with regard to the spiritual calling of the church was of such a nature as to justify the negative effects his or her dismissal would have on his or her personal and family life or religious freedom.⁸ The reference here to “deliberation and persuasion” as trumping “legal coercion” poses challenges towards qualifying the parameters of appointments by, and membership to, religious associations. Will persuasion always be possible? Should persuasion always be required? Are there not

5. *Id.* at 27–28; *see also* TRIGG, *supra* note 3, at 139.

6. STEVEN M. TIPTON, PUBLIC PULPITS: METHODISTS AND MAINLINE CHURCHES IN THE MORAL ARGUMENT OF PUBLIC LIFE 435–36 (2007).

7. Johan D. van der Vyver, *State Interference in the Internal Affairs of Religious Institutions*, 26 EMORY INT’L L. REV. 1, 9 (2012).

8. *Id.* at 9. This is, according to van der Vyver, due to the influences from approaches taken by the European Court of Human Rights relating to the dismissal of church employees for sexual conduct considered by the respective churches to be violations of those churches’ core doctrines. *Id.* at 1–2.

different forms of persuasion that oppose one another on moral matters? Who should be persuaded?

According to Nicholas Rescher, the empirical basis of our factual knowledge is bound to cultivate different forms of “alternative cognitive positions through the variation of experience,” which in turn leads to rational inquiries of different results.⁹ It is therefore normal that people with different experiences should judge differently with respect to issues that are not in themselves very simple,¹⁰ and for this reason, dissensus and pluralism overrides the quest for consensus.¹¹ These alternative cognitive positions which include rational inquiries of different results are also represented by religious associations. With reference to Canadian and South African jurisprudence, it has been commented that the legal claims for accommodation that are not viewed as challenging the lexical superiority of “constitutional religion” itself, stand a fair chance of success. However, this is in contrast to the substantial reluctance of the judiciary (and the legislature) to accept as authoritative any potentially competing legal order that originates in sacred sources of authority.¹² Stephen Carter comments that the liberal image of the religiously devout citizen seems to be one of an individual whose

9. NICHOLAS RESCHER, *PLURALISM: AGAINST THE DEMAND FOR CONSENSUS* 76–77 (1993). Rescher adds that as long as people think themselves to have good reason for making different assessments, consensus (however attractive) is not realistic—“This normality of dissensus of values, ideals, aims, and aspirations prevails among people, engenders a pluralism in cognitive, practical, doctrinal, and even political regards, which in turn inheres in the human condition.” *Id.* at 132.

10. *Id.* at 77.

11. *Id.* at 125–26. This quest for consensus is also found in the strand of liberalist thinking that views toleration as an instrument of rational consensus (where the diversity of ways of life is endured in the faith that it is destined to disappear). In this regard, John Gray states

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism’s future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.

JOHN GRAY, *TWO FACES OF LIBERALISM* 105 (2000).

12. Ran Hirschl & Ayelet Shachar, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 *CARDOZO L. REV.* 2535, 2536 (2009).

moral knowledge proceeds from a privileged insight that others do not or cannot share.¹³ The same applies to points of view by religious associations on moral matters.

This therefore directly impacts the rights of religious associations in the context of the rationale by such associations to prohibit employment or membership of persons who practice sexual conduct that is in opposition to the tenets of such associations. This in turn has implications for the flourishing of diversity in pluralist and democratic societies. South African scholarship poses questions as to whether same-sex sexual conduct should be accommodated (whether by means of membership or appointments) within religious associations where the core belief (or beliefs) of such associations prohibit same-sex sexual conduct by its members or appointees. This forms part of the challenges confronting many religious associations due to a more diversified polity, which increases the risk of flattening out the confessional and theological integrity of particular churches into what Steven Tipton refers to as the “moral Esperanto of legal procedures [and] ‘rights talk.’”¹⁴

Bearing the above in mind, this Article addresses the importance of religious associational rights, also with special reference to the South African jurisprudential context. This is due to a recent development in the South African judiciary where the services of an appointee to a religious association were terminated by the association due to the appointee participating in same-sex sexual conduct, such conduct being in violation of the core doctrine of the religious association. After having looked at the various South African scholarly approaches in this regard, this article emphasizes

13. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 941–42 (1989). Carter also states that

Many people who are religiously devout derive at least large parts of their world view from an epistemology that is very different from the materialist epistemology on which empirical morality depends. So the problem of thinking of scientism as a neutral mediating force is that the effort to turn moral questions into empirical ones actually devalues some modes of thinking—particularly the religious mode . . . The current liberal message to people whose moral judgments have religious roots is that they are not welcome in public dialogue until they start speaking the same language as everyone else.

Stephen L. Carter, *Lecture One: The Uses of Empiricism and the Uses of Fanaticism*, 69 OR. L. REV. 471, 492–93 (1990).

14. TIPTON, *supra* note 6, at 44, 284.

the importance of allowing for a substantial level of autonomy pertaining to religious associational rights. Following on this, critical perspectives on the relationship between the arguments presented by religious associations in qualification of their activities (which includes the parameters allowed for membership and appointments) and the persuasive force of such arguments in the context of rational requirements and expectations are presented. The assumed superiority of a point of view that arises from a non-religious point of departure over a point of view that is based on a religious point of departure is questioned. Accepting the view that a proper degree of autonomy should be awarded to the religious association to function as it deems fit is of much assistance towards the accommodation of the reasons for such functioning. At the same time, bringing to light the rationality of a religious association's reason for acting in the way it does provides us with a renewed sense of the autonomy to be granted to a religious association in its functioning. These insights are of importance to the improvement of diversity in pluralist and democratic societies.

II. RELIGIOUS ASSOCIATIONAL RIGHTS AND THE SOUTH AFRICAN CONTEXT

A. Associational Rights as Foundational

Associational rights (with special focus on religious associations, which are important constituents of civil society¹⁵) overlap with interests and concerns supportive of the accommodation of diversity within society.¹⁶ More sensitivity towards religious associational

15. Justice Sachs, of the South African Constitutional Court, acknowledges the importance of religious associations as part of civil society:

[R]eligion provides . . . a framework for . . . social stability and growth. . . . Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of societal activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. . . . Religious organisations constitute important sectors of national life.

Minister of Home Affairs v. Fourie, [2005] ZACC 19, ¶¶ 89–90 (CCT) (S. Afr.).

16. Maurizio Viroli speaks of a culture of citizenship that is cultivated not by means of

rights leads to a more nuanced insight of the different forms of rationality in society, each of these forms providing a unique interpretation of certain foundational concepts. Not to do so will result in a large sector of civil society having to compromise and in the process having its freedom and identity weakened. This is important, bearing in mind that religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values.¹⁷ Religion is not only individual and private; in many instances religion exists in communities, and individuals are members of wider religious communities.¹⁸ Civil society represents a plethora of morally-driven interests and exchanges based on specific beliefs, and it includes different forms of persuasion (to selected individuals and groups of individuals sharing the same core beliefs) in justification of certain

universal political principles applied to specific cultures, not by dispersing particular cultures throughout a common universal political frame, not by strengthening the cultural homogeneity of different groups, but by encouraging many civic traditions within different groups. MAURIZIO VIROLI, *REPUBLICANISM* 102 (Anthony Shugaar, trans., Hill & Wang 2002) (1999). *See also* WILLIAM JOHNSON EVERETT, *GOD'S FEDERAL REPUBLIC: RECONSTRUCTING OUR GOVERNING SYMBOL* 19 (1988); TIPTON, *supra* note 6, at 430–31; William Galston, *Religion and the Limits of Liberal Democracy*, in *RECOGNIZING RELIGION IN A SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY* 41, 49 (Douglas Farrow ed., 2004); Terrance Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 FLA. L. REV. 523, 535 (1989); Danie F.M. Strauss, *Public Justice: Delimiting the Task of Government in the Thought of Dooyeweerd and Chaplin*, 44 J. FOR CHRISTIAN SCHOLARSHIP 157, 176 (2008).

