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The Tension Between Freedom of Religion and Equality in Liberal Constitutionalism[1]

The Problem of Freedom and Equality

Orthodox Judaism, as it currently exists in South Africa, refuses to ordain women. Seminaries for Orthodox Jewish learning in South Africa (often known as *yeshivot*) also generally only admit men. No regard is paid to how intellectually capable a prospective female applicant is or how suitable she may be emotionally, socially or personally: the mere fact she is a woman is sufficient to justify her exclusion from yeshivot and rabbinical positions. It is unfair to single out Orthodox Judaism; similar exclusions on the basis of sex/gender exist with regard to becoming a priest in the Roman Catholic tradition and an imam in traditional Islamic communities. Yet, in most other contexts, it is quite clear that the exclusion of women from such positions on the basis of their sex or gender constitutes unfair discrimination. The South African Constitution prohibits not only the state but individuals and civil society entities (such as religions) from engaging in unfair discrimination on several prohibited grounds which include sex and gender.[3] In order to give effect to this prohibition, a more detailed law titled the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') was passed in 2000.

Nevertheless, there remain arguments that many find convincing for a liberal democracy not to outlaw the discriminatory practices of Orthodox Judaism, Roman Catholicism and Islamic communities or even to penalise these groups for their exclusionary practices. These arguments generally are rooted in the principles underlying two other important rights in the South African Constitution: the right to freedom of religion and the right to freedom of association.[4] These freedoms, it is often argued, guarantee that religious groupings are entitled to hold the beliefs that they do and to organise their communities according to their beliefs. Given that these groupings hold the religious view that only men are entitled to hold religious offices, they should be entitled to act accordingly and to organise their communities on this basis.

This example raises a fundamental tension at the heart of liberal democracies, between freedom and equality, both central values in our constitutional order. On the one hand, it is of great importance that individuals (and communities) be given the freedom to decide what beliefs they hold and to put these beliefs into practice; on the other hand, individuals should be treated with equal importance and not be subject to arbitrary discrimination on the basis of characteristics they can do little about. How is this tension between these foundational values to be resolved? How far should the domain of religious freedom extend? These are the questions I shall engage in this article. I shall contend, ultimately, that liberalism is not just about defending the freedom of individuals; it is in fact concerned with ensuring 'equal freedom' for all. Since discriminatory practices harm the ability of some individuals to live an equal manner with others, I shall argue for a strong presumption in favour of equality and against exempting religious associations from provisions prohibiting discrimination in the Constitution and PEPUDA. I will ultimately defend an egalitarian form of liberalism (rooted in some of the great philosophers) which recognises that individuals and associations should be accorded the freedom to practice their own ways of life only insofar as they do not undermine the capacity of other individuals to do likewise.

Protecting Diversity and Reciprocity

It is thus no surprise that the protection of freedom of religion became a cornerstone of liberalism and was protected in such important documents as the French Declaration of the Rights of Man and Citizens and the first amendment of the Constitution of the United States of America.

Religious persecution was rife in Christian Europe throughout the Middle Ages and into the early days of the Enlightenment. John Locke's *A Letter of Toleration* of 1689 was a centrally important philosophical text which made the case for tolerating religious difference. It has been described recently as 'finding a political-philosophical basis for a negotiated settlement that would prevent England from being continually riven by religious strife'.[5] Majority religions sought to wield their power to crush dissent, forcing individuals with differing religious beliefs to flee Europe. The United States, of course, saw the arrival of many escaping religious persecution; and in South Africa, too, our history was affected by the arrival of the Huguenots who fled persecution in Europe. It is thus no surprise that the protection of freedom of religion became a cornerstone of liberalism and was protected in such important documents as the French Declaration of the Rights of Man and Citizens and the first amendment of the Constitution of the United States of America. Religious oppression and persecution were the basic underlying conditions that necessitated the protection of freedom of religion. Recognising such a freedom required individuals to accept that, though they may have very strong beliefs in their own religions, others are entitled to differ and follow other systems. No one is to be coerced into a particular belief or practice, and everyone's individual autonomy is to be protected that includes the ability to have diverse beliefs and practices.[6]

