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# **Equality and Sovereignty of Religious Institutions: A South African Perspective**

Johan D. van der Vyver\*

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In his presentation on “Equality in Sheep’s Clothing,” Professor Brett Scharffs critically analyzed several instances that, in his opinion, exemplify a trend in recent times to afford preference to equality norms over freedom of religion. His analysis was mainly focused on the following: a case where, in the United States, an educational institution forfeited tax-exemption privileges because it declined, on religious grounds, to admit black students;<sup>1</sup> a case where an institution caring for people with developmental disabilities in Ontario, Canada, dedicated to Evangelical Christianity was condemned by a secular court for dismissing an employee who had engaged in a same-sex relationship;<sup>2</sup> two judgments of the European Court of Human Rights (ECHR) which, in the one instance, upheld the dismissal of an employee of the Church of Jesus Christ of Latter-day Saints because the employee committed marital infidelity,<sup>3</sup> while, in the other instance, deciding on the very same day that the dismissal of an employee of the Roman Catholic Church for marital infidelity constituted a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms;<sup>4</sup> and finally, the closing of a Catholic organization, by church authorities, that provided adoption services in Washington D.C. because legislation compelled them to facilitate adoptions by same-sex couples.<sup>5</sup>

I shall confine my substantive comments, in the second part of this essay, to the two judgments of the ECHR. Those comments will be preceded, in the first part of the essay, by certain conceptual clarifications and explanatory notes on the special comparative relevance to our inquiry of South African law. Following our comments on the judgments of the ECHR, with reference also to German jurisprudence featured in those judgments, I shall, in the third part, focus on certain South African statutory provisions and case law concerning church-state relations. I shall conclude my discussion, in the fourth part, with some observations.

## I. Religious Freedom, Autonomy and Sphere Sovereignty

It seems to me that the crux of the problem under consideration is not exactly a matter of “the ascendancy of equality over freedom,” but rather interference by the repositories of political power in the internal affairs of religious institutions. That, in any event, is how the matter is depicted and regulated in South African law.

### *Individual and Group Rights*

Freedom of religion, belief and opinion is, by its very nature, an individual right that can be exercised by “everyone,” either individually or in community with other (individual)

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1. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
  2. Ontario Human Rights Comm’n v. Christian Horizons, [2010] 319 D.L.R. 4th 477 (Can.).
  3. Obst v. Allemagne, App. No. 425/03, Eur. Ct. H.R. (2010), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=obst%20%7C%20425/03&sessionid=90483822&skin=hudoc-en>.
  4. Schüth v. Allemagne, App. No. 1620/03, Eur. Ct. H.R. (2010), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=1620/03&sessionid=79414695&skin=hudoc-pr-en>.
  5. *See, e.g., Gay Adoption to Proceed: UK Catholic Agency Loses Fight over Same-Sex Parents*, HUFFINGTON POST (Aug. 22, 2010, 8:13 AM), [http://www.huffingtonpost.com/2010/08/22/catholic-adoption-agency-\\_n\\_689711.html](http://www.huffingtonpost.com/2010/08/22/catholic-adoption-agency-_n_689711.html).

members of a religious community. Freedom of religion can also take on the form of a collective group right; that is to say, a right that vests in an individual in the capacity of belonging to a particular category of persons, such as the rights of a child (the repository of such a right is an individual, but one that falls within the category of persons under the age of 18 years).<sup>6</sup> The right to self-determination of a religious community is a typical example of a collective group right within the range of religious freedom.<sup>7</sup>

These freedoms must be clearly distinguished from the competence of a group entity, such as a church institution, to regulate and administer its internal affairs without interference by outside forces, including the agencies of state authority. The entitlement of private educational institutions or religious organizations to determine who to admit within their ranks, who to employ for the exercise of their calling, or what conditions to apply for the rendering of their services, vests in the institution or organization as such. It is, by its very nature, an institutional group right.<sup>8</sup> The problem posed by Professor Scharffs is primarily one within the cadre of state interference in the internal affairs of non-state institutions, such as a church or other religiously-committed organization. It thus violates the internal sphere sovereignty of the group entities concerned. In this context, further conceptual clarity is called for.

### ***Sphere Sovereignty and Autonomy***

A distinction should be made between the exercise of power by an organization in virtue of a concession granted to it by another organization on the one hand, and the exercise of internal authority by an organization as of right on the other. Contemporary Calvinism refers to the first instance of domestic authority as a matter of autonomy, and the second as a matter of internal sphere sovereignty.<sup>9</sup> Autonomy in this sense is confined to instances where the organization granting the power of domestic governance, and the recipient of such a grant, function within the enclave of a single social structure. The institution entrusted with autonomous power invariably forms part of an overarching organization that grants the power and is essentially structured as a subordinate part of that overarching organization. Autonomous powers may thus be afforded by a central governmental institution to regional and local political authorities within the domain of a single body politic. Autonomous powers may similarly be entrusted by the central power base of a church institution to subordinate local congregations.

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6. See JOHAN D. VAN DER VYVER, LEUVEN LECTURES ON RELIGIOUS INSTITUTIONS, RELIGIOUS COMMUNITIES AND RIGHTS 72 (2004) (defining the concept of collective group rights).

7. *Id.* at 77.

8. *Id.* (defining the concept of institutional group rights).

9. *Id.* at 43-45; see also Johan D. van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations*, in CHURCH AUTONOMY: A CONTEMPORARY SURVEY 645, 656 (Gerhard Robbers ed., 2001); Johan D. van der Vyver, *The Jurisprudential Legacy of Abraham Kuyper and Leo XIII*, 5 J. MKTS. & MORALITY 211, 220-21 (2002) [hereinafter van der Vyver, *Jurisprudential Legacy*]; Johan D. van der Vyver, *Culture and Equality: An Egalitarian Critique of Multiculturalism by Brian Barry*, 17 CONN. J. INT'L L. 323, 329-30 (2002) (book review).

Sphere sovereignty, on the other hand, implies the relationship between two or more structurally distinct social entities, such as church and state.<sup>10</sup> Here, the internal sphere of competencies of each of the respective institutions is not dependent on a concession of the other, but belongs to each one in its own right and is founded on its existence and functioning as an independent component of human society. It is fair to conclude that the concerns expressed by Professor Scharffs, evaluated on the basis of this vital distinction, amounts to interpreting power structures which ought to be treated as instances of sphere sovereignty as though they were matters of autonomy.

### *The South African Context*

The state of affairs relating to the sovereignty of religious institutions as regulated by the Constitution of the Republic of South Africa, Act 108 of 1996, offers a commendable comparison with the problem highlighted by our introductory speaker. In the South African constitutional dispensation, equality is a preferred right.

Comparative analysis should be sensitive to distinct foundational predilections that permeate the human rights regime of the different jurisdictions being surveyed. Every system of human rights protection is founded on, or affords special prominence to, a particular basic norm — a *Grundnorm* — of the entire rights regime: in the United States, the First Amendment freedoms with special prominence being afforded to freedom of speech; in Germany, human dignity; in Canada, perhaps, the principle of equal protection.<sup>11</sup>

Equal protection and the proscription of discrimination is without a doubt the *Grundnorm* of the South African constitutional dispensation. Given the history of racial discrimination in that country, this stands to reason. The Constitution defines the “new South Africa” as “an open and democratic society based on human dignity, equality and freedom.”<sup>12</sup> In a recent judgment of the Constitutional Court, Justice Froneman stated, with a view to this provision: “Equality, together with dignity and freedom, lie at the heart of the Constitution.”<sup>13</sup> The Constitution accordingly protects the equality of everyone before the law and “the right to equal protection and benefit of the law,”<sup>14</sup> subject, though, to remedial action “to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination” of the past.<sup>15</sup> It prohibits unfair discrimination, directly or indirectly, by the state and by other persons based on “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,” or

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10. VAN DER VYVER, *supra* note 6, at 32-33, 41-43; van der Vyver, *Jurisprudential Legacy*, *supra* note 9, at 217-18.