17. John O. Cole, *Symposium: The Secularization of the Law*, 31 MERCER L. REV. 401, 403 (1980). Max Stackhouse comments that faith inevitably articulates a “‘metaphysical-moral vision’ about what is ‘really real.’ If taken at all seriously, it serves as a guide to meaningful living. It shapes, over time, the ethos, that subtle web of values, meanings, purposes, expectations, obligations, and legitimations that constitutes the publicly operating norms of a civilization.” Max Stackhouse, *An Ecumenist’s Plea for a Public Theology*, 8 THIS WORLD, Spring/Summer 1984, at 49. This in turn is of relevance for the protection of human dignity. Human dignity as including psychological significance, is violated when there are attacks on personal beliefs and ways of life, as well as attacks on groups and communities with which individuals are affiliated. Respect for the intrinsic worth of a person requires a recognition that the person is entitled to have his or her beliefs, attitudes, ideas and feelings. Coercive measures (including psychological) to change personal beliefs is, according to Oscar Schachter, as striking an affront to the dignity of the person as physical abuse or mental torture. Oscar Schachter, *Editorial Comment: Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 850 (1983). *See also* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008); Robert P. George, *Religious Liberty and the Human Good*, 5 INT’L J. REL. FREEDOM 35, 39 (2012).

18. TRIGG, *supra* note 3, at 47.

actions taken by the constituent parts of civil society. The protection of the autonomy of the entities comprising civil society results in sensitivity to the rationale used by such entities in qualifying certain modes of conduct.¹⁹ In fact, the converse is also true. This is especially true for religious associations, where the qualification of prohibitions on appointments by, and membership to, religious associations of persons practicing same-sex sexual conduct, where such practices are contrary to the core doctrine of such associations, are concerned. Appreciating the merits of religious reasoning results in sensitivity to the autonomy of the religious association that presents such reasoning. The value of this understanding for the flourishing of interests (individual and associational) within civil society is substantial, and the law has its role to play in this regard in that it derives its authority from the premise that “it strives to anticipate and give expression to what people believe to be their collective destiny or ultimate meaning within a moral universe.”²⁰ The ideal for a flourishing of diversity²¹ includes the recognition of specific religious modes of understanding, which in turn nourishes identity, self-realization and expression.

When appointments by, and membership to, religious associations are not carried out in accordance with the wishes of a

19. A sensitivity to different modes of rationality (including religious modes) providing added sensitivity towards the accommodation of the autonomy of religious associations will be further elaborated upon in the second part of this Article. An in-depth analysis regarding theories related to the qualification of the inherent or foundational importance of associational rights (for example ideas emanating from the communitarian school of thinking or ideas related to sphere sovereignty or the inherent importance of the idea of subsidiarity) does not form part of the purpose of this Article. Current scholarship on associational rights is in dire need of a reconsideration of such schools of thought, where associational rights are viewed as an ultimate subject of moral value, just as liberalism supports the view that the individual is the ultimate subject of moral value. See, e.g., DWIGHT NEWMAN, *COMMUNITY AND COLLECTIVE RIGHTS: A THEORETICAL FRAMEWORK FOR RIGHTS HELD BY GROUPS* (2011). It suffices for purposes of this article (as stated earlier) to accept that associational rights, especially those related to religious associations, are of fundamental importance (and are widely supported).

20. RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 256 (1984).

21. Needless to say, calls for the flourishing of society beg the question as to why diversity should be valued, especially where it counters claims made by historically disadvantaged groups. See Stu Woolman, *On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta*, 25 S. AFR. J. ON HUM. RTS. 280, 286 (2009). This article is based on the assumption that diversity is important and deems a further analysis in this regard to be irrelevant to its purposes.

collectivity of persons believing in the same core views on reality, existence, and purpose, then we find some or other negative effect countering the eternal pursuit of an ideal attainment of diversity. Collectivities understood as the bearers of meaning²² have their meaning disrupted in instances where membership or appointments are enforced from the outside, along lines of reasoning that are not always in line with those of the religious association.

Against the background of the South African context, Lourens du Plessis comments that the South African Constitution “leaves ample room for the protection of the right to religious freedom as a group right.”²³ There were important judgments of the Constitutional Court of South Africa regarding the right to religious freedom that gave a libertarian and individualist meaning to such a right, although this need not imply a negation of any institutional issues related to such a right.²⁴ Ran Hirschl and Ayelet Shachar observe that South Africa is one of the most accommodating jurisdictions in the world regarding cultural diversity. However, “[w]hereas the South African Constitutional Court has been more sympathetic to the claims of difference than most of its counterparts worldwide, even such a generous accommodation regime reaches its limits of toleration

22. Woolman, *supra* note 21, at 296.

23. Lourens M. du Plessis, *Grondwetlike beskerming vir godsdiensregte as groepsregte in Suid-Afrika*, 43 NGTT 214, 214, 228 (2002). See also Stuart Woolman, *Freedom of Association*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 62 (Woolman ed., since 2002). Referring to the South African Constitutional Court’s case of *Prince v. President, Cape Law Society 2002 (2) SA 794 (CC)*, Woolman comments that the minority judgment recognizes how associations are constitutive of the beliefs and practices of individuals and how the fact of their being constitutive entitles them to constitutional protection. *Id.* at 63.

24. Du Plessis, *supra* note 23, at 228 (note that this article was published in 2002). Since 2002, the next landmark case on religious rights and freedoms was *MEC for Education v. Pillay*, [2007] ZACC 21 (CCT) (S. Afr.). In this case, nothing substantial was stated regarding the importance of associational rights, and Chief Justice Langa continued in the emphasis of the individualist sense of religious rights. See, e.g., Pillay, [2007] ZACC at ¶ 143. However, Chief Justice Langa also states that:

By including religion in section 31, the Constitution makes plain that when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group. . . . In the case of an associative practice, an individual is drawing meaning and identity from the shared or common practices of a group. The basis for these practices may be a shared religion, a shared language or a shared history. Associative practices, which might well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character.

Id. at ¶ 145.

when it encounters a challenge to its overarching reign over law's empire."²⁵ South Africa's human rights jurisprudence has a substantial individualist approach that includes an emphasis on religion as an "individual" (and private) thing.²⁶ Referring to the Constitutional Court of South Africa, Stu Woolman comments that in fifteen years, the Court has never decided a case solely, or even largely, in terms of freedom of association—"[a]nd that says quite a lot about where, in our hierarchy of rights, freedom of association is located."²⁷

As stated earlier, an emphasis on, and prioritization of, religious associational rights allows for more sensitivity towards the accommodation of diverse forms of rationalization and persuasion, each of which is based on a specific underlying belief. Claims in support of associational rights are inextricably connected to claims of persuasive reasoning held by the religious, and as reflected in the core tenets of a religious association. Claims for the flourishing of diversity include support for the accommodation of different forms of reasoning so as to qualify certain modes of functioning by, among others, religious associations.²⁸ But how important are associational rights really?

Associational rights, understood as foundational to the functioning of a pluralist and democratic society, have, for example, enjoyed much support in terms of the principle of subsidiarity,²⁹

25. Hirschl & Shachar, *supra* note 12, at 2541–42.

26. This is similar to, for example, the position in Canada. According to the Ontario Conference of Catholic Bishops, most judgments have failed to give a proper recognition to the group dimension of religious liberty in Canada. Also according to the said conference, a proper contextual reading and understanding of the purpose and nature of the values of the Canadian Charter should have led to an interpretation that accords with maximal involvement of religious projects both in the public sphere and as a group activity. IT Benson (Lawyer for the Intervener), Factum for the Intervener, Ontario Conference of Catholic Bishops, (Jan. 23, 2009), Ontario Human Rights Commission and Connie Heintz (Respondents) and Christian Horizons (Appellant) and Ontario Conference of Catholic Bishops (Intervener); Ontario Superior Court of Justice (Divisional Court), Court File No. 221/08, paragraph 45, page 21. The same is also the case in the American jurisprudential milieu. *See, e.g.*, Garnett, *supra* note 17, at 286, 291.

27. Woolman, *supra* note 21, at 296. Ever since these comments by Woolman were made, the position remains unchanged. For some critical remarks on the Canadian judiciary pertaining to an emphasis on individual rights (to the exclusion of group rights) in religious matters, see TRIGG, *supra* note 3, at 49. This has implications for the South Africa Constitutional Court's approach to such matters, as Canadian jurisprudence enjoys authority in that court.

28. Rationality and its connection to religious associations are dealt with later on.

29. This is the view that the smaller should not be dominated by the larger (the larger

which is the assistance of the state towards having other entities in a society achieve their legitimate purposes.³⁰ This emphasis on the importance of associational rights is further enhanced by views pertaining to the law in a pluralist society, as well as by insights related to the nature of the private versus the public and how the individual's human dignity relates to this. Margaret Davies, for example, is of the view that pluralism includes the understanding that the hierarchy of the law should be flattened—the law should be viewed as a complex horizontal as well as vertical structure.³¹ Also, says Davies, the spatial diversity of law is to be found in an irreducibly plural multicultural landscape, in non-essential social groupings, and in the formation of identities in relation to such multiple normative environments.³² It is true that in popular and legal-professional circles, law is generally defined as a body of norms promulgated and enforced by the state. However, according to social scientists, both public and private domains also produce their own

exists so as to further the proper functioning of the smaller) which is translated into constitutional theory as an understanding that the state is posited as the entity that is to help the smaller or lesser entities (for example, the entities of civil society).