South Africa has never had a complete denial of religious freedom and diversity. During the apartheid era, a clear priority was given to particular forms of Christianity. This had a negative impact upon minority religious groupings with Muslim marriages, for instance, not being recognised by the state as they were potentially polygamous. Censorship laws also often accorded with conservative Christian religious proscriptions and laws restricted such activities as shopping, sport and entertainment on Sundays. Whilst freedom was no doubt curtailed, Jews, Hindus and Muslims were able by and large to practice their religions without fear

of major persecution. The key wrong perpetrated during apartheid in this regard could thus be described as a denial of *equal* freedom and treatment to the followers of religions other than Christianity rather than a complete denial of freedom of religion itself. Such unequal treatment fails adequately to respect the full diversity of South Africa's peoples and their beliefs and practices.

Respect for diversity is thus one of the key reasons underlying the protection of freedom of religion. Importantly, however, respecting diversity is also one of the core values underlying the right to equality. The prohibition on unfair discrimination is there to ensure that individuals are not disadvantaged on the basis of certain characteristics that render them different from other individuals. The grounds upon which discrimination is expressly prohibited in South Africa include race, sex, gender, sexual orientation, age, religion and several others. These categories provide recognition of the fact that South Africa is comprised of individuals that differ in a variety of ways and that both the state and private parties must not, in general, subject any individual to prejudicial treatment on account of their differences (particularly where such differences have led to discrimination in the past). The concern for equality also, importantly, ensures that individuals are able to exercise their freedom in an equal manner to others: unfair discrimination often prevents the exercise of freedom on the basis of an individual's difference to another. Once we recognise that prohibitions on non-discrimination protect the 'equal freedom' of individuals, it becomes more evident why religious associations should not be exempt from these proscriptions.

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Associations – whether religious or otherwise – that act in a discriminatory manner fail to honour the value of respect for diversity and understand the importance of 'equal freedom'. A religious grouping such as Orthodox Judaism must claim the right to follow its beliefs and practices is founded in the values of respect for freedom, equality and diversity. Yet, if it wishes to claim such protections, then it needs to respect these very values in its treatment of others. To claim a freedom based on respect for diversity where one fails to respect that very diversity demonstrates a lack of reciprocity and a desire to gain the benefits of liberal societies without subscribing to its basic foundational values.

In outlining his version of political liberalism, John Rawls, for instance, recognises the importance of creating space for a range of 'reasonable comprehensive doctrines'.[7] In specifying what is meant by reasonable, Rawls explains that '[r]easonable persons, we say, are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others. By contrast, people are unreasonable in the same basic aspect when they plan to engage in cooperative schemes but are unwilling to honour, or even to propose, except as a necessary public pretense, any general principles or standards for specifying fair terms of co-operation."[8] The liberal state need not, according to this view, accommodate those that are unreasonable and are not prepared to respect the rules of society that determine the basis upon which we co-operate.

An example can help illustrate this point. Take, for instance, the strong campaign by the Catholic church against states recognising the civil marriages of same-sex

couples. Proponents of such reforms (which include liberal religious groupings) do not seek to force the Catholic church to conduct same-sex marriages; they simply wish to conduct those marriages themselves. The Catholic church, on the other hand, wants all other groups in society – including liberal religions – to be forced by the operation of law to adopt their definition of marriage. As such, the church claims a freedom – to conduct marriages according to their own doctrines – that they deny to others who differ from them. Such claims which are not reciprocal and deny the equal freedom of others should generally not be protected in a constitutional democracy.