11. Johan D. van der Vyver, *Constitutional Protection of Children and Young Persons*, in *THE LAW OF CHILDREN AND YOUNG PERSONS*, 265, 282 (J.A. Robinson ed., 1997); Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 *EMORY INT'L L. REV.* 499, 508 (2005).

12. S. AFR. CONST., 1996 § 39(1)(a); and see also §§ 1(a), 7(1), 36(1).

13. *Bengwenyana Minerals Ltd. v. Genorah Res. Ltd.* 2011 (3) BCLR 229 (CC) at 3 (S. Afr.).

14. S. AFR. CONST., 1996 § 9 (1).

15. *Id.* § 9 (2).

on other similar grounds.<sup>16</sup> The constitutional right to equality is therefore “foundational to the open and democratic society envisaged by the Constitution.”<sup>17</sup> It is “a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance.”<sup>18</sup> In South Africa, equality does not impose itself “in sheep’s clothing”; it is a core value within the structures of all legal regulations.

The special significance of the basic norm emerges when different constitutionally protected rights and freedoms come into conflict with one another. One should, in such cases, always try to reconcile the conflicting rights and freedoms, but where that becomes too challenging, the provision that is most supportive of the basic norm will prevail. In our discussions today, the question is exactly how to construe a fair balance between the dictates of sphere sovereignty and equality.

The constitutional proscription of unfair discrimination in South Africa is, for purposes of the present survey, quite unique in two special respects: (a) sexual orientation is included as one of the grounds that would render differentiations for legal purposes a matter of unfair discrimination (unless it can be proven that the differentiation “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”<sup>19</sup>); and (b) the Constitution also makes provision for the proscription of discrimination by persons and institutions other than the state. To this latter end, the Promotion of Equality and Prevention of Unfair Discrimination Act was enacted in 2000.<sup>20</sup> Since the Act “binds the State and all persons”<sup>21</sup> and proclaims that “[n]either the State nor any person may unfairly discriminate against any person,” one might expect that discrimination by religious organizations based on gender or sexual orientation has been outlawed for all ends and purposes in South Africa. And let it not pass unnoticed that persons under an obligation to uphold the provisions of the Bill of Rights, including the dictates of equality and non-discrimination, include “a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.”<sup>22</sup>

Rest assured, though, that South African courts have thus far succeeded in finding a way within the labyrinth of constitutional constraints to uphold the sphere sovereignty of religious institutions. This will appear more fully in the third section of this essay.

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16. *Id.* § 9 (3,4); *See also* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 1(xxii) (“prohibited grounds”) ¶ (a) (S. Afr.).

17. *Strydom v. Nederduitse Gereformeerde Gemeente, Moreletta Park* 2009 (4) SA 510 (Equality Court, TPA) at 516 ¶ 14 (S. Afr.); *see also Prince v. President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) at 816 ¶ 49 (S. Afr.); *Prince v. President, Cape Law Society and Others* 2002 (3) BCLR 231 (CC) at 54-55 ¶ 49 (S. Afr.).

18. *Minister of Finance and Another v. Van Heerden* 2004 (6) SA 121 (CC) at 132-133 ¶ 22 (S. Afr.); *see also Minister of Education and Another v. Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (CPD) at 221 ¶ 31 (S. Afr.); *Strydom*, 2009 (4) SA 510 at ¶ 10.

19. S. AFR. CONST. 1996 § 36(1).

20. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.).

21. *Id.* § 5(1).

22. S. AFR. CONST., 1996 § 8(2).

## II. “Self-Determination” of Religious Institutions in Germany

On September 23, 2010, the ECHR handed down judgments in two distinct cases based on similar facts, but which came to opposite conclusions. The Applicants in both cases were employees of church institutions and were dismissed, again in both instances, because they were involved in extra-marital relations.<sup>23</sup> The complaint against their dismissal was essentially based on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which protect the right of everyone “to respect for his private and family life, his home and his correspondence.”<sup>24</sup> The facts in these two cases are summarized in the presentation of Professor Scharffs.

### *Obst and Schüth Revisited*

It appears from Professor Scharffs’ summary that the dismissal of Michael Heinz Obst, Director for Europe in the Department of Public Relations of the Church of Jesus Christ of Latter-day Saints (the Mormon Church), was upheld by the ECHR on the basis that the labor courts of Germany, in reviewing the legality of his dismissal, adequately considered the impact of the discharge on the Applicant’s personal and family life.<sup>25</sup> The ECHR noted that the effect on the personal and family life of the Applicant would be minimal, given the fact that Mr. Obst was still relatively young and should be able to find alternative employment without too much hassle.<sup>26</sup> The ECHR also noted that Mr. Obst, upon accepting the position of Director for Europe, was, or should have been, aware of the special premium placed by the Mormon Church on marital fidelity.<sup>27</sup> His dismissal by the Mormon Church could therefore not be faulted.

In the case of Bernhard Josef Schüth, organist and choirmaster of the Catholic congregation of St. Lambert in Essen, Germany, the ECHR came to the opposite conclusion. The marriage of Mr. Schüth broke down in 1994. He subsequently lived with another woman in an extra-marital relationship beginning in 1995. At the time of his dismissal by the Church, that other woman was expecting his baby. The ECHR paid special attention to the question of whether or not the labor courts of Germany considered the impact of his dismissal on his personal and family life and noted that the legal protection afforded to the rights of the Applicant by the European Convention was never mentioned in proceedings before the labor courts.<sup>28</sup> The labor courts consequently failed to strike a balance between the interests of the Catholic Church and the rights of the Applicant.<sup>29</sup> The signature of Mr. Schüth on his contract of employment cannot be interpreted as an indisputable undertaking to lead a life of abstinence following the break-up of his marriage or in the event of a divorce.<sup>30</sup> The fact that

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23. *Obst*, App. No. 425/03, Eur. Ct. H.R. (2010); *Schüth*, App. No. 1620/03, Eur. Ct. H.R. (2010).

24. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S 222 [hereinafter European Convention].

25. *Obst*, App. No. 4205/03, Eur. Ct. H.R. at ¶ 49.

26. *Id.* ¶ 48.

27. *Id.* ¶ 50.

28. *Schüth*, App. No. 1620/03, Eur. Ct. H.R. at ¶ 67.

29. *Id.* ¶ 74.

30. *Id.* ¶ 71.

the Applicant would only have limited opportunities to find alternative employment received special emphasis in the opinion of the ECHR (at the time, he had a temporary job at a Protestant congregation).<sup>31</sup> Since the labor court neglected to strike a balance between the rights of the Applicant, in respect to his private and family life, and the interests of the Church, the ECHR decided that the respect for the private and family life of Mr. Schüth, as protected by Article 8 of the European Convention, had been violated. His discharge consequently constituted a violation of the European Convention.

More recently, in *Siebenhaar v. Germany*, the ECHR reiterated the principles outlined in *Obst* and *Schüth*.<sup>32</sup> In this instance, though, the Applicant's rights in contention were based on the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights and Fundamental Freedoms. Astrid Siebenhaar was employed by a day-care center of a congregation in Pforzheim of the Evangelical (Lutheran) Church. She was discharged by church authorities when they were alerted to the fact that she was a member of the Universal Church of Humanism and, in fact, also conducted primary education classes within that religious sect. The ECHR, following the reasoning in *Obst*, decided that her dismissal did not amount to a violation of the freedom of religion provisions of the European Convention.

### ***The Doctrine of Positive Obligation***

It must be emphasized that the ECHR does not have jurisdiction over the Mormon Church, the Roman Catholic Church or the Lutheran Church. It can only adjudicate compliance by High Contracting Parties (Member States of the Council of Europe) with their obligations under the European Convention.

However, the ECHR has developed the "doctrine of positive obligation," based on Article 1 of the European Convention, which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention."<sup>33</sup> In virtue of this provision, High Contracting Parties are not only obligated to refrain from human rights violations through state action, they must also put laws and procedures in place that will protect the rights and freedoms of their nationals against infringement by non-state actors.<sup>34</sup> In *Obst*, the ECHR referred to the principle of positive obligation as "the adoption of measures aimed at respect for the private life, even in mutual relations between

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31. *Id.* ¶ 73.