30. See Stephen V. Monsma, *The Relevance of Solidarity and Subsidiarity to Reformed Social and Political Thought 4* (Paper Prepared for the International Society for the Study of Reformed Communities, July 9–12, 2006), available at <http://www.calvin.edu/henry/ISSRC/Conferences/Papers/monsma06.pdf>. Regarding the importance of sphere sovereignty (which is a concept similar in meaning to that of subsidiarity), see *id.* at 4–6.

31. Margaret J. Davies, *Pluralism in Law and Religion*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 72, 72, 94 (Peter Cane et al. eds., 2008).

32. D. Cooper cited in Davies, *supra* note 31, at 94. Referring to Robert Cover's *Nomos and Narrative*, Davies refers to the associations of

normative meaning inhabited by religious sectarian communities . . . each constructs its own *nomos* . . . The state is one element of such a *nomos*, but not necessarily the most significant . . . State law is interpreted through religious norms: thus, a plurality of possible meanings arises from law's intersection with various normative worlds and subject-positions. It is the task of legal officials, in particular judges, to contain this plurality.

Id. at 94. See also *id.* at 96–97. Referring to the Canadian position, Benjamin Berger states that law

is *not* a cultural understanding of religion. It does not seek to understand religion as an interpretive horizon, composed of sets of symbols and categories of thought, out of which meaning can be given to identity, history, and experience. Instead, it moulds religion to the shape of its own set of normative and symbolic commitments.

Benjamin L. Berger, *Law's Religion: Rendering Culture*, 45 *OSGOODE HALL L.J.* 277, 310–11 (2007).

distinctive norms—bodies of law, which the state may acknowledge and enforce, or alternatively, refuse to recognize or even tolerate.

In its post-modern formulation, this theory of “legal pluralism” holds that law need not originate with or be enforced by the state; that law is imminent in all social and economic relations; and that state law ought to be respectful of non-state normative systems, which express the “otherness” of those who inhabit the plethora of private and public domains that exist in any society or polity.³³ This understanding of the plurality of the law also has relevance to our understanding of pluralism as something that is to be “structural” or “shared.” Iain Benson states that:

Pluralism can connote a kind of relativistic approach, as in “because we are a pluralistic society, such and such a moral position cannot have any public validity.” It does not have to mean this, however, and . . . our linkage of a language of pluralism with a firm commitment to group rights, for example, points us to a principled, and what might be called structural or shared pluralism, rather than one that is relativistic or, perhaps, totalistic.³⁴

When dealing with religious associations, for example, as part of civil society, it is important to note that religion viewed as that which should be relegated to the private sphere also has implications for how we understand religious associational rights. Iain Benson comments that if we are looking to discuss the relationship between religion and other aspects of society, we must be careful to avoid setting up false dichotomies. Religion discussed “in relation to the state or within society” is a far cry, says Benson, from the frequently used “religion and the state.” Benson explains that when we use the “state” to mean the order of government and the law, and “society” to mean citizens at large, including both religious and non-religious citizens, we must remember that religion, in some sense, is within both, since religious and non-religious citizens make up both the state and society.³⁵ It is in this regard that caution is required

33. Harry Arthurs, *The Re-Constitution of the Public Domain*, in *THE MARKET OR THE PUBLIC DOMAIN? GLOBAL GOVERNANCE AND THE ASYMMETRY OF POWER* 85, 86–110 (Daniel Drache ed., 2001).

34. IAIN T. BENSON, *LIVING TOGETHER WITH DISAGREEMENT: PLURALISM, THE SECULAR, AND THE FAIR TREATMENT OF BELIEFS IN CANADA TODAY* 3 (2010) [hereinafter *LIVING TOGETHER WITH DISAGREEMENT*].

35. Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and*

regarding a too general and frequent usage of “public” versus “private” when it comes to religious rights. In many instances, the “private-religious” extends itself into the “public-belief” domain, becoming a participant and representative of a specific belief in the various areas of reality, which may include other participants and representatives of other beliefs. If religion is understood as being outside of the public sphere, then it is likely that it will be given a different emphasis. On the other hand, if beliefs (including those that are religious) are understood as being part of the public sphere (due to their inextricable connection to the individual in his or her activities in a private or public context), then the relevance of religion takes on a whole new dimension.³⁶ This implies therefore that religious associations also are to be viewed as part and parcel of the public sphere, which in turn implies an acceptable level of freedom for the manifestation of religion in the public sphere. Richard Garnett comments that the importance of religious associational rights finds confirmation in the individual’s freedom to freely express and manifest his or her religion—“from the free-exercise or conscience rights of individual persons.”³⁷

Opportunities, 21 EMORY INT’L L. REV. 111, 155 (2007).

36. Benson states: “In fact, all citizens are ‘in’ the public sphere and to characterize religion as ‘outside’ the public perpetuates the error of anti-religious secularism—an ideology that, from its inception intended to minimize the public space and involvement of religious beliefs and religious projects.” Factum for the Intervener, Ontario Conference of Catholic Bishops, 23 January 2009, *Ontario Human Rights Commission and Connie Heintz (Respondents) and Christian Horizons (Appellant) and Ontario Conference of Catholic Bishops (Intervener)*; Ontario Superior Court of Justice (Divisional Court), Court File No. 221/08, paragraph 40, page 18. See also LIVING TOGETHER WITH DISAGREEMENT, *supra* note 34, at 9; Iain T. Benson, *Taking Pluralism and Liberalism Seriously: The Need to Re-Understand Faith, Beliefs, Religion, and Diversity in the Public Sphere*, 23 J. STUDY REL. 17, 22–25 (2010).

37. Garnett, *supra* note 17, at 293, 295. See also Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 116, 118–19, 158 (1989). Richard Moon states that religious belief lies at the core of the individual’s world view. Richard Moon, *Freedom of Religion under the Charter of Rights: The Limits of State Neutrality*, 45 U.B.C. L. REV. 497, 507 (2012). This belief orients the individual in the world and provides a moral framework for his or her actions. *Id.* Moreover, religious belief ties the individual to a community of believers and is often the essential or defining association in her or his life. *Id.* In the words of Moon,

If religion is an aspect of the individual’s identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual’s views and values, it is denying her or his equal worth.

Associational rights therefore remain important, especially in the context of the furtherance of diversity in societies where the improvement of pluralism and democracy remain high on the agenda. The importance of associational rights is also furthered in the understanding (as referred to above) that the spatial diversity of law is to be found in an irreducibly plural multicultural and multi-faith environment, in non-essential social groupings, and in the formation of identities in relation to such multiple normative environments. Added to this is an understanding of the private versus the public domains as more integrated with one another, also in the context of the protection of the individual's human dignity, which includes the experience and manifestation of religious belief (both within and outside of the private domain).

The following sections reference recent developments in South African jurisprudence regarding religious associational rights, more specifically pertaining to appointments by, and membership to, a religious association in relation to matters of the personal sexual conduct of such appointees or members. From this arises the proposal that religious associational rights pertaining to membership to, and appointments by, a religious association in the context of same-sex sexual conduct, be given sufficient autonomy. This also has implications for other forms of sexual conduct in the context of membership and appointments to religious associations. Not only is this argued for based on the importance of associational rights per se (and as referred to earlier), but also in the context of understanding religious reasons as substantially competitive with non-religious reasons regarding the matter of membership to, and appointments by, religious associations in the context of specific forms of sexual conduct as substantial criteria for a determination of whether such membership or appointments should be allowed by the respective religious associations.

B. Religious Associational Rights and Sexual Conduct

In *Johan Daniel Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*³⁸ (referred to as *Strydom*) the applicant, Mr. Strydom,

Id.