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Similarly, by a religious association acting in a manner that discriminates unfairly on the prohibited grounds, it demonstrates that it is not prepared to subscribe to one of the most fundamental underlying principles of the South African state: equality and respect for the diversity of individuals. Such groupings fail to respect the very values that provide the grounding for their own claims to be protected. As such, courts should not accord protection to such associations to engage in discriminatory practices and there should be a strong presumption against exempting religious groupings from the operation of prohibitions of non-discrimination.

Harm to Others

A further argument that supports this view, is rooted in the important point, famously made by John Stuart Mill, that individual freedom may be limited where the exercise of that freedom causes harm to other individuals.[9] No-one is entitled to the freedom to blow up a plane or to abuse a child. In the latter case, in recent years, there has been some resistance by members of the Catholic church to state investigations into child abuse by priests with a range of measures being taken to obstruct the release of incriminating evidence.[10] Many in the church structures would like for these matters to be left to internal investigations. Yet, the internal structures have in the past covered up much abuse and often transferred individuals to other roles within the church where they were able to continue their abusive activities.[11] It is clear that the harm to vulnerable children has largely (at least in the public) been recognised as sufficient justification to limit the associational rights of the church to police its own members.

A similar reason can be given for not allowing religious groupings to discriminate on the prohibited grounds in the South African Constitution. Such discrimination causes concrete harm to the individuals concerned: it can lead to the loss of employment opportunities, fulfillment of deeply-held goals and emotional and psychological distress. Discrimination on the basis of any of the prohibited grounds listed in the Constitution harms the dignity of the individual concerned. As Chief Justice Ngcobo has put it, '[d]iscrimination conveys to the person who is discriminated against that the person is not of equal worth.' [12]. Employment is of course connected to a person's sense of dignity and thus losing one's job on discriminatory grounds may indeed cause a crisis of self-worth. Yet, the dignity claim goes beyond this: it is about the exclusion of individuals from a community (or community position) on the basis of a central element of their identity, and the stigma that this causes. It involves fundamentally a failure to treat individuals as ends in themselves. It involves reducing individuals to a particular characteristic

and taking decisions that have a detrimental impact upon them simply because of that characteristic. These were the exact evils that were at issue under apartheid: the prejudicial treatment of black people simply because of the colour of their skin. Such discrimination is ugly and harmful to the individual concerned, impacting on their self-worth and their associational relationships. The non-pecuniary harm caused to individuals in these circumstances needs to be seriously considered in any justification that is given for discriminatory treatment.

The harms attendant upon discriminatory practices also have a social dimension. Here, it is of great importance to recognise that certain religious groupings (such as the Dutch Reformed Church) actually played a role in legitimising the policy of apartheid. Discrimination on the basis of race was rife within the internal affairs of even more progressive churches. Before the Truth and Reconciliation Commission, religious groupings 'were virtually unanimous in apologising for playing a role, whether through omission or commission in the abuses in the past'.[13] Religion in the past has not only supported discrimination on the basis of race but also on such grounds as gender and sexual orientation. The history of religion in South Africa demonstrates that the impact of religious teachings and practices do not remain neatly confined within the internal affairs of a religious association. Such discrimination can also undermine the very equality of black people, women and lesbian/gay people in the wider community as well. Similarly, if discrimination is allowed within religious associations, individuals may not neatly compartmentalise this objectionable behavior within such a community. Discriminatory practices and attitudes within religious communities can thus harm the transformative project of creating a society free from unfair discrimination that respects the dignity, freedom and equality of all. The harms attendant upon discrimination thus provide strong reasons why the prohibitions on non-discrimination in our law should apply with equal force to religious associations with a strong burden being placed on any group that seeks to justify any discriminatory actions on its part.

Discriminatory practices and attitudes within religious communities can thus harm the transformative project of creating a society free from unfair discrimination that respects the dignity, freedom and equality of all.