32. *Siebenhaar v. Allemagne*, App. No. 18136/02, Eur. Ct. H.R. (2011), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Siebenhaar%20%7C%2018136/02&sessionId=79867538&skin=hudoc-en>.

33. European Convention art. 1, Sept. 3, 1953, 213 U.N.T.S. 222, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf>.

34. See, e.g., *HLR v. France*, App. No. 24573/94, 1997 Eur. Ct. H.R. 23 ¶ 40 (1997); *A v. The United Kingdom*, App. No. 25599/94, 1998-IV Eur. Ct. H.R. ¶ 22 (1998). Many years ago, an American court also seemed to subscribe to the same idea by proclaiming: "Denying includes inaction as well as action . . . the omission to protect, as well as the omission to pass laws for protection." *United States v. Hall*, 26 F.Cas. 79, 81 (C.C.S.D. Ala. 1871). However, the principle of state action was the one that prevailed in the United States.



individuals,”<sup>35</sup> and it added that “it is required of the State, as a component of its positive obligation under Article 8, to recognize the complainant’s right to respect for his private and family life as against measures enforced by the Mormon Church for his dismissal.”<sup>36</sup> Germany complied with its positive obligation by establishing labor courts and by making provisions for the review of judgments of those courts by the Federal Constitutional Court (*das Bundesverfassungsgericht*),<sup>37</sup> and further by affording the Applicant the opportunity to take his case to a labor court in order to contest the legality of his dismissal in view of the rights associated with his ecclesiastical duties and by balancing his competing interests up against those of the Church.<sup>38</sup> In *Obst*, the ECHR decided that Germany, through its labor courts, complied with its positive obligation by taking into account the right of the Applicant to his private and family life and violation thereof by the Mormon Church. In *Siebenhaar* the ECHR came to a similar conclusion, holding that the German labor courts adequately considered the effect of the Applicant’s dismissal in relation to her freedom of religion.

In *Schüth*, the ECHR came to the opposite conclusion: The labor court did not balance the entire scope of the conflicting interests that were at issue: It made no mention of the family life of the Applicant,<sup>39</sup> and “the interests of the ecclesiastical employer was [sic] not weighed up against the right of the Applicant to respect for his private and family life as guaranteed by Article 8 of the European Convention, but [the labor court] only considered his interests of remaining in the employ of the Church.”<sup>40</sup> Therefore, the protection afforded to him did not comply with the positive obligation of Germany as a High Contracting Party to the European Convention.

The question that the ECHR therefore had to decide was not primarily whether or not the Mormon or Catholic or Lutheran Churches violated the Convention provisions relating to the right of everyone to respect for their private and family life,<sup>41</sup> or with a view to freedom of religion,<sup>42</sup> but whether Germany adequately secured that right and freedom from infringement by the churches concerned. Proceedings in the German labor courts, and not the discriminatory practices of the concerned churches, were therefore at issue.

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35. *Obst*, App. No. 425/03, Eur. Ct. H.R. at ¶ 41 (“l’adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux.”); *See also Schüth*, App. No. 1620/03, Eur. Ct. H.R. at ¶ 55; *Siebenhaar*, App. No. 18136/02, Eur. Ct. H.R. at ¶ 38.

36. *Obst*, App. No. 425/03, Eur. Ct. H.R. at ¶ 43 (“l’Etat était tenu, dans le cadre de ses obligations positives découlant de l’article 8, de reconnaître au requérant le droit au respect de sa vie privée contre la mesure de licenciement prononcée par l’Eglise mormone.”); *accord Siebenhaar*, App. No. 18136/02, Eur. Ct. H.R. at ¶ 40; *Schüth*, App. No. 1620/03, Eur. Ct. H.R. at ¶ 57.

37. *Siebenhaar*, App. No. 18136/02, Eur. Ct. H.R. at ¶ 42; *Obst*, App. No. 425/03, Eur. Ct. H.R. at ¶ 45; *Schüth*, App. No. 1620/03, Eur. Ct. H.R. at ¶ 59.

38. *Id.*

39. *Schüth*, App. No. 1620/03, Eur. Ct. H.R. at ¶ 67.

40. *Id.* (“Les intérêts de l’Eglise employeur n’ont ainsi pas été mis en balance avec le droit du requérant au respect de sa vie privée et familiale, garanti par l’article 8 de la Convention, mais uniquement avec son intérêt d’être maintenu dans son emploi.”)

41. European Convention, *supra* note 24, art. 8.

42. *Id.* art. 9.

### ***The Status of Religious Organizations in Germany***

The status of churches and other religious institutions in Germany is governed by the Church Clauses (*die Kirchenartikel*) in the Weimar Constitution of August 11, 1919.<sup>43</sup> These were incorporated into the German Constitution by Article 140 of the *Grundgesetz für die Bundesrepublik Deutschland* of 1949.<sup>44</sup> Article 137(3) of the Weimar Constitution provides as follows: “Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.”<sup>45</sup>

The principle embodied in this provision is commonly referred to as “the right to self-determination of churches” (*das kirchlichen Selbstbestimmungsrechts*).<sup>46</sup> Its details were specified in a judgment of the *Bundesverfassungsgericht* of 1985<sup>47</sup> in an appeal against two decisions of the German Federal Labor Court relating to (a) the dismissal of a medical doctor in a Catholic hospital in Essen,<sup>48</sup> and (b) the dismissal of an accountant at a Catholic youth hostel in München.<sup>49</sup> The doctor was dismissed because he publicly testified to his personal view on abortions (which was in conflict with official church policy on the matter), and the accountant because he defected from the Catholic Church.

The *Bundesverfassungsgericht* decided that the provisions of Article 137(3) of the Weimar Constitution apply not only to churches and their independent components, but also to other institutions, irrespective of their legal construction, which in view of their purpose and disposition, are self-evidently, according to perceptions of the church, associated with the church in a certain way and which may be required to undertake and to execute a component of the church’s calling.<sup>50</sup> The constitutional guarantee of the right to self-determination remains of vital importance for purposes of specifying these labor relations, and includes the competence of churches to require their employees to uphold the prevailing principles of the

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43. *Die Verfassung des Deutschen Rechts* [Constitution] Aug. 11, 1919, arts. 137-141 [hereinafter WEIMAR CONST.].

44. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 140 (Ger.) (incorporating the provisions of art. 136-40 into the Grundgesetz).

45. WEIMAR CONST. art. 137(3) (July 31, 1919) (Ger.) (“Jede Religionsgesellschaft ordnet und verwaltet ihre Angelegenheiten selbständig innerhalb der Schranken des für alle geltenden Gesetzes. Sie verleiht ihre Ämter ohne Mittwirkung des Staates oder der bürgerlichen Gemeinschaft.”).

46. Selbstbestimmungsrecht, as exemplified by the Weimar Constitution, must not be confused with the right to self-determination of contemporary international law. The right to self-determination of contemporary international law does include the right of members of religious communities to practice their religion, and to form, join, and maintain religious association. See S. AFR. CONST., 1996 §31(1) (a) and (b). It does not include the right of religious institutions to regulate and administer their own internal affairs. This is a matter of sphere sovereignty.

47. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 70, 138, Loyalitätspflicht (June 4, 1985) (Ger.).

48. 2 AZR 591/80 (October 21, 1982); 2 AZR 628/80 (October 21, 1982).

49. 7 AZR 249/81 (Mar. 23, 1984).