38. [2008] ZAEQC 1 (EqC) (S. Afr.).

was appointed as an independent contractor (organ teacher) by the respondent; namely, the “Nederduitse Gereformeerde Kerk” (Dutch Reformed Church) to teach music to students at the arts academy of the congregation. The church terminated Mr. Strydom’s services when it was discovered that he was involved in a same-sex relationship.³⁹ Mr. Strydom instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) against the church, as he was not an employee and he could therefore not proceed in terms of the Labour Relations Act (1995) or the Employment Equity Act (1998). The Equality Court found that the church had discriminated unfairly against Mr. Strydom and ordered the church to apologize to him, pay him R75000,00 for emotional suffering, pay him the balance of his contract for 2005 amounting to R11970,00, and pay his legal fees. The church relied on section 15 of the Constitution of the Republic of South Africa, 1996 (the right to freedom of religion⁴⁰) to justify the “discrimination.” The respondents argued that the complainant was “a spiritual leader and as such cannot by way of his example of living in a homosexual relationship deliver his services as lecturer in music at the church’s [art academy]. In other words, as a role model the complainant was to follow an exemplary Christian lifestyle.”⁴¹

According to Justice Basson, there was no convincing evidence presented by the church that the complainant was in a position of “spiritual leadership.”⁴² The Court also found that the complainant was not even a member of the church, was not an employee of the church (he was merely a contract worker) and therefore the complainant, according to the Court, “was . . . removed or distanced from the church, and did not even participate in its activities.”⁴³ Also, the Court was of the view that: “The right to

39. Here it is important to note that the respondent omitted, when appointing the applicant, to make it clear that same-sex sexual conduct is in opposition to the tenets of the said church. This was emphasized in *Strydom*. However, this does not form the crux of this investigation, rather, the question is as to how far a religious institution may go regarding appointments and membership, and in this regard, *Strydom* allows for furtherance of the debate.

40. CONST. OF THE REP. OF S. AFR. OF 1996, ch. 2, § 15, available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> (“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”).

41. *Strydom*, [2008] ZAEQC at ¶ 16.

42. *Id.* at ¶ 17.

43. *Id.* at ¶ 20. Justice Basson added that: “There is also not a shred of evidence that the

equality of the complainant must . . . be balanced against the freedom of religion of the church”⁴⁴ and that

The question remains whether the right to religious freedom outweighs the Constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation? The Constitutional right to equality is foundational to the open and democratic society envisaged by the Constitution. As a general principle therefore, the Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation.⁴⁵

South African scholarship resulting from the *Strydom* case is comprised basically of three main streams of thought. Firstly, there is the view that a church should accommodate those who practice same-sex sexual conduct due to an understanding of equality as uniformly supportive in this regard. According to this view, no matter what the nature of the functions to be exercised by an appointment, a church should appoint a person who practices same-sex sexual conduct.⁴⁶ In this regard it is argued that, for example, it seems clearly justifiable for a Christian community to refuse to employ a Jewish or Muslim minister, or any person who does not profess the faith of that community, and this, says David Bilchitz, is

complainant wanted to influence the students or any other church member. In fact, he wanted to keep his homosexual relationship to himself as he regarded it as a private matter.” *Id.* at ¶ 22. *See also id.* at ¶ 17. This led Justice Basson to come to the conclusion that “it would not have been devastating to the church to keep the complainant on in his teaching position.” *Id.* at ¶ 23. From this it can be deduced that according to Justice Basson, where a religious association appoints someone who is not “distanced” from the relevant religious community or church (and which consequently has the power to exert some sort of influence on the members of the religious institution), then such a church should have the freedom to exclude such a person from membership or services to the church.

44. *Id.* at ¶ 8.

45. *Id.* at ¶ 14. Although being sensitive to the church’s authority to determine whom to appoint when it comes to religious duties or functions related to spiritual leadership, Justice Basson here implies that the prohibition of unfair discrimination due to sexual orientation (as inferred from the “equality” clause in the Constitution) should be elevated to a more superior norm than that of the right of a religious association to have absolute freedom to appoint whom it wishes. The credibility of this type of reasoning when compared to the reasoning of a religious association in the context of its religious ethos is critically addressed in the second part of this article.

46. In this regard, Bilchitz’s argument is not confined only to being supportive towards appointments by religious associations of those who practice same-sex sexual conduct but also to membership of religious associations.

based on the idea of “religious leadership.” However, according to Bilchitz, “[t]his is a different matter altogether from refusing to employ a . . . gay individual as a minister where such individual belongs to such a community, professes its beliefs and identifies with that community.”⁴⁷ Bilchitz also strongly relies on “biological inherency” as reason for being orientated towards participating in same-sex sexual conduct and that it is therefore not based solely on choice.⁴⁸ Bilchitz uses biological inherency in furthering the claim that religious associations may not prohibit membership or appointments even where such conduct is in opposition to the core tenets of such an association.

Secondly, there is the view that religious institutions should not be forced to appoint persons practicing same-sex sexual conduct, where such persons are expected to perform a “core function” within such an institution. When a church wants to appoint someone who practices same-sex sexual conduct, and such an appointment is not aligned with a core function in the church (such as a secretary for example), then such a person needs to be accommodated.⁴⁹ In this regard, Patrick Lenta refers to “economic opportunity” as a reason for allowing persons to be appointed by religious associations when such appointments entail functions that are not linked to the core tenets or to spiritual leadership of the religious association.⁵⁰

Thirdly, there is the view that a religious association represents a unique and important ethos (especially and foremost to its members), and that membership to such an ethos requires one to adhere to the core tenets of such an institution irrespective of the functions to be performed by a member or an appointee. Here it is argued that the way we think of our bodies and the purposes for which our bodies are to be used (including sexual activities) are

47. David Bilchitz, *Should Religious Associations Be Allowed to Discriminate?*, 27 S. AFR. J. HUM. RTS. 219, 246 (2011). According to Bilchitz, a law that prevents a religious group from discriminating on grounds of sexual-orientation should be defended. *Id.* at 240.

48. *See, e.g., id.* at 231.

49. *See* Patrick Lenta, *Taking Diversity Seriously: Religious Associations and Work-Related Discrimination*, 126 S. AFR. L.J. 827–60 (2009). Interesting is that Lenta here also argues that, contrary to Justice Basson’s view in the *Strydom* judgment, even teaching music is related to spiritual influence in the church and can therefore be understood as constituting a religious function or function of spiritual leadership in the church.

50. *See id.* at 859.

inextricably connected to morally-based predilections.⁵¹ It is also as a result of the central meaning that marriage has for many,⁵² that sexual activity is such a central issue and core doctrine to many believers, religious believers and religious associations.⁵³ A society seeking the protection and furtherance of “identity” and “diversity” needs to accommodate morally-based predilections regarding sexual activity in the private sphere, which includes the religious association. In this regard, an argument is also made for an approach to appointments by religious associations, based on “religious ethos” which does not necessarily exclude those functions that on the face of it seem to be “distanced from religion” or “excluded from the domain of spiritual influence or leadership.” How we perceive of “distance” and “spiritual leadership” is in itself a matter of religious interpretation sacred to the relevant collective belief. In other words, the status of functions in a religious association that may, on the face of it, appear to be distanced from spiritual leadership and core doctrine, might in fact not be so on closer inspection. For example, Alvin Esau explains that:

[U]nder the organic view of employment the employee is expected to participate in the mission of the organization as a whole, and is expected to join the whole community, the whole body, in a way that transcends any narrowly defined job description. . . . [t]he workplace itself constitutes a community of believers where relationships are as important, if not more so, than narrowly defined role tasks. . . . When you focus instrumentally on a role you might well conclude that the religious organization should not be allowed to discriminate on religious grounds when hiring kitchen staff as opposed to professors. However, when you shift

51. See Shaun A. de Freitas, *Freedom of Association as a Foundational Right: Religious Associations and Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, 28 S. AFR. J. HUM. RTS. 258 (2012).

52. Marriage “also includes organic bodily union. This is because the body is a real part of the person, not just his costume, vehicle, or property. Human beings are not properly understood as nonbodily persons—minds, ghosts, consciousnesses—that inhabit and use nonpersonal bodies. . . . Because persons are body-mind composites, a bodily union extends the relationship of two friends along an entirely new dimension of their being as persons.” Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J. L. & PUB. POL’Y 245, 253 (2011).

53. See also TRIGG, *supra* note 3, at 96.

your perspective to the organic view, . . . *relationships* rather than roles are to a degree the point of the enterprise.⁵⁴

This emphasizes “membership” of a religious institution as an important factor, irrespective of the task expected of such a person—the person (employee or independent contractor) is invited into a relationship and into membership with the group,⁵⁵ and on obtaining membership, the person becomes inextricably related to the religious ethos of the relevant group which has a core relational understanding encompassing it. This understanding of “membership” (in the context of the organic model) is also of persuasive force to the members of such a congregation, and makes perfect sense to each such member.⁵⁶

The *Strydom* judgment brings to the fore debate related to the status of associational rights in South Africa, and in turn serves as a catalyst for a consideration of the status of religious associational rights in the context of appointments by, and membership to, religious associations, where specific forms of sexual conduct are in opposition to the core tenets of the religious association. In addition to credible pillars of support for associational rights, such as sphere sovereignty and the principle of subsidiarity, are valuable insights pertaining to the status of the law, the nature of pluralism and the relationship between the public and the private (as discussed above) that also enhance the importance of religious associational rights in the context of a substantial level of autonomy to be awarded to the activities of a religious association.