Minorities Within Religions

The last argument I wish to provide seeks to elaborate on the idea of 'equal freedom' through considering the problem of minority or marginalised groups within religious groupings such as Orthodox Judaism. It is often assumed (sometimes by courts) that religious associations are homogenous in themselves with clear rules and doctrines. Yet, it is important to recognise that there is always some form of internal diversity within any religious group. Communities will usually include individuals who differ in at least one or more of the following respects, including age, disability, sex, gender, race and sexual orientation. Should the dominant segment of a religious association act in a discriminatory manner towards any one of these groups, that may affect the very freedom of religion and association of the marginalised group.

If confronted with a case concerning unfair discrimination, courts are not only required to adjudicate upon a clash between equality and freedom of religion and association. There is in fact a clash between the very freedoms of differing parties *within* the association: often the dominant structures of the association and a minority or marginalised group. Courts will, of necessity, in deciding the case have to decide *whose* freedom should take precedence. In such circumstances, I

would argue that courts in South Africa should err on the side of equality and avoid sanctioning any position within a denomination that seeks to exclude individuals on the basis of any of the prohibited grounds from exercising their freedom of association within that group.

If it condemns the action, it would be defending the freedom of association of those members of the Orthodox community who believe women can be rabbis. In such circumstances, there is an internal clash within the group and courts are required to decide upon whose side they should intervene.

An example may help clarify these theoretical claims. Imagine that a highly suitable female candidate named Deborah, applies to be admitted to the Orthodox rabbinical training programme in Johannesburg expressing her view that she ultimately wishes to be a rabbi. Deborah is already learned and, explains, that in her view there is both precedent for female rabbis in the tradition as well as no barrier in Jewish law (or halacha). She is refused admission on the grounds simply that she is female and that the yeshiva itself subscribes to the dominant Orthodox view that women cannot train to be rabbis. Deborah approaches a secular court claiming unfair discrimination on grounds of sex and/or gender. What should the court do? What I have been seeking to show in this section is that such a case demonstrates that there is a clash not simply between Deborah's right to equal treatment and the yeshiva's right to freedom of religion and association; the clash is also between Deborah's right to freedom of religion and association and that of the yeshiva. If the court upholds the yeshiva's actions, it would respect the freedom of association of those within the Orthodox community who believe that a women may not be a rabbi. If it condemns the action, it would be defending the freedom of association of those members of the Orthodox community who believe women can be rabbis. In such circumstances, there is an internal clash within the group and courts are required to decide upon whose side they should intervene.

The traditional objection to this line of reasoning is that the freedom of association of the marginalised individual or group (Deborah, in this example) is adequately protected so long as she can leave religious association that has treated her in a discriminatory manner and be part of a grouping that is not discriminatory (or form her own).[14] The problem with this response is it essentially sees religious belief as a 'personal preference that can be changed easily. However, religion is not necessarily a voluntary association'.[15] Individuals usually are born into a religious community and grow up with a particular faith. Being forced to leave that faith because of discriminatory practices within a religious denomination is to require them to rupture a part of their own identities. This is not to argue that it is not possible to change a religious belief but that courts must recognise the severe burden imposed on individuals of doing so: indeed, being forced to leave a community is a severe violation of that individual's own freedom of religion and association. For instance, Deborah may be an intensely devout Orthodox Jewess with no desire to leave the community. Her desire to be a rabbi flows from her intense commitment to this very community. Having to leave the community would leave her socially isolated and away from the path she believes to be true; on the other hand, failing to pursue her rabbinical ambitions, will leave her personally bereft and unfulfilled.

The courts should recognise in situations such as this, that the dominant structures of Orthodox Judaism, here, are failing take account of the very diversity of their own congregation. They wish to deny an individual a position within the religion

on the basis of a characteristic that she can do nothing about. The leadership in this example displays a disregard for the dignity and freedom of association of the individual (or minority) which can cause some of the severe harms elaborated upon above. They thus are acting in a way that goes against the very basis of their own claim to freedom of association and non-discrimination on grounds of their own religious tradition. They do this, however, on the basis of firm religious convictions rooted in their understanding of tradition. To require them to do otherwise would be a serious intrusion into their religious beliefs and practices. That renders the decision that has to be made one which evaluates the freedom of association of some individuals against other individuals within the religious grouping. Protecting equal freedom requires finding ways in which to prevent discrimination whilst according maximum respect for freedom of religion and association of *all* parties. What then should courts do practically in a situation such as this?