50. BVerfGE, *supra* note 47, at 162, ¶ B.II. 1a. (“Diese Selbstordnungs- und Selbstverwaltungsgarantie kommt nicht nur den verfaßten Kirchen und deren rechtlich selbständigen Teilen zugute, sondern allen der Kirche in bestimmter Weise zugeordneten Einrichtungen ohne Rücksicht auf ihre Rechtsform, wenn sie nach kirchlichem Selbstverständnis ihrem Zweck oder ihrer Aufgabe entsprechend berufen sind, ein Stück des Auftrags der Kirche wahrzunehmen und zu erfüllen”).

religious and ethical doctrines of the church.<sup>51</sup> Employees of churches are accordingly bound to uphold “loyalty commitments” (*Loyalitätsobliegenheiten*) toward the church and the principles for which it stands.<sup>52</sup>

Churches, like all other persons, must execute their freedom of contract subject to the labor laws of the state.<sup>53</sup> This does not mean, however, that the labor law of the state will necessarily in all instances trump the right to self-determination of a church.<sup>54</sup> It is therefore necessary to strike a balance between the conflicting interests inherent in obligatory labor practices and the demands of ecclesiastical autonomy, and in this process, a special premium is to be placed on the personal image of churches (*Selbstverständnis der Kirchen*).<sup>55</sup>

After all, it remains constitutional to leave it up to the Church itself to take binding decisions as to what “the credibility of the Church and the advocacy thereof” requires, what constitutes “specific ecclesiastical matters,” what the “closeness” of such matters entails, what is included in the “essential principles of faith-related and ethical doctrine,” and what should be regarded as — at times, serious — violations of these doctrines.<sup>56</sup>

The judgments of the ECHR in *Obst*, *Schüth* and *Siebenhaar* added a particular dimension to the principles which Germany is required to demand of its labor courts: the effects of dismissal of an employee, for whatever reason, on the personal and family life, or on religious freedom, of the employee. This particular constraint on the constitutional right of church institutions to require loyalty of its workers, with regard to the principles and practices upheld by the church as part of its confession of faith, seems to place a special burden on the “right to self-determination” of religious institutions. It might happen that church institutions are constrained, in view of human rights standards deriving from the European Convention, to put up with the services of someone who commits marital infidelity (*Obst* and *Schüth*), who turns out to be an active member of a sect whose beliefs and practices are at odds with those of the employer church (*Siebenhaar*), who publicly contradicts established dogma of the Church (2 AZR 591/80 and 2 AZR 628/80), or who terminates his or her membership of the Church (7 AZR 249/81). On the other hand, though, 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, or on his or her freedom of religion, and to ask themselves whether the consequences of the employee’s conduct, with regard to the calling of the church, was really of such a nature as to justify the negative effects his or her dismissal would have on his

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51. *Id.* at 165, ¶ B.II. 1a. (“Die Verfassungsgarantie des Selbstbestimmungsrechts bleibt für die Gestaltung dieser Arbeitsverhältnisse wesentlich . . . Dazu gehört weiter die Befugnis der Kirche, den ihr angehörenden Arbeitnehmern die Beachtung jedenfalls der tragenden Grundsätze der kirchlichen Glaubens- und Sittenlehre aufzuerlegen. . .”).

52. *See e.g., id.* ¶ A.pr and A.2.

53. *Id.* ¶ B.II. 1e.

54. *Id.*

55. *Id.* (“Dabei ist dem Selbstverständnis der Kirchen ein besonderes Gewicht beizumessen.”)

56. BVerfGE, *supra* note 47, at ¶ B.2a: “Es bleibt danach grundsätzlich den verfaßten Kirchen überlassen, verbindlich zu bestimmen, was ‘die Glaubwürdigkeit der Kirche und ihrer Verkündigung erfordert’, was ‘spezifisch kirchliche Aufgaben’ sind, was ‘Nähe’ zu ihnen bedeutet, welches die ‘wesentlichen Grundsätze der Glaubens- und Sittenlehre’ sind und was als — gegebenenfalls schwerer — Verstoß gegen diese anzusehen ist.”

or her personal and family life or religious freedom. It might turn out that the game was not worth the candle after all.

### **The South African Model**

The current South African Constitution can generally be described, as far as religion and religious diversity are concerned, as one of profound toleration and accommodation. It, in general, allocates to church institutions the rights in the Bill of Rights to the extent required by the nature of the right and the nature of the church as a legal person;<sup>57</sup> it guarantees the free exercise of religion;<sup>58</sup> it sanctions freedom of assembly<sup>59</sup> and freedom of association of “[e]veryone”<sup>60</sup>; it guarantees the right to self-determination of religious communities,<sup>61</sup> and makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;<sup>62</sup> it envisions the establishment, by means of national legislation, of a Pan South African Language Board charged, *inter alia*, with promoting and ensuring respect for “Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.”<sup>63</sup>

The Constitutional Court, on several occasions, emphasized the vital importance *for the state* of religion as a component of South Africa’s constitutional democracy. In a case instructing the legislature to amend a provision in the Marriage Act that was based on the common-law definition of a marriage as “a union of one man with one woman, to the exclusion, while it lasts, of all others,”<sup>64</sup> in order to make allowance for same-sex marriages, the Constitutional Court was confronted with *amici* briefs claiming, with reference to texts from the Old and New Testaments, that from a religious perspective, “the institution of marriage simply cannot sustain the intrusion of same-sex unions.”<sup>65</sup> Justice Albie Sachs, delivering the unanimous decision of the Court, noted the many difficulties attending “the relationship foreshadowed by the Constitution between the sacred and the secular.”<sup>66</sup> He went on to say:

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 social 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. Religion is not just a question of belief or doctrine. It is part of the people’s temper and culture, and for many believers a significant part of their way of life. Religious

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57. S. AFR. CONST., 1996 § 8(4).

58. *Id.* § 15(1).

59. *Id.* § 17.

60. *Id.* § 18.

61. *Id.* § 31.

62. *Id.* §§ 181(1)(c), 185-86. See Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 (S. Afr.).

63. S. AFR. CONST., 1996 § 6(5)(b)(ii).

64. *Minister of Home Affairs v. Fourie and Others; Lesbian and Gay Equal. Project and Others v. Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC) at ¶ 3 (S. Afr.).

65. *Lesbian and Gay Equal. Project* (3) BCLR at ¶ 88.

66. *Id.* ¶ 89.

organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.<sup>67</sup>

### ***Equality Concerns***

As noted earlier, equal protection and non-discrimination constitute the most basic norm of the South African constitutional dispensation, and unfair discriminatory practices based on, amongst other things, gender and sexual orientation are presumed to be unfair. The prohibition of such discriminatory practices by the state, as well as by private individuals and group entities (legal persons other than the state), is included in the constitutional proscription of discrimination. Drafters of the 1996 Constitution instructed the legislature to enact a law to afford substance to the prohibition of unfair discrimination by non-state perpetrators. The Promotion of Equality and Prevention of Unfair Discrimination Acts was enacted in 2000 to give effect to this instruction.

Imposing the constitutional proscription of unfair discrimination on, for example, religious institutions, was, in a sense, unfortunate. Many mainline churches still uphold age-old practices that amount to gender discrimination against women, and does one really want to entrust the state with the power and obligation to compel the Roman Catholic Church, the Greek Orthodox Church, Jewish religious institutions, and the *Gereformeerde Kerk* (related to a Church in the Netherlands with the same name and the Christian Reformed Church in the United States) to ordain women as part of their clergy? Surely, that would amount to political totalitarianism, which “becomes evident when State authority extends into the private enclave of non-State societal circles, such as family life, academic institutions and the sovereign sphere of the churches.”<sup>68</sup> Nor has the Promotion of Equality and Prevention of Unfair Discrimination Act brought comfort in this regard.

The Act singled out unfair discrimination based on race, gender, and disability for special scrutiny, but applies broadly to discrimination by the state and by non-state perpetrators. It thus deviated from the constitutional legislative intent in at least three respects:

First, it should be clear to everyone that the drafters’ instruction only applied to unfair discrimination by non-state perpetrators,<sup>69</sup> yet the legislature included unfair discrimination by the state in its provisions.<sup>70</sup>

Second, drafters of the Constitution were sensitive to the fact that discrimination in the private sphere should be made subject to less, or other, limitations than those applying to discrimination by the state, but the legislature saw fit not to make that distinction.<sup>71</sup>

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67. *Id.* ¶ 90.