An additional component in this regard is a critical analysis of the points of rationality used in debates related to the parameters of religious associational rights. For example, as mentioned above, David Bilchitz views the prohibition of discrimination based on sexual orientation as an encompassing norm that should be enforced on all religious associations in South Africa, irrespective of their core tenets. Patrick Lenta, on the other hand, aims at providing some sort

54. Alvin J. Esau, “*Islands of Exclusivity*”: *Religious Organizations and Employment Discrimination*, 33 U.B.C. L. REV. 719, 734 (2000) (emphasis added).

55. *Id.* at 735. There can be many other examples—for example, the organic nature of a religious association reflected in the core doctrine and mission of such an association requiring the proclaiming of the Gospel to the world in all of the actions by all of its members.

56. Regarding further support of religious associations as “organic entities,” see Garnett, *supra* note 17, at 292.

of balance between the rights of the religious association and those of the individual, where “economic opportunity”⁵⁷ serves as an important factor in trying to accommodate those persons who do not ascribe to the core tenets of the religious association from which they are seeking employment. An argument was also made for a higher degree of autonomy for a religious association in instances where the religious ethos of a specific religious institution requires it. From these three points of view, questions related to the persuasive force of each arise and therefore require further analysis. In the next section it will also be argued that the views of David Bilchitz and of Patrick Lenta (as representative of South African scholarship on the matter) reflect an assumed universality of rational persuasion which are in fact, not of universal persuasion. This in turn calls for a more accommodative approach to be taken towards the reasons given by a religious association for the way in which it functions.

III. RELIGIOUS ASSOCIATIONS AND THE DIFFERENT FORMS OF REASON

A. The Marginalization of Religious Language

There is currently, in what is referred to as “post-secular” society, a growing realization that religion deserves its rightful place in public debate without having to sacrifice its own “language.” This is of relevance to the freedom that religious associations should have in qualifying their ways of functioning. Consequently, this improves the persuasive force of the religious language emanating from a religious association. Certain sectors in liberalism are coming to realize the subjectivity of discussions and reasoning clothed in so-called “neutral” (non-religious) language. The norms essential to the sub-communities of interests within civil society are derived from foundational beliefs (whether religious or non-religious), which in turn represent what is rational to an individual believer or a group of believers.⁵⁸ Liberalism’s privatization of religion, together with the strict separation between the private and the public, go hand-in-hand

57. See Lenta, *supra* note 49, at 859.

58. Roger Trigg criticizes Ronald Dworkin’s distinction between “faith” and “reason” in the sense that, according to Dworkin, faith (and therefore religion as well) cannot be rational. TRIGG, *supra* note 3, at 34, 142, 145.

with an understanding of reason as solely restricted to the public or to common consensus. This negates the credibility of forms of explanation emanating from groups of individuals sharing the same core religious beliefs and interests.

Liberalist thinking in support of the strict separation between the private (also being the domain of religion) and the public (as excluding anything religious) ignores the fact that every individual and all groups of individuals sharing a foundational common interest are bearers and doers of some or other faith. It is not only religious people who have faith. In the words of Iain Benson, “[T]o make assumptions is to have faith of some sort.”⁵⁹ The public sphere can therefore not escape practices of faith loyalties whether religious or non-religious (or secular). What also requires mentioning here is that science cannot tell us either why something exists or what the ultimate purpose of something is. The question of ultimate causes (or ends) is the jurisdiction of religion (and philosophy).⁶⁰ Faith permeates all of reality, whether in education, scientific experimentations or in the observations of astronomers. Faith is exercised not only by the religious but also by the non-religious. Reason does not manufacture moral criteria *ex nihilo*—it needs something to work with.⁶¹ In other words, reason is ultimately based on some or other pre-suppositional or pre-rational point of belief that lies in the transcendental realm of things. This has implications for how we understand reason and the viability thereof.

59. Iain T. Benson, *The Jurisdiction of Science: What the Evolution/Creation Debate is Not About*, 3 J. FOR CHRISTIAN SCHOLARSHIP 1, 3 (2007).

60. *Id.* at 21.

61. SMITH, *supra* note 3, at 153. Steven D. Smith goes on to show that concepts (such as “harm,” “equality,” “freedom,” and “human dignity” for example) are in many instances used by theorists to vindicate a certain point of view regarding a moral matter, where it is impossible for such conceptual view to escape subjectivity. *Id.* at 95. Smith explains for example that: “Liberals and others use the harm principle to argue for their favored positions on questions of individual freedom, often in the context of specific controversies over obscenity, regulation of sexual conduct, abortion, or similar issues. But, reversing directions, they also use their favored positions on issues of individual liberty to argue for understanding ‘harm’ in particular ways—and for excluding from the category of ‘harm’ injuries that are in fact harmful in any ordinary sense not skewed to reach (or avoid) particular favored (or disfavored) conclusions.” *Id.* at 95. Applying this to the argument in this article, a concept such as “equality” is used by some scholars as a point of rationality in qualifying the accommodation by religious associations of certain forms of sexual conduct even where the practice of such sexual conduct is in opposition to the core tenets of such an association. This is dealt with in more detail below.

If faith permeates all of society (including the public) and if “fact” has a faith dimension to it and also permeates all of society, then reason is open to variation, depending on the specific religious and faith basis relevant to a given situation. Also, reasoning from a religious point of departure forms part of the dissemination of religious belief.⁶² This not only applies to the individual believer but also to a group of believers sharing the same core beliefs and interests.

Accompanying the importance of the protection of associational rights is sensitivity towards the diversity of credible arguments on certain moral matters. This is especially the case where such moral matters form part of the core doctrine of a religious association. Questions related to the prohibition of appointments by, or membership to, religious associations of persons practicing same-sex sexual conduct concern one such moral matter. The protection and flourishing of civil society not only has to do with the protection and flourishing of specific interests shared and practiced by a group of believers, but also implies the accommodation of different forms of rationality in qualifying specific practices that are unique to a specific association. Liberalism’s staunch support of the public/private divide serves as a metaphor for the dividing line between reason and preference, where the public is understood as being governed by reason.⁶³ Also, liberalism’s understanding of the individual as being “the elementary unit of explanation” has difficulty assimilating the religious other than in its individual dimensions.⁶⁴ Added to this, religion falls on the private side of law’s conceptual divide, and once so accepted, religion is viewed as being bound to preference and not to reason. Consequently, religion is viewed as a matter of preference (or choice), and as such, an expression of the autonomous

62. *See, e.g.,* Lund v. Boissoin, 2012 ABCA 300, at ¶ 64 (Can.) (“A moral statement arising out of religious conviction may, in some cases, be seen as the dissemination of religious belief.”).

63. PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 120–23 (2005). The public is also understood as the secular domain, which is viewed as a non-religious domain. In this regard, secular grounds need not be more reliable than religious ones especially when dealing with moral issues which are connoted to cultural grounds. Secular grounds can be corrupted as well. BRYAN T. MCGRAW, FAITH IN POLITICS: RELIGION AND LIBERAL DEMOCRACY 101 (2010). Secular reasons can also come into conflict with one another. *Id.* at 102.

64. Berger, *supra* note 32, at 284–85.

individual.⁶⁵ This has implications for how we understand the parameters of the religious association's expressions of conviction and reason and whether a sense of reason should be excluded from the religious group.

Jürgen Habermas refers to the "assumption of a common human reason [which] forms the basis of justification for a secular state that no longer depends on religious legitimation."⁶⁶ It is this assumption which, according to Habermas, makes the separation of state and church possible at the institutional level.⁶⁷ This assumption of a common reason has dire implications for the justificatory weight stemming from religious modes of rationalization. The courts in many instances fuel this assumption in their analysis of the parameters of religious rights and freedoms. Habermas comments that "[i]n the liberal view, the state guarantees citizens freedom of religion only on the condition that religious communities, each from the perspective of its own doctrinal tradition, accept not only the separation of church and state, but also the restrictive definition of the public use of reason."⁶⁸ Many religious believers base their decisions concerning fundamental matters of justice on their religious convictions. The liberal state, which protects such forms of life in terms of a basic right, then cannot at the same time expect all citizens to justify their political statements independently of their religious convictions (or world views)⁶⁹—"the liberal state must not transform the requisite institutional separation of religion and politics into an undue mental and psychological burden for those of its citizens who follow a faith."⁷⁰ Religious dialogue and forms of reason have been subdued by the dominance of non-religious language in Western liberal and democratic societies. Also, the more theologians seek to find the means to translate theological convictions into terms acceptable to the non-believer, the more they

65. *Id.* at 309–10.