Unfair Discrimination and Judicial Remedies

In light of the arguments made above and the still shaky commitment to non-discrimination on all prohibited grounds, courts should allow very little latitude to religions who wish to discriminate on the grounds contained in the equality clause. The one exception here is discrimination on the basis of religion in the case of religious leadership: 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.

This is a different matter altogether from refusing to employ a black, female or gay individual as a religious leader where such individual belongs to such a community, professes its beliefs and identifies with that community. Some may contend that, where the precepts of the faith are opposed to black, female, or gay/lesbian people assuming office, then such individuals, by applying for formal positions within that faith, are seeking to contravene its precepts. This will no doubt take us into doctrinal matters and, as has been explained in the article, will often require the law to take a position. What is important to recognise, however, is that, if the discriminatory practice or policy is indeed a precept of the faith, then that precept excludes individuals from the community (or assuming positions therein) on the basis of a fundamental element of their identity that they can do very little about. These are people within the community who, through a deep-seated characteristic of self, are treated detrimentally by that community. The precepts of the faith here are incompatible with the values of South African society within which the religious association resides.

What is important to recognise, however, is that, if the discriminatory practice or policy is indeed a precept of the faith, then that precept excludes individuals from the community (or assuming positions therein) on the basis of a fundamental element of their identity that they can do very little about.

In such circumstances, the political community (and its courts) should not simply defer to the precepts of faith as it would not do if a faith sanctioned other harmful practices such as child abuse or terrorism. Courts should, at a minimum, declare that unfair discrimination has taken place in a case such as Deborah's or any other where arbitrary and unequal treatment is evident. Recognising such practices as unfair discrimination does not render the state complicit in sanctioning them and represents a strong moral condemnation. Yet, should the courts go beyond such a declaration and order specific relief?

One possibility would be for the court to adopt the most coercive intervention and to force a community to behave in a non-discriminatory manner by, for instance, re-instating a dismissed employee or admitting Deborah to the yeshiva. As much as such an approach has certain advantages, I do not believe it is generally desirable in relation to religious associations. Let us imagine that a community is ordered by a court to admit Deborah to the yeshiva and grant ordination to her once she has complied with the requirements for becoming a rabbi. The community could technically obey yet eventually boycott the synagogue in which she is appointed (presuming this occurs). No law could prevent the side-lining of Deborah within the decision-making structures of the community. It is thus unlikely that law in a liberal society could be effective in coercing a change in this manner. Moreover, such a highly interventionist approach is likely to result in a serious backlash with religious associations feeling persecuted for their beliefs and finding ways to resist coercive measures they perceive to be secular impositions upon their religious convictions. Part of the case for toleration of diverse religions is to promote the stability of society:[16] such overly interventionist remedies could in extreme cases lead to an undermining of the stability of the state with religious resistance (armed or otherwise) challenging the constitutional order. Moreover, the state here may achieve an own goal: seeking to change discriminatory attitudes, it may in fact land up reinforcing them or driving them under-ground.

It can indeed be hoped that religious associations that recognised the evils of racial discrimination can come to recognise and reject discrimination on grounds of gender and sexual orientation as well.

In light of these considerations, courts can stop short of coercing the change in question whilst still making the important point that South African society does not accept unfair discrimination even where this is sanctioned by the doctrines of a religious association and occurs in relation to employees functioning in a religious capacity. In the case of Deborah, it seems to me that an award of damages would be wholly appropriate. Such a remedy clearly indicates to the religious association that the South African state does not approve of its discriminatory behavior and helps to compensate victims for the harm caused to them. [17] It does so, however, without forcing a change in the rules of the association itself.