68. Johan D. van der Vyver, *The Function of Legislation as an Instrument of Social Reform*, 93 S. AFR. L.J. 56, 66 (1976); see also Johan D. Van der Vyver, *Gelykbergtiging*, 61 J. CONTEMP. ROMAN-DUTCH LAW 367, 395 (1998).

69. The instruction to enact legislation (“[n]ational legislation must be enacted”) is part of S. AFR. CONST., 1996 § 9(4), which deals exclusively with unfair discrimination in the private sphere (emphasis added).

70. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 6 (“Neither the State nor any person may unfairly discriminate against any person.”) (S. Afr.).

71. *Id.*

Third, the proscription of unfair discrimination by the state and in the private sphere based on race, gender and disability was singled out by the legislature for special scrutiny and was subjected to limitations that do not apply to unfair discrimination on any of the other grounds specified in the Constitution.<sup>72</sup>

In terms of the Act, discrimination based on gender includes “any . . . religious practice, which impairs the dignity of women and undermines equality between women and men.”<sup>73</sup> This provision clearly implicates the exclusion of women from ecclesiastical offices. Since gender is included in the list of grounds that *prima facie* renders differentiations for legal purposes to be a matter of unfair discrimination,<sup>74</sup> the burden of proof would be on a church institution to show that exclusion of women from ecclesiastical offices is in fact not “unfair.”<sup>75</sup> The Act contains a long list of circumstances that may be considered in this regard, for example, “whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned,”<sup>76</sup> “the impact or likely impact of the discrimination on the complainant,”<sup>77</sup> and “whether the discrimination has a legitimate purpose.”<sup>78</sup> It does not seem as though these considerations would contribute to alleviate the burden of proof resting on a church institution in any way; and as this writer observed before, “The mere fact that a church may be compelled to justify its internal legal provisions before a secular tribunal, amounts to totalitarianism of the worst kind.”<sup>79</sup>

### ***Sphere Sovereignty of Religious Institutions***

In spite of the Act, South African authorities have remained particularly sensitive to the internal sphere sovereignty of religious institutions.

Discrimination based on sexual orientation by a church institution was at issue in the case of *Strydom v. Dutch Reformed Congregation, Moreleta Park*, decided by the Equality Court, Transvaal Provincial Division on August 27, 2006.<sup>80</sup> Johan Daniel Strydom was employed by the Moreleta Park congregation as a music instructor (organ teacher) in its Arts Academy. He was fired by the Church authorities because he became involved in a same-sex relationship with another man. Mr. Strydom challenged his dismissal before the Equality Court and was awarded compensation in the amount of R.75 000 for pain and suffering and a further R.11 000 for loss of income. The Reverent Dirkie van der Spuy of the Moreleta Park congregation testified that elders and deacons of the Church may be gay but are not allowed to practice homosexuality. The dismissal of Mr. Strydom, according to the Equality Court, amounted to

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72. *Id.* §§ 7-9.

73. *Id.* § 8.

74. *Id.* § 1(xxii).

75. *Id.* § 13(2)(b)(ii).

76. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 14(2)(c).

77. *Id.* § 14(3)(b).

78. *Id.* § 14(3)(f).

79. Johan D. Van der Vyver, *Constitutional Perspective of Church-State Relations in South Africa*, 1999 BYU L. REV. 635, 664-67 (1999); see also *Gelykberegtiging*, *supra* note 68, at 397 (own translation from the original Afrikaans).

80. *Strydom v. Nederduitse Gereformeerde Gemeente, Moreletta Park* 2009 (4) SA 510 (Equality Court, TPA) (S. Afr.).

unbecoming discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act. The Church did not take the matter on appeal.

The Equality Court based its decision mainly on the fact that Mr. Strydom (a) served as an independent contractor, (b) was in no way involved in the spiritual activities of the Church, and (c) was not even a member of the particular Dutch Reformed Church, which brought suit in the matter.<sup>81</sup> The Equality Court made it abundantly clear that it would not have ruled against the Church if Mr. Strydom's contractual obligations included functions that were part of the spiritual mission of the Church. It referred in this regard to the exposition by a leading analyst of the religion clauses in the South African Constitution, Paul Farlam, of instances where the state ought not to interfere in the internal affairs of religious institutions, and cited (with approval) the following passage from the Farlam article:

The first scenario involves discrimination against a person with *spiritual responsibilities* (such as a priest or a candidate for ordination). Few exercises are more central to religious freedom than the right of a church to choose its own spiritual leaders. If a court were to hold that churches could not deem sexual orientation, or any of the other enumerated ground[s] [sic] in the equality clause, a disqualifying factor for the priesthood, the effect on many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders. Where the appointment, dismissal and employment conditions of religious leaders (such as priests, imams, rabbis, and so forth) are concerned, religious bodies are likely to be exempted from compliance with legislation prohibiting unfair discrimination.<sup>82</sup>

The substance of this citation — although it was included in the judgment merely as an *obiter dictum* — must be commended. It reflects the spirit thus far maintained in practices and court judgments dealing with domestic affairs of religious institutions.

For example, public benefit activities that are exempt from income tax include “the promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity,” as well as “the promotion and/or practice of a belief,” and “the promotion of, or engaging in, philosophical activities.”<sup>83</sup> There are many racially-exclusive churches in South Africa,<sup>84</sup> but, to the best of my knowledge, none of those have been denied tax exemptions.

The law that was enacted in 2006 to afford legal sanction to same-sex marriages (referred to in the Act as “civil unions”) contains a provision that affords the right to a marriage officer

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81. The Churches denoted in English as Dutch Reformed actually comprise three quite distinct denominations (two distinct words in the Afrikaans language that are used to distinguish the three churches — “Gereformeerd” and “Hervormd” — can only be translated in English as “Reformed”). The Plaintiff in this case was a congregation of the “Nederduitse Gereformeerde Kerk” and Mr. Strydom was a member of the “Nederduitsch Hervormde Kerk”.

82. *Strydom*, 2009 (4) SA, *supra* note 80, ¶ 15, with reference to Paul Farlam, *Freedom of Religion, Belief and Opinion*, in 3 CONSTITUTIONAL LAW OF SOUTH AFRICA vol. 3 Ch. 41, 47 (Stuart Woolman et al. eds., 2nd ed. 2009).

83. Income Tax Act 58 of 1962, Ninth Schedule, Pt. I, ¶ 5.

84. Leaving aside adherents to traditional African religions and the many independent Christian churches in the African community (of which there are about 7,000 in South Africa), mention can be made of the Afrikaanse Protestantse Kerk (Afrikaans Protestant Church) which expressly reserves membership of the Church to whites only.

to inform the Minister of Home Affairs that “he or she objects on grounds of conscience, religion and belief to solemnizing a civil union between persons of the same sex, whereupon the marriage officer cannot be compelled to solemnise such civil unions.”<sup>85</sup>

In South Africa, courts of law will not “embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of . . . [religious] belief.”<sup>86</sup> However, should a conflict arise as to the legal rights and duties of parties to a dispute, a court will not decline to give a judgment in a matter, by reason of doctrinal issues, that might have a bearing on those rights and duties.<sup>87</sup> South African courts have thus entertained jurisdiction, following a schism, to decide which one of two religious factions was entitled to the use of a particular name,<sup>88</sup> or could lay claim to church property;<sup>89</sup> and they have taken decisions of an internal ecclesiastical tribunal on review.<sup>90</sup>

Religious institutions are particularly sensitive to the exercise of review powers by secular courts in regard to disciplinary proceedings of an ecclesiastical tribunal.<sup>91</sup> In South Africa, decisions of an ecclesiastical tribunal cannot be taken on appeal to a secular court, but such decisions are subject to review by a court of law.<sup>92</sup> The court exercising review powers will not interfere in the domestic affairs of the ecclesiastical institution duly constituted and operating in terms of its own rules, but will intervene if an ecclesiastical tribunal has failed to follow the internally prescribed procedural rules or acted *ultra vires*.<sup>93</sup> The tribunal must apply its mind to the matter and not take arbitrary decisions; it must remain within the confines of its authority and not act *ultra vires*; it must maintain good faith and not be motivated by malice, ill will or spite, and it must act reasonably.<sup>94</sup>