66. Jürgen Habermas, *Religion in the Public Sphere*, 14 EUR. J. PHIL. 1, 4 (2006).

67. *Id.* at 1.

68. *Id.* at 6.

69. *Id.* at 8.

70. *Id.* at 9 (emphasis omitted). Habermas states that the insight by secular citizens that they live in a post-secular society that is epistemically adjusted to the continued existence of religious communities in a post-secular society should include an understanding that their conflict with religious opinions is a "reasonably expected disagreement." *Id.* at 15.

substantiate the view that theology has little of importance to say in the area of ethics.⁷¹ The result of this is also that religion is becoming more and more undifferentiated from other forms of belief. This has implications for the accommodation by the law and the authorities of a religious association's justification for functioning in a certain manner.

Stephen Carter comments that what is needed is not a requirement that the religiously devout choose a form of dialogue that liberalism accepts, but that liberalism accept whatever form of dialogue a member of the public offers. Carter warns that unless liberal theory and liberal law develop a way to welcome the religiously devout in public moral debate without first demanding that they make themselves into different people, liberalism will continue its slide from a pluralistic theory of politics to a narrow, elitist theory of right results, and damned be those who try to block the liberal path.⁷² To assume that people should discuss public policy based on shared moral premises is to assume that all worldviews share basic moral premises.⁷³ According to Stanley Fish, liberalism is:

[C]ommitted at once to allowing competing world views equal access to its deliberative arena, and to disallowing the claims of any one of them to be supreme, unless of course it is demonstrated to be at all points compatible with the principles of reason. . . . The one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and

71. Stanley Hauerwas, *On Keeping Theological Ethics Theological*, in THE HAUERWAS READER 51, 69 (John Berkman & Michael Cartwright eds., 2001). In the words of Liliane Voyé, "Instead of speaking of 'the laws of God,' 'the rules of the church,' more and more frequently representatives of the Catholic Church refer to 'human rights' and to 'human values,' without mentioning a specific doctrinal background." Liliane Voyé, *Secularization in a Context of Advanced Modernity*, 60 SOC. REL. 275, 278 (1999); see also RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 173 (1983). Habermas goes so far as to state that religious citizens should be allowed to express and justify their convictions in a religious language if they cannot find secular "translations" for them. Habermas, *supra* note 66, at 9–10.

72. Stephen L. Carter, *Lecture Two: The Establishment Clause Mess*, 69 OR. L. REV. 495, 524 (1990); see also Stephen L. Carter, *Liberalism's Religion Problem*, FIRST THINGS (Mar. 2002), <http://www.firstthings.com/article/2007/01/liberalisms-religion-problem-14>.

73. Christine L. Niles, *Epistemological Nonsense? The Secular/Religious Distinction*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 561, 576 (2003).

where it could not succeed merely by invoking itself because its own status would be what was at issue.⁷⁴

Jonathan Chaplin is of the view that separate secular reasons for political views may not even be identifiable by religious believers, and the very attempt to formulate principles to govern political life, which can command the universal acceptance of all rational and reasonable citizens, is, after all, a hopeless task.⁷⁵ John Rawls' commitment to overlapping consensus does not do much to improve the integration of religious argument and consequent reasoning. Rawls' account of overlapping consensus represents, in spite of Rawls' disavowal of secularism, a commitment to an independent ethic of autonomy that has no place for religious convictions.⁷⁶

74. Stanley Fish, *Liberalism Doesn't Exist*, 36 DUKE L.J. 997, 997 (1987). Fish also states: If you tell a serious Christian that no one can walk on water, rise from the dead, or feed five thousand with two fishes and five loaves, he or she will tell you that the impossibility of those actions for mere men is what makes their performance so powerful a sign of divinity. For one party the reasoning is 'No man can do it and therefore Christ didn't do it'; for the other the reasoning is 'Since no man could do it, he who did it is more than man.' For one party falsification follows from the absence of a plausibly empirical account of how the purported phenomena could have occurred; for the other, the absence of a plausibly empirical account is just the point, one that does not challenge the faith but confirms it.

Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255, 2279, 2291 (1997). See also Carter, *supra* note 72, at 523. Carter also states, "It is a commonplace of public dialogue in our current era—at least among elites—to treat religionists working for change as presumptively fanatical, not amenable to reason. In the first half of the nineteenth century, the abolitionists, too, were described as fanatics." STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 97 (2000).

75. Jonathan Chaplin, *Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy*, 33 U.B.C. L. REV. 617, 640 (2000). See also RESCHER, *supra* note 9, at 10.

76. STANLEY HAUERWAS, *THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD 176–77* (2007). On the one hand, Rawls believes that he is doing justice to the comprehensive character of differing fundamental views of life by seeking to build political agreement only on the "overlapping" consensus that exists among all of them. On the other hand, as Rawls moves toward the construction of that overlapping consensus, he argues that differing comprehensive views should "give way in public life" in order to allow the common, political conception to become "freestanding." What, according to James Skillen, finally becomes freestanding in Rawls's construction, however, looks very much like something quite compatible with Rawls's own comprehensive liberal view of life and not so much like something that overlaps comfortably with many other comprehensive religions and philosophies? James W. Skillen, *The Theoretical Roots of Equal Treatment*, in *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* 55, 69 (Stephen V. Monsma & J. Christopher Soper eds., 1998). See also SMITH, *supra* note 3, 14–15.

Public discourse, says Steven Smith, is impoverished because of the limitations emanating from secular rationalism which prevent an unveiling of fundamental normative commitments, which eventually results in a superficial discourse.⁷⁷ These are but some of the indicators confirming that religious reasons for religious commitments are sidelined by the dominance of non-religious thinking and reasoning within Western liberalist societies. This has implications for how the religious association's reasons for acting in certain ways are understood.

B. Religious Associations and Reason

The question that arises against the background of appointments by, or appointments to, religious associations in the context of those who practice same-sex sexual conduct (which is in opposition to the core tenets of such an association) is the following: At what point will freedom of association and religious liberty have to give way to the right to freedom from discrimination? Stated otherwise: When does the freedom to associate (or the right to religious practice and expression) guarantee a legitimate right to discriminate? In beginning to answer this, it may be possible to postulate some or other universally rational and coherent explanation. However, the rational aspect will soon begin to mutate into different forms of rationality. Who would disagree with the view that many religious and non-religious believers, cultures and religious associations in South Africa (and elsewhere) have, as part of their core belief, requirements pertaining to sexual conduct that are inextricably connected to foundational views on marriage, family, child-rearing and purpose in life? Human rights jurisprudence supports the sacredness of the human body, the protection of which is prioritized by human rights instruments around the world. Irrespective of race, creed or culture, the living (and dead) human body is sacrosanct. The creeds of, for example, the mainstream religions in South Africa are in agreement with this. Questions as to how and for what purposes we use our bodies are therefore of fundamental concern and naturally overlap with our foundational beliefs and consequently also with our right to freedom of religion, belief and opinion.

77. SMITH, *supra* note 3, at 211, 215, 218.

The autonomy of religious associations and their independence from the state are vital to a conscience-honoring social order. The state's interference therefore should be limited to protecting vulnerable members from readily discernible, serious harm (for example, physical or sexual abuse of a child, or financial fraud by church officials), not from moral claims that the political community rejects.⁷⁸ The manner in which we use our bodies (including sexual activities) overlaps with our individual identity, introducing the relevance of this for the fruition of our human dignity. The way we think of our bodies and the purposes for which our bodies are to be used (including sexual activities) according to each of our beliefs, overlaps with our moral views on the matter (whether driven by genetic influences or not)—moral views which differ from believer to believer and from group of believers to group of believers. Genetic reasons for sexual arousal are not limited to reasons for same-sex sexual conduct but apply to other types of sexual conduct as well. This however does not rid forms of sexual conduct from loyalty to specific moral positions for the reason already explained.⁷⁹ If same-sex sexual conduct is enforced upon society then why should other types of sexual conduct such as “an affiliation of someone in age-minority and someone in age-majority who claim the right to be equal and therefore married in spite of current prohibitions on age limitations”⁸⁰ (to name only one example) not be enforced on society? Here too reasons provided for having same-sex sexual conduct enforced upon society whilst supporting a prohibition against marriage between someone who is in age-minority and

78. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 308 (2010).