Perhaps, more creatively, courts could order religious associations to engage in a process of deliberation requiring them to consider the very rules of the association that result in discriminatory practices. Such an order would again not compel such a change but nevertheless require the community to consider whether their rules and practices are appropriate in the new South Africa. Such internal processes may take time to bear fruit, yet provide a catalyst for change within the religious groupings in question. Indeed, the rapid change in many religious associations to reject racial discrimination in light of the new South Africa bodes well for the long-term possibilities such internal processes may yield. It can indeed be hoped that religious associations that recognised the evils of racial discrimination can come to recognise and reject discrimination on grounds of gender and sexual orientation as well.[18] Internal changes in attitudes are also more likely to be sustainable in the longer term. Through creative and sensitive remedial relief, a balance thus can be struck by the courts between recognising the unacceptability of the unfair discrimination that has taken place whilst respecting the internal processes of change within religious groupings.

As we have seen in this article, a deep tension arises in liberal democracy concerning whether to allow religious associations to engage in conduct that constitutes unfair discrimination. I have suggested that the requirements of reciprocity, protection of diversity, avoiding harm to others and balancing the freedom of association of differing parties supports a strong presumption in favour of equality and against non-discrimination being allowed in the context of religious associations. Suggestions were made as to how courts can practically instantiate this ethos. South Africans understand the perils of religiously-sanctioned discrimination in light of our history: for transformative constitutionalism to be successful it will be imperative for religious associations also to be required to embody an ethos that respects the equal dignity of all individuals.

NOTES

1 This piece includes arguments and segments drawn from an academic article I have authored titled 'Should Religious Associations be Allowed to Discriminate Unfairly?' to be published in the South African Journal of Human Rights 2011 (2) (forthcoming). Please see the full article for a more extensive argument on the themes addressed in this article. I would like to thank the managing editor for permission to reproduce some of these segments in Focus.

2 Associate Professor, University of Johannesburg; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law

3 Section 9 of the South African Constitution

4 The former is protected in section 15 of the Constitution and the latter in section 18 of the Constitution.

5 S Woolman 'On the Fragility of Associational Life: a Constitutive Liberal's Response to Patrick Lenta' (2009) 25 South African Journal of Human Rights 280-305.

6 P Lenta 'Taking Diversity Seriously: Religious Associations and Work-related Discrimination' (2009) 126 South African Law Journal 827-860.

7 John Rawls Political Liberalism (1992) 58ff.

8 Ibid 50.

9 Famously, John Stuart Mill On Liberty (1860) available at http://www.constitution.org/jsm/liberty.htm stated that '[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.

10 See 'Catholic Sex Abuse Cases' and several comments therein at http://en.wikipedia.org/wiki/Catholic_sex_abuse_cases.

11 Ibid.

12 Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC) para 187.

13 J Cochrane, J De Gruchy and S Martin Facing the Truth: South African Faith Communities and the Truth and Reconciliation Commission (1999) 34.

14 This is one of the key factors that leads Brian Barry Culture and Equality (2000) 176 to conclude that laws prohibiting employment discrimination should not be applied to religious associations.

15 J Rutherford 'Equality as the Primary Constitutional Value: the Case for Applying Employment Discrimination Laws to Religion' (1996) 81 Cornell L.Rev. 1049, 1100.

16 Rawls (note 6 above) xviii-xix places the 'problem of stability' between a plurality of comprehensive religious, philosophical, and moral doctrines at the heart of his development of a form of political liberalism.

17 A similar approach is adopted by J Rutherford (note 14 above) 1126.

18 Indeed, the authors of the RICSA Report (note 12 above) 73 state that it 'stands as an indictment of the faith communities that for the most part they continue to see racial, economic and gender oppression as separate categories'.