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85. Civil Union Act 17 of 2006 § 6 (S. Afr.).
86. *Christian Education SA v. Minister of Education of the Government of the RSA* 1999 (9) BCLR 951 (SE) at 958 (S. Afr.), *aff'd*, *Christian Education v. Minister of Education* 2000 (4) SA 757 (CC) (S. Afr.).
87. *Allen & others N.N.O. v. Gibbs & others* 1977 (3) SA 212 (SEC) 218 (S. Afr.).
88. *Old Apostolic Church of Africa v. Non-White Old Apostolic Church of Africa* 1975 (2) SA 684 (C) (S. Afr.).
89. *The Nederduitsche Hervormde Church v. The Nederduitsche Hervormde of Gereformeerde Church* 1893 (10) Cape L.J. 327 (S. Afr.).
90. *Jamile v. African Congregational Church* 1971 (3) SA 836 (D) (S. Afr.); *Theron v. Ring van Wellington van die NG Kerk in SA* 1976 (2) SA 1 (A) (S. Afr.); *Taylor v. Kurtstag NO & others* 2005 (1) SA 362 (W) (S. Afr.).
91. See Michael J. Broyd, *Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 203, 224 (John Witte Jr. & Johan D. van der Vyver eds., 1996) (noting that “the question of membership in the colony of the Church should be beyond review of a secular court”), cited with approval in *Taylor* 2005 (1) SA at ¶ 43.
92. *Du Plessis v. Synod of the Dutch Reformed Church* 1930 CPD 403, 420-21 (S. Afr.); *Taylor* 2005 (1) SA 362 (W) (S. Afr.).
93. *Odendaal v. Loggerenberg NNO (I)* 1961 (1) SA 712 (0) 719 (S. Afr.); *Yiba & others v. African Gospel Church* 1999 (2) SA 949 (CPD) 961 (S. Afr.); see also *NGK in Afrika (OVS) v. Verenigde Geref. Kerk in Suid-Afrika* 1999 (2) SA 156 (SCA) 170 (S. Afr.) (noting that the General Synod must comply with the internal rules of church law).
94. Johan D. van der Vyver, *Religion*, in 23 THE LAW OF SOUTH AFRICA ¶ 229 (W.A. Joubert & T.J. Scott, eds., 1986).



In conducting disciplinary hearings, an ecclesiastical tribunal must uphold the “elementary rules of justice.”<sup>95</sup> Emphasis is often placed on the right of a person under investigation to be heard in his or her own defense (*audi alteram partem*), but even then, the ultimate test is not *audi alteram partem* as such but “the fairness of the process” in light of the nature of the proceedings.<sup>96</sup> The *audi alteram partem* rule in any event does not apply if the person wanting to be heard lays claim to a privilege to which he or she will normally not be entitled.<sup>97</sup>

Upholding the basic principles of justice and other constitutional rights of members of a religious institution has become critical in South Africa due to, and to the extent of, applying the Bill of Rights obligations to juristic persons. In *Taylor v. Kurtstag*, the Witwatersrand Local Division of the High Court was confronted by exactly that dilemma.<sup>98</sup> The Plaintiff in the matter had been served a notice of excommunication (*cherem*) from the Orthodox Jewish Faith by a Jewish ecclesiastical court (*Beth Din*) and applied for the *cherem* to be set aside on the grounds that it violated his constitutional right to freedom of religion (Section 15(1) of the Constitution) and, as a component of the right to self-determination, the entitlement to practice his religion and maintain religious associations with fellow members of his faith (Section 31(1)(b) of the Constitution). That indeed was found to be the case, but the Court went on to consider the legality of those violations in view of the limitations provisions of the Constitution (Section 36). The Court noted that “[a] religious tribunal is subject to the discipline of the Constitution, but its being a religious body giving effect to the associational rights of its members, must be accounted for.”<sup>99</sup> Having noted that “the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded,” and in the absence of evidence of bias or bad faith on the part of the *Beth Din*,<sup>100</sup> the Court upheld the constitutionality of its *cherem*.

In December 2009, the Reverent Ecclesia de Lange, a minister in the Methodist Church of Southern Africa in Rondebosch, Cape Town entered into a same-sex union with Amanda van Aswegen. The Church, which does not condone same-sex marriage, suspended her in January 2010 from her post. De Lange is currently fighting to get her job back through internal church arbitration channels. The hearing was conducted behind closed doors in January, 2011. A disciplinary committee recommended that De Lange “continue under suspension until such time as the Methodist Church of Southern Africa makes a binding decision on ministers in same-sex unions.” In a statement on Facebook and other websites, De Lange proclaimed:

I desire to serve Jesus. I desire to be true to myself. I desire to minister within the Methodist Church of Southern Africa with integrity and be faithful to God’s call on my life.

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95. *Theron v. Ring van Wellington van die NG Kerk* 1976 (2) SA 1 (A) 10 (S. Afr.); *Odendaal* 1961 (1) SA 712 (O) 719 (S. Afr.).

96. *Taylor* 2005 (1) SA 362 (W) ¶ 87 (S. Afr.).

97. *Mankatshu v. Old Apostolic Church of Africa & others* 1994 (2) SA 458 (Tk AD) 463-64 (S. Afr.). See also *Jacobs v. Old Apostolic Church of Africa & another* 1992 (4) SA 172 (Tk GD) (S. Afr.) (holding that a member of a Church cannot insist on inspecting the books and financial records of the Church where no such right has been vested in him by the Constitution of the Church).

98. *Taylor* 2005 (1) SA 362 (W).

99. *Id.* ¶ 63.

100. *Id.* ¶ 62.

I have reached the point where I can no longer be silent. I have come to see that it is better to be rejected for who I am than to be accepted for who I am not.<sup>101</sup>

The matter is currently pending. It is submitted that if the Church were to terminate the Reverent De Lange's appointment as a minister, provided the proper procedures are applied by the Church, a court of law will not overrule that decision.

### ***Self-determination of Religious Communities***

While sphere sovereignty applies to the exercise of internal powers by, for example, a religious institution (an institutional group right), the right to self-determination of a religious community vests in individual members of the community (a collective group right).<sup>102</sup> It must be emphasized at the outset that the South African community is made up of extremely diverse and highly polarized population groups. There is a general tendency in the world today to promote homogeneity within the body politic. The Constitution of Nigeria, for example, placed an obligation on the State to encourage inter-marriage between members of different religious, ethnic, or linguistic communities for the purpose of "promoting national integration."<sup>103</sup> South Africa, by contrast, encourages pride in one's ethnic, linguistic, and religiously defined group identities. The constitutional preamble thus expresses the belief that all who live in South Africa are "united in our diversity."<sup>104</sup> It seeks to create, in the celebrated words of Archbishop Desmond Tutu, "[a] rainbow people."<sup>105</sup> The Constitution accordingly guarantees the right to self-determination of cultural, religious, and linguistic communities in accordance with international directives that apply in this regard.<sup>106</sup> In terms of the International Covenant on Civil and Political Rights, self-determination entails the following principle: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."<sup>107</sup>

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities similarly speaks of "the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any

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101. *Minister's Allies Talk of Court Action*, SUNDAY TIMES (Johannesburg), Feb. 6, 2011.

102. Van der Vyver, *supra* note 6, at 71-72; Johan D. van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESK-BOOK 85, 99-103 (Tore Lindholm, Bahiyayih Tazib-Lie & Cole Durham eds., 2004); van der Vyver, *Jurisprudential Legacy*, *supra* note 9, at 222; Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT'L L. REV. 499, 519-22, 525 (2005).