79. *See, e.g.*, Chamberlain v. Surrey School District No. 36, 2000 BCCA 519, at ¶ 20 (Can.) (“Some aspects of human sexuality remain morally controversial including homosexual or ‘same sex’ relationships. The division of moral conviction on this subject cuts across society and divides religious communities as well as people of no religious persuasion. The moral position of some on all sides of particular issues will be influenced by their religion, others not. There is no bright line between a religious and non-religious conscience. Law may be concerned with morality but the sources of morality in conscience are outside of the law’s range and should be acknowledged from a respectful distance.”).

80. Robert J. Araujo, *Same-Sex Marriage—From Privacy to Equality: The Failure of the “Equality” Justifications for Same-Sex Marriage*, in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 195, 203 (Scott FitzGibbon et al. eds., 2010).

someone who is in age-majority will not be accepted by everyone in society. Sensitivity and an accommodative approach regarding differing moral opinions on the body against the background of sexual conduct is reflected in South African legislation that even allows for marriage officers, for example, not to serve before marriages between same-sex couples when such officers conscientiously object to doing so. In this regard, there should be a fair amount of agreement⁸¹ amongst competing forms of belief and religion regarding the differences of opinion on acceptable forms of sexual conduct; but as the debate develops, so do the possibilities of disagreement, and this despite efforts towards avoiding disagreement. It is at this stage that one needs to become attentive towards the different forms of reasoning. In what follows are three examples of where the religious association's conviction that membership and appointments to itself should conform to its core tenets pertaining to sexual conduct (otherwise such membership and appointments will be prohibited) is opposed along lines of language that assumes universal rationality.⁸²

The first example is that of "biological inherency." Here the reasoning is that because one is born with an inherent attraction to persons of the same sex, a religious association may not prohibit such a person from being a member of a religious community where such a person practices same-sex sexual conduct and where such conduct is in opposition to the core tenets of a religious association.

81. But even here there can be disagreement. For example, those who view the prohibition of discrimination due to sexual orientation as an encompassing norm to be applied by religious associations as well will already disagree at this stage with the rationale provided for in the above. Likewise, there might be those religious associations whose members would directly resort to religious language regarding a justification for the approach taken by such an association in prohibiting membership to someone due to the latter's conduct resulting from his or her specific form of sexual orientation. The importance of this is elaborated upon below in the context of Alvin Esau's "organic model" as an example.

82. Note here the similarities when referring to South African scholarship on religious associational rights in the context of sexual conduct, where we find parallels to the examples of assumed universal rationality grounded in "biological inherency," "possibilities of employment," and "equality understood as an encompassing norm prohibiting discrimination based on sexual orientation." More specifically, as stated earlier, David Bilchitz assumes that equality should include the encompassing norm of prohibiting discrimination based on sexual orientation and relies strongly on the "biological inherency" of sexual orientation as countering discrimination resulting from this. Patrick Lenta on the other hand places the emphasis on practical considerations related to "economic opportunity" and therefore that employment figures be considered as well.

This is an example of what Stephen Carter refers to as matters of empirical morality, meaning that which is couched in terms of appeal to values so overarching that no one would dispute them. Moral dialogue of this type seems easier for liberal courts to accept, where the judge is not supposed to impose her own moral judgments, but she can certainly manage the facts.⁸³ Carter explains, by way of an example, that empirical morality is viewed as the effort by the gay rights movement to portray homosexuality as innate rather than chosen. The innateness claim has the advantage of inviting equal protection scrutiny of restrictions on conduct that can be seen as disadvantaging a particular sexual preference. However, says Carter, as a constitutional (or for that matter a moral) issue it is difficult to see why it ought to matter whether sexual preference is a choice or whether it is something innate.⁸⁴

Such rationality relying on biological inherency does not take cognizance of other rational approaches emanating from other foundational points of belief. As explained earlier, human rights jurisprudence supports the sacredness of the human body, the protection of which is prioritized by human rights instruments around the world. Irrespective of race, creed or culture, the living (and dead) human body is sacrosanct. Questions as to how and for what purposes we use our bodies are therefore of fundamental concern and naturally overlap with our foundational beliefs and consequently our right to freedom of religion, belief, and opinion. This means that biological inherency as reason for specific forms of conduct can be trumped by other forms of reasoning.⁸⁵

These different reasons in justifying or prohibiting certain types of conduct also lurk beneath the balancing efforts to be found between conflicting rights.⁸⁶ A second example of where non-

83. Carter, *supra* note 13, at 481–82.

84. *Id.* at 483.

85. There are also other forms of criticism that can be added to this, for example, whether the assumed rationality of biological inherency trumps forms of reasoning that support the organic model of associational loyalties such as that which Alvin Esau refers to. *See* Esau, *supra* note 54, at 734. In other words, how persuasive is this application of biological inherency when compared to other forms of reasoning?

86. Needless to say, where there is a serious violation of a human right, such as the taking of life or the exercise of physical (or psychological) harm or the threat of taking a life or of causing physical (and psychological) harm, then the reasons as to what right should be prioritized involves a simpler determination as to which right should be prioritized.

religious reasons are viewed as trumping religious reasons pertaining to membership or appointments to a religious association is the following: Looking at the judgments of the European Court of Human Rights (“ECtHR”) pertaining to decisions taken by the German labor courts related to sexual conduct and the consequent dismissal by church institutions of persons that conducted extramarital relations, Van der Vyver observes that the ECtHR judgments added a particular dimension to the principles that Germany is required to demand of its labor courts; namely, the effects of dismissal of an employee, for whatever reason, on the personal and family life of the employee, among other things.⁸⁷ In this regard, the question needs to be asked as to what, from a rational point of view, trumps “personal and family life,” for example, over that of the religious rights and right to human dignity of the members of a religious institution as well as the associational rights of such an institution?⁸⁸ In *Schüth v. Germany*⁸⁹ the ECtHR pertinently stated that:

[T]he fact that an employee dismissed by an ecclesiastical employer has limited possibilities of finding new employment is decisive. This is all the more significant where the employer holds a dominant position in a given sector . . . or where the training of a dismissed employee bore such a specific nature that it would be difficult if not impossible for him to find new employment outside of the church.⁹⁰

Here, “family related concerns” (concerns related to privacy) and the “limited possibility of finding new employment,” form part of the reasons given by the ECtHR so as to uphold the employment of an employee in a religious association. This reasoning therefore

87. Van der Vyver, *supra* note 7, at 8. More specifically, these involved disputes related to dismissal by church institutions of persons who had conducted extramarital relationships.

88. In this regard, Roger Trigg comments that the right to respect for privacy trumped any right a religious institution had to demand that its employees live by its principles:

This demand for equal respect, and recognition of equal dignity, ensures that institutions have little say, even in ensuring that their teaching is observed by their own employees. The result is that there is no respect for the particular ethos of a church or other religious institution, and indifference as to whether a religion can continue to uphold its principles through example and teaching.

TRIGG, *supra* note 3, at 120.

89. (2011) 52 E.H.R.R. 32 (Eur. Ct. Hum. Rts.).

90. *Id.* at ¶ 73.

overrides the religious association's opposition to extramarital sexual conduct by its members or employees. The question arising from this is whether such reasons presented by the ECtHR should trump the reasoning of the church, which in this case involves the "entering into a marriage void within the understanding of the faith and Canonic Code of the Church"?⁹¹ However, what rationally trumps the "limited possibility of finding new employment" over that of the associational rights of a religious association?⁹²

A third example of assumed universal rationality is that regarding the concept of "equality" and its assumed qualification of an encompassing application of the prohibition of discrimination based on sexual orientation. An example of this is Justice Basson's finding in the *Strydom* judgment that the South African Constitution's right to equality is foundational to the open and democratic society envisaged by the Constitution, and therefore that, as a general principle, the Constitution should counteract rather than reinforce unfair discrimination on the ground of sexual orientation.⁹³ Kent Greenawalt points to problems of understanding arising from the puzzling nature of equality, one of them being the "uncertainty among lawyers and judges about the significance of legal norms formulated in the language of equality."⁹⁴ Religion is an equality right itself and religious people are entitled to non-discriminatory treatment *in terms of their religion* as well. Placing equality and non-discrimination over against religion, or viewing some forms of non-discrimination (say, same-sex sexual conduct) as

91. *Id.* at ¶ 38.

92. Here again added criticism can be added; for example, how persuasive will this argument be to those who are persuaded by the belief and consequent rationality connected to viewing heterosexual sexual conduct and marriage as a Godly sacrament? Also, how will the argument supporting "possibilities of employment" rationally override the interests related to Alvin Esau's organic model? See Esau, *supra* 54 at 734–35.

93. *Strydom*, [2008] ZAEQC at ¶ 14. As explained above, the *Strydom* judgment emphasized the superiority of the prohibition of discrimination based on sexual orientation where the appointment made by a religious association is not connected to a core religious function or to spiritual leadership within such an association. This however, does not negate the strong message by Justice Basson in support of the prohibition of unfair discrimination due to sexual orientation as an encompassing norm.

94. Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1167 (1983). For different conceptions on equality, including equality as the right to flourish, see Robert J. Araujo, *What is Equality? Arguing the Reality and Dispelling the Myth: An Inquiry in a Legal Definition for the American Context*, 27 QUINNIPIAC L. REV. 113, 169–70 (2009).

more important than the religious person's freedom to disagree with the associational acceptance of same-sex sexual conduct, is questionable. Roger Trigg asks: "How is it that we now believe in Western democracies in the equality of all, when many in the contemporary world still do not? It may be a constituent belief of democracy, but what justifies it?"⁹⁵ Trigg then adds that acknowledgment of equality need not imply uniform treatment.⁹⁶ Robert Araujo states

[W]e often hear claims made about "inclusiveness" that are deemed essential by some advocates to make each person "equal" with all others, notwithstanding the diversity that differentiates among them in some significant ways. This kind of equality, however, tends to be contrived. . . . The argument for these equalities is false and unsustainable because it removes the claim to equality from the two foundational pillars of fact and the transcendent or metaphysical nature of the human person. It represents an attempt to do away with distinction and employs . . . a misuse of the law that grants a license to equality in spite of what reason and reality declare that it is not.⁹⁷

Trigg also states, "Discrimination in favour of religious views will seem as unacceptable as discriminating against some other group. Yet, although 'discrimination' has become a powerful label for unacceptable behaviour, it is worth remembering that every

95. TRIGG, *supra* note 3, at 2.

96. *Id.* at 4. Justice Albie Sachs formerly of the Constitutional Court of South Africa: [E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.

Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice, [1998] ZACC 15, at ¶ 132 (CCT) (S. Afr.). Stuart Woolman refers to the South African Constitutional Court's view in *Christian Education South Africa v. Minister of Education* that the essence of equality under the South African Constitution is that "we treat everyone with equal concern and respect," Woolman responding that this is "just a fancy way of saying that we need not all act the same way in order to enjoy the benefits—including the associational benefits—of a liberal constitution." WOOLMAN, *supra* note 23, at 64.

97. Araujo, *supra* note 94, at 170. In similar fashion Roger Trigg comments that "[s]ecular thinking, caught up with issues concerning equality and non-discrimination, treats its own views as superior to those of any religion." TRIGG, *supra* note 3, at 133.

rational judgement, and indeed every moral judgement, involves discriminating between relevant and irrelevant factors.”⁹⁸ This gives discrimination a wider, more acceptable tone, where differences in rational approaches inherently exclude or discriminate against one another as a result of differences in belief. Therefore, to assume that the prohibition of unfair discrimination due to sexual orientation trumps a religious association’s reasoning in support of the sacredness of heterosexual marriage is erroneous.

In the examples above where “biological inherency,” “possibilities of unemployment,” and “equality understood as including the prohibition of discrimination based on sexual orientation” are used as assumed rational points in countering the upholding of the associational rights of a religious institution (and the religious rights and rights to human dignity of its members), the question remains as to whether these examples rationally override other (including religious) forms of persuasion. The answer to this is surely not in the affirmative.

The first part of this article referenced three main streams of thought arising from South African jurisprudence pertaining to the parameters of a religious association in allowing membership or appointments to itself in the context of forms of sexual conduct that are in opposition to such an association’s core tenets. In this regard, David Bilchitz’s reliance on the prohibition of unfair discrimination based on sexual orientation as an encompassing norm and his inclusion of “biological inherency” so as to support this view, and Patrick Lenta’s reliance on “economic opportunity” were critically investigated in the second part of this article against the background of assumed rational qualifications emanating from sources external to that of the religious association itself. From this, the question arises of whether reasons presented by a religious association, such as that of Esau’s organic model, are to be subordinated to opposing reasons based on, for example, biological inherency, the accommodation of sexual orientation as an encompassing norm, economic opportunity, opportunities of employment, and privacy. The ideal towards persuasion in obtaining harmony amongst individuals and entities within civil society should not imply uniformity of persuasion, due to the fact (and as explained in the

98. TRIGG, *supra* note 3, at 4.

above) that there are different forms of language (religious and non-religious) and reasoning in society which justify certain modes of operation and functioning by individuals and groups sharing the same interests in society.

Specifically focusing on the accommodation of same-sex sexual conduct by a religious association whose core doctrine is in opposition to such conduct, it was argued along the lines of general persuasion that such accommodation should be allowed due to the central role that sexual relationships play in our existence and purpose in life. This in itself provides a reasoned argument that should appeal to society in general (which in turn should allow the necessary autonomy to religious associations in deciding its approach). This reasoned argument is further enhanced by questioning the rationality of certain non-religious points of view (such as biological inherency) when compared to some religious points of view (such as that which arises from the organic model). The rationality of the religious foundational ethos illustrated, in for example, Alvin Esau's organic model cannot be overridden by a perceived to be universally persuasive form of rationality (based on a non-religious pre-rational point of departure) and therefore should not be assumed to be less rational than other non-religious reasoning pertaining to important moral beliefs (provided of course that the public peace and order, as well as the fundamental tenets related to the protection of human dignity are not violated). These two forms of reasoning support a religious association's right to prohibit membership or appointments of persons who participate in same-sex sexual conduct, where such conduct is in opposition to such a religious association's core doctrine.

IV. CONCLUSION

This article argues for the prioritization of religious associational rights as well as a better understanding of reason inherent to a religious association (and which is of consequent persuasion to the members of such association). This takes place against the background of recent developments in South African jurisprudence, specifically concerning membership and appointments to a religious association in the context of a certain form of sexual conduct that is opposed to the core tenets of such an association. Recent scholarship in South Africa is reflective of different and sometimes contrasting views. The view taken by this article is one which supports the

awarding of a proper level of autonomy to a religious association in deciding on the acceptance or rejection of certain forms of sexual conduct, where same-sex sexual conduct is the specific focus. In addition to emphasizing the importance of religious associational rights, this article addressed different forms of reasoning (both religious and non-religious) regarding membership or appointments to religious associations of persons participating in same-sex sexual conduct. Here, this article presents both a reasoned argument that houses general appeal due to its reliance on the important role that certain forms of sexual conduct play in enhancing our sense of meaning and purpose for existence and an argument that questions the universal rationality of certain non-religious reasons that purport to have universal persuasion. This in turn establishes a more nuanced and accommodative understanding regarding religious reasons for prohibiting certain forms of sexual conduct when dealing with membership and appointments.

Forms of belief (and consequent persuasion) in moral matters related to the acceptance or rejection of forms of sexual conduct are varied and, as stated earlier, in many instances directly opposed to one another. Underlying these forms of persuasion, whether religious or non-religious, are pre-suppositional or pre-rational points of departure that rest on some or other belief. These beliefs provide specific and differing interpretations of concepts such as equality, harm, freedom, and human dignity, and in turn, of whether certain forms of sexual conduct are acceptable or not. Therefore, religious associations should have a high level of autonomy in decisions on moral matters (in this case, matters related to same-sex sexual conduct) not only because of the idea that the right to freedom of association is a foundational norm but also due to the fact that the reasoning emanating from such associations are, on closer analysis, just as competitive as non-religious forms of reasoning. This in turn strengthens the autonomous nature that should accompany religious associations. Consequently, this will be constructive towards the furtherance of diversity in pluralist and democratic societies. Roger Trigg, in the context of discrimination on grounds of same-sex sexual conduct comments that neither side should assume the other to be so wicked that they have to be constrained by the law. The issue is not which side is right, but whether there is a genuine moral discussion to be had and whether a right to religious freedom must always be “trumped” by other

considerations.⁹⁹ It is not only questions related to same-sex sexual conduct and its accommodation by religious associations that is at issue here, but other forms of sexual conduct as well, such as sexual conduct resulting from polygamous and pre-marital relationships, for instance. A more nuanced sense of autonomy for religious associations together with sensitivity towards the credibility of reasoning by religious associations (in opposition to allowing membership or appointments to those persons who practice sexual conduct which is in opposition to the core tenets of such an association) should assist in furthering the tenuous and challenging quest (which is laden with complexities) towards a fair balance in the conflict between the right to equal treatment and the right to religious freedom in a pluralist and democratic society.

99. *Id.* at 94.