103. CONSTITUTION OF NIGERIA (1999), § 15(3)(c).

104. S. AFR. CONST., 1996, pmb1.

105. DESMOND TUTU, THE RAINBOW PEOPLE OF GOD: THE MAKING OF A PEACEFUL REVOLUTION (John Allen ed., 1994).

106. S. AFR. CONST., 1996, § 31, 235 (stating that the constitutional guarantee of self-determination extends to cultural, linguistic, and religious communities).

107. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171; *See generally* Felix Ermacora, *The Protection of Minorities Before the United Nations*, reprinted in 4 RECUEIL DES COURS 246 (1983).

form of discrimination.”<sup>108</sup> The South African Constitution captured the gist of these provisions by affording to cultural, religious and linguistic communities the entitlement “to enjoy their culture, practise their religion and use their language,”<sup>109</sup> and “to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”<sup>110</sup>

Implementation of these provisions can be illustrated with reference to the case of Sunali Pillay.<sup>111</sup> Ms. Pillay was a teenage South African girl of Hindu extraction. She had gained entry into the Durban Girls’ High School — one of the most prestigious state schools in South Africa — where she received excellent education. When she reached a certain stage of maturity, a golden stud was inserted in her nose, which is a custom in the Hindu community indicating that a girl has become eligible for marriage.<sup>112</sup> This brought her into conflict with the school authorities. The school’s code of conduct, signed by her parents as a condition for Sunali’s admission to Girls’ High, prohibited the wearing of any jewelry, except earrings, and then only under meticulous conditions specified in the code of conduct.<sup>113</sup> Sunali’s mother explained to the school authorities that her daughter did not wear the nose stud as a token of fashion but in deference to an age-old tradition of the Hindu community. The school management refused to grant Sunali an exemption from its dress code. A complaint was thereupon filed by Mrs. Pillay in the Equality Court, based on discrimination.<sup>114</sup> The Equality Court ruled in favor of the school,<sup>115</sup> but the Natal Provincial Division of the High Court set aside the decision of the Equality Court on appeal.<sup>116</sup> The matter eventually came before the Constitutional Court of South Africa. The Constitutional Court decided that refusal by the school authorities to grant Sunali an exemption from the jewelry provision in the school’s code of conduct amounted to unreasonable discrimination and was therefore unlawful.<sup>117</sup>

A case of similar dimensions came before the ECHR. Leyla Şahin was a Muslim student at Istanbul University in Turkey. She was excluded from classes because she wore a head scarf. A Turkish law banned the wearing of headscarves in all universities and official government buildings, basing the proscription on the fact that Turkey is a secular state. In 1998, Şahin filed a complaint under the European system for the protection of human rights and fundamental freedoms.<sup>118</sup> The Grand Chamber of the ECHR — the court of final instance in the European system of human rights protection — gave judgment in favor of Turkey. It decided that the headscarf ban is based on the constitutional principles of secularism and equality and consequently did not constitute a violation of the European Convention, nor did

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108. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. GAOR, 47th Sess., Supp. No. 49, (Vol. I), U.N. Doc. A/47/49, at 210, 212 (Dec. 18, 1992).

109. S. AFR. CONST., 1996, § 31(1)(a).

110. *Id.* § 31(1)(b).

111. *Pillay v. MEC for Education, Kwazulu-Natal, and Others* 2006 (6) SA 363 (EqC) (S. Afr.).

112. *Id.* at 366, ¶ 5.

113. *Id.* at 366, ¶ 3.

114. *Id.* at 367, ¶ 12.

115. *Id.* at 365, ¶ 1.

116. *Id.* at 379, ¶ 70.

117. *MEC for Education: Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) (S. Afr.).

118. *Leyla Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

her suspension from the University for refusing to remove the head scarf amount to a violation of the Convention.<sup>119</sup> Ms. Şahin subsequently left Turkey and is now living in Vienna.

The judgment of the South African Constitutional Court was based on the non-discrimination provisions in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000,<sup>120</sup> and was more precisely based on the proscription in the Act of discrimination based on religion and on culture.<sup>121</sup> Basing its decision on the proscription of discrimination was perhaps dictated by the fact that the case came to the Constitutional Court via the Equality Court, and therefore under the Promotion of Equality and Prevention of Unfair Discrimination Act. Had the matter been raised along a different route, the Court might have been constrained to deal with it under the religion prong of the right of everyone to “freedom of conscience, religion, thought, belief and opinion.”<sup>122</sup> It is somewhat surprising that the Court, while noting that prohibiting Sunali to wear a nose stud “affects other constitutional rights as well” (besides human dignity), mentioned freedom of expression only, and not freedom of religion.<sup>123</sup> This omission was perhaps prompted by the Court’s declining to decide definitively whether the wearing of a nose stud by Hindu women was a matter of religion or one of culture. The matter also fell squarely within the confines of the right to self-determination of cultural, religious, and linguistic communities, which, under the South African Constitution, includes the entitlement of such communities “to enjoy their culture, practice their religion and use their language.”<sup>124</sup>

### ***Limitations of the Right to Self-Determination***

The right to self-determination is not absolute but must be exercised in a manner that is consistent with the principles enunciated in the Bill of Rights.<sup>125</sup> Criminal conduct embarked upon in the name of religion cannot be legitimized under the rubric of self-determination. South African legislation accordingly prohibits female genital mutilation,<sup>126</sup> which in some jurisdictions is sought to be legitimized on religious grounds.

In *Prince v. President, Cape Law Society & Others*, the Constitutional Court was called upon to decide on the constitutionality of a law prohibiting the possession and use of the dependence-producing drug cannabis (better known in South Africa as “dagga” and similar to marijuana), in so far as that legislation was made applicable to its possession and use for religious purposes.<sup>127</sup> The applicant in the case was a law graduate whose application for

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119. See also *Kurtulmuş v. Turkey*, 2006-II Eur. Ct. H.R. 297; *Kose & others v. Turkey*, 2006-II Eur. Ct. H.R. 339.

120. The Promotion of Equality and Prevention of Unfair Discrimination Act, *supra* note 16, was enacted under S. AFR. CONST., 1996 § 9(4), to prohibit unfair discrimination by persons or institutions other than the State.

121. *MEC For Education* 2008 (1) SA 474 (CC) at ¶ 68 (referencing to The Promotion of Equality and Prevention of Unfair Discrimination Act, *supra* note 16, § 6).

122. S. AFR. CONST., 1996, § 15(1).

123. *MEC for Education* 2008 (1) SA 474 (CC) at ¶ 93.

124. S. AFR. CONST., 1996, § 31(1)(a).

125. *Id.*, § 31(2).

126. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 8(b) (S. Afr.).

127. *Prince v. President, Cape Law Society and Others* 2002 (3) BCLR 231 (CC) (S. Afr.).

registration of his contract of community service, as a prelude for admission to the practice of attorney, had been refused by the Cape Law Society. The Law Society judged that he was not “a fit and proper person” for legal practice because of two previous convictions for the illegal possession of cannabis, and his stated resolve to continue using the drug. The applicant maintained that he was a member of a certain sect, the Rastafari religion, that cannabis was regarded by that sect as a “Holy Herb,” and that its use constituted an integral part of Rastafari rituals. The Constitutional Court acknowledged that “the right to freedom of religion and to practise religion are important rights in an open and democratic society based on human dignity, equality and freedom, and that the disputed legislation places a substantial limitation on the religious practices of Rastafari.”<sup>128</sup> However, if an exemption were to be made in regard to the possession and use of a harmful drug by persons who do so for religious purposes, “the State’s ability to enforce its drug legislation would be substantially impaired.”<sup>129</sup> In a five to four decision, the Court declined to make an exception in favor of persons possessing or using cannabis for religious purposes.

In *Christian Education SA v. Minister of Education of the Government of the RSA*, the constitutionality of a provision in the South African Schools Act, which prohibits corporal punishment in independent schools,<sup>130</sup> was at issue.<sup>131</sup> The Applicant claimed the right to apply corporal punishment in its parochial (independent) schools on Biblical grounds, and argued that the legislation being contested violated the right to self-determination afforded to religious communities by the Constitution.<sup>132</sup> The Court would have nothing of it: the Biblical texts cited by the Applicant<sup>133</sup> refer to corporal punishment inflicted by parents on their own children and do not sanction an entitlement of persons *in loco parentis* to do the same; flogging of children has been designated in South Africa,<sup>134</sup> and elsewhere,<sup>135</sup> as a cruel and inhuman (or degrading) punishment, and, in terms of the Constitution, the right to self-determination may not be exercised “in a manner inconsistent with any provision of the Bill of Rights.”<sup>136</sup> Speaking for a unanimous court, Sachs, J. observed:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and

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128. *Id.* at ¶ 114.

129. *Id.* at ¶ 132.

130. South African Schools Act 84 of 1996 § 10.

131. *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) (S. Afr.); see also Johan D. van der Vyver, *Freedom of Religion or Belief and Other Human Rights*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 85, 85-86 (Tore Lindholm, W. Cole Durham Jr. & Bahia G. Tahzib-Lie eds. 2004).

132. See S. AFR. CONST., 1996 § 31(2).

133. *Proverbs* 22:6; *Proverbs* 22:15; *Proverbs* 19:18; *Proverbs* 23:13-14.

134. *S v. Williams and Others* 1995 (3) SA 632, 1995 (7) BCLR 861 (CC) (S. Afr.).

135. *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) (S. Afr.) (regarding Namibia); *S. v. F.* 1989 (1) SA 460 (Z) (S. Afr.); *S. v. Juvenile* 1990 (4) SA 151 (ZSC) (S. Afr.) (regarding Zimbabwe); *Tyrer v. United Kingdom* 1979-80 App. No. 5856/72, 2 Eur. H.R. Rep. 19 (in regard to the European Convention).

136. S. AFR. CONST., 1996 § 31(2).

standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful to the law.<sup>137</sup>

Faith healing has also come under the spotlight in South Africa. In the U.S., the right of parents to withhold life-sustaining medication or therapeutic treatment from a child in their care has had a checkered history.<sup>138</sup> There are, on the one hand, state laws in place that exempt parents who prefer spiritual treatment or faith healing from statutory requirements to furnish health care to a child in their care,<sup>139</sup> but this concession to freedom of religion will not absolve a parent from criminal liability for involuntary manslaughter if the child should die in consequence of being denied conventional medical treatment.<sup>140</sup> Parents will therefore be prosecuted for providing spiritual treatment for their children in lieu of traditional medical care, but only if such treatment turned out to be ineffective and resulted in the death of the child.<sup>141</sup> In South Africa, on the other hand, the High Court, as upper guardian of all children, can intervene by sanctioning a feasible medical procedure while the life of the child can still be saved.<sup>142</sup> In South Africa, the constitutionally protected right to life of the child will, in all circumstances, trump the claim to the exercise of religious liberty of the parent.

### **III. Concluding Observations**

South African law has been quite meticulous in upholding the sphere sovereignty of non-state, including religious, institutions. This can perhaps be attributed to the influence of Calvinism, or perhaps sensitivity to the dangers of totalitarianism in the form of state interference in the internal affairs of non-state institutions.<sup>143</sup> It thereby set a commendable example in recognizing the competence of religious institutions to uphold spiritual values of their own choice or convictions within the internal enclave of their domestic household.

The special appeal of sphere sovereignty has over time spread its influence well beyond persons and communities dedicated to Calvinistic political thought. There is, for example, seemingly a shift in Roman Catholic social theory transforming the typical scholastic doctrine of subsidiarity toward recognizing a greater measure of sovereignty of Church and State. Professor Ronald Minnerath, special Vatican representative in the University of Strasbourg, almost said it in so many words. According to him, Church-State relationships ought to be based on (a) the autonomy of each of the two parties, and (b) co-operation in areas of common

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137. *Christian Education* 2000 (4) SA ¶ 35.

138. See Edward Egan Smith, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991).

139. *Walker v. Super. Ct.*, 763 P. 2d 852, 858 (Cal. 1988) (referencing § 270 of the California Penal Code).

140. *Id.* at 878.

141. See John Dwight Ingram, *State Interference with Religiously Motivated Decisions on Medical Treatment*, 93 DICK L. REV. 41, 59 (1988).

142. See *Hay v. B & others* 2003 (3) SA 492 (W.L.D) at 495 (S. Afr.).

143. See VAN DER VYVER, *supra* note 6, at 54.

interest; and he went on to explain: “Recognition of the autonomy of church and state requires that each shall be sovereign and independent in its own sphere.”<sup>144</sup>

In recent times, several American scholars have ventured to introduce the Calvinistic doctrine of sphere sovereignty into American legal thinking. This includes the commendable work of Paul Horwitz of the University of Alabama in Tuscaloosa and an analyst of First Amendment jurisprudence. Professor Horwitz sought guidance from the Neo-Calvinistic doctrine of sphere sovereignty as enunciated by the Dutch political philosopher, Abraham Kuyper (1837-1920), to overcome some of the difficulties attending establishment jurisprudence in the United States. To this end, he looked beyond the legal norms that may or may not be enacted by Congress under the constraints imposed by the Constitution to uncover the role of institutions functioning within the protected enclave of the First Amendment, such as universities, the press, and religious associations.<sup>145</sup> Horwitz convincingly argued that such “First Amendment institutions” should be afforded the right to operate on a largely self-regulating basis and beyond the supervision of external legal regimes.<sup>146</sup>

Sensitivity in the United States to the sphere sovereignty of religious institutions is exemplified by Section 702 of the Civil Rights Act of 1964,<sup>147</sup> which exempts religious corporations, associations, educational institutions, and societies from the Equal Employment Opportunity provisions of the Act with respect to the employment of persons of a particular religion to perform work connected with the carrying on by the corporation, association, educational institution or society of its activities.<sup>148</sup> The constitutionality of Section 702 was upheld in *Corporation of the Presiding Bishop of the Church of Latter Day Saints v. Amos*.<sup>149</sup> The Court decided that Section 702 was intended to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission.<sup>150</sup> In that case, a building engineer, working for a nonprofit gymnasium operated by religious institutions affiliated with the Church of Jesus Christ of Latter-day Saints, was dismissed because he had lapsed from the Mormon Faith. The Court upheld the legitimate competence of the church authorities to do so. In a concurring judgment, Justice Brennan endorsed the internal sovereignty of the Church by saying:

Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them is . . . a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea

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144. Ronald Minnerath, *The Doctrine of the Catholic Church*, in PROCEEDINGS OF THE THIRD WORLD CONFERENCE ON RELIGIOUS LIBERTY 49, 51 (I.R.L.A. 1989).

145. Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 35 HARV. C.R.-C.L. L. REV. 79 (2009).

146. See Lael Daniel Weinberger, *The Business Judgment Rule and Sphere Sovereignty*, 27 T.M. COOLEY L. REV. 279 (2010).

147. 42 U.S.C. § 2000e-1(a) (2011).

148. *Id.*

149. *Corporation of the Presiding Bishop of the Church of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

150. *Id.* at 335.

that furtherance of the autonomy of religious organizations often furthers religious freedom as well.<sup>151</sup>

In *Kedroff v. St Nicholas Cathedral*, Justice Reed, speaking for the majority, referred to “a spirit of freedom for religious organizations” that embraces “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,” which freedom includes the right to select the clergy of the Church.<sup>152</sup>

It would perhaps be wise not to lay too much stress on the historical foundation or religiously-inspired impetus of principles of good governance, lest this might promote negative responses from persons who do not entertain historical and dogmatic loyalties to the sources of their origin. The doctrine proclaiming the internal sphere sovereignty of Church and State, and international directives calling for protection of the right to self-determination of religious communities, should gain support because of their inherent soundness as a mechanism for addressing structural varieties and group alliances within human society.

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151. *Id.* at 342.

152. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see also* John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 567, 578 (1990) (concluding at 584, with reference to *Kedroff*, that “churches as groups may also claim a right to the free exercise of religion.”).