JUDGING JEWS: COURT INTERROGATION OF RULE-MAKING AND DECISION-TAKING BY JEWISH ECCLESIASTICAL BODIES

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ABSTRACT
Determining who is in, and who is out, is a hot topic in debates about membership in religious communities, and the bodies, state and sectarian, that have the power to make decisions regarding such membership. For the most part, the state and the courts have taken a decidedly hands-off approach to interference in religious association decision-making. Some judgments have reinforced the proposition that individuals who ‘voluntarily’ commit themselves to a religious association’s rules and decision-making bodies must be prepared to accept the outcome of fair-hearings conducted by those bodies. At the same time, a number of judgments have demonstrated a willingness to intervene quite profoundly in the affairs of a variety of different religious communities and mediate the relationship between the profane and the sacred, the traditional and the modern. Our intervention concentrates on but two features of court-driven, constitutional review of religious association decisions regarding membership or participation in a given community. First, we suggest how the law of evidence can provide appropriate guidance to courts faced with the challenge of interrogating the validity of decisions taken by religious bodies. Second, we offer a theory of religious community life in a constitutional democracy that can guide courts in determining when and where they should and should not interfere in the decision-making of religious bodies.

I INTRODUCTION: MEMBERSHIP, VOICE AND EXIT

(a) Radically, heterogeneous constitutional orders, forum shopping and muscle flexing

Consider the following hypothetical scenario:

A married couple in the midst of divorce proceedings could not agree on the terms of a maintenance order. As is often in the case in such matters, the children are held perpetual hostage by parental acrimony. Having failed to secure succour through normal pre-trial negotiations under the law of South Africa, the couple, Mr Greenberg and Mrs Greenberg, asked South Africa’s Orthodox Jewish ecclesiastical body – the Beth Din – to intervene in the dispute. Mr Greenberg and Mrs Greenberg voluntarily submitted to the Beth Din’s process and agreed to adhere to any judgment that it might reach. Few human endeavours are prone to such bad sportsmanship as that displayed by antagonists in divorce proceedings. Mr Greenberg and Mrs Greenberg were no different. After hearing from both parties, the Beth Din’s panel repaid to its rabbinical chambers to consider the merits of each party’s request. When they returned, the Beth Din handed down an order in favour of Mrs Greenberg.

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Outraged, Mr Greenberg declined to abide by the decision. Neither Mrs Greenberg nor the Beth Din was particularly taken with his response. The Beth Din responded by issuing two orders, sequentially, that fall into a loose category of punishments known as ‘cherems’. In the first cherem, all members of the South African Jewish community were barred from any and all interactions with Mr Greenberg – religious, political, social or economic. Aware that they may have overstepped their authority, the Beth Din retracted the first cherem and issued a second cherem. While Mr Greenberg could still attend shul, he could no longer be counted, for having flouted the Beth Din’s authority, as one of ten members required for a ‘minyan’ (the ten-member minimum required to conduct most religious services). He could no longer perform an ‘aliyah’ – an honour bestowed upon a member during a religious service. The final nail in the coffin, however, was the Beth Din’s decision to bar Mr Greenberg from having a burial according to Orthodox Jewish ritual in a South African Orthodox Jewish cemetery. Mr Greenberg sought relief from this religious sanction in the High Court. He asked that the Beth Din be barred from publishing, disseminating or enforcing this edict on the grounds that it had violated his constitutional rights under s 18 (the right to freedom of association) and s 31 (the right to participation within a religious community) under the Constitution of the Republic of South Africa, 1996. The High Court made short, but compelling, shrift of Mr Greenberg’s arguments. While acknowledging that the Beth Din had arrogated to itself a power that belonged solely to the High Court – the construction and the imposition of maintenance orders – it found against Mr Greenberg on two primary grounds. First, as a matter of associational rights, the High Court held that members who voluntarily submit to the membership rules, practices and judgments of a religious association were obliged to abide by the religious association’s rules, practice and judgments. To put matters slightly differently, the right of freedom of association allowed a religious community to determine the criteria of membership, the practices of the faith and whether its members’ behaviour conformed to its strictures. Non-conformists could be excluded from participation in the religious practices of the community. This first finding led to a second conclusion: religious associations in South Africa had the right to excommunicate individuals in order to safeguard what the Beth Din and other similar religious bodies regarded as ‘fundamental and critical tenets of their faith’. The High Court held, however, that the right to religious community under s 31 of the Constitution could not be employed by a religious community to permit the community to engage in constitutionally offensive practices or especially oppressive features of internal relationships. Whether religious practices prima facie protected by s 31 offended other constitutional norms – such as the rights to dignity or to equality – could only be determined on a case by case basis. The High Court noted that while the Constitution’s rights and freedoms protected a high degree of private ordering, the structure and the content of the basic law framed the relationships of all South Africa’s denizens. Mr Greenberg’s application was dismissed.

What can we say at the outset without tipping our hand? Well, Mr Greenberg certainly is a piece of work. Dissatisfied with secular law and its potential consequences for a maintenance order, Mr Greenberg decided to forum shop. He found, he believed, a religious tribunal likely to be more congenial to his concerns. When he discovered that the Beth Din’s rulings were no more favourable than those orders likely to be handed down by a High Court, Mr Greenberg refused to follow the edicts of a body to which he had quite voluntarily subjected himself. The Beth Din can be forgiven for 1

1 *Taylor v Kurtstag NO* 2005 (1) SA 362 (W), [2004] 4 All SA 317 (W) para 37. This hypothetical tracks some of the facts and the findings of *Taylor*. It should not be understood as a summary of that judgment. It provides a useful framing device for the discussion that follows. Citations to *Taylor* here and below do reflect various holdings of the *Taylor* High Court.

2 Ibid para 40.
expressing its pique with Mr Greenberg’s behaviour. But the Beth Din hands here are not entirely clean. It held itself out as providing a quasi-legal service for members of the Orthodox Jewish community that, under South African law, only High Courts could provide. The Beth Din’s initial responses to Mr Greenberg’s behaviour cast it in further unflattering light. It issued a ‘cherem’ – a much used, little understood term – that amounted to a stunning, sweeping, shunning of Mr Greenberg from the entire Orthodox Jewish community. Aware that in so flexing its muscle, its behaviour went beyond both the pale of accepted secular and sectarian norms, the Beth Din withdrew its initial cherem. In its stead, the penalty imposed on Mr Greenberg allowed him to participate in a small number of the rites performed within the Orthodox Jewish community and a denial of Orthodox Jewish burial rites. Given this more sensible sanction, the High Court responded in an equally prudent fashion. It concluded that if a person (a) submits himself or herself voluntarily and expressly to the decision-making or rule-making of an ecclesiastical authority then she or he is bound by those decisions or rules and any consequences that follow from disobeying those decisions or rules; (b) subject to the proviso that the sanctions imposed do not offend, egregiously, the basic norms of the Constitution. Somewhat perversely, the High Court upheld the Beth Din’s cherem, at the same time that it claimed that it lacked the authority to determine what religious law required and what an appropriate penalty ought to be. That said, the High Court did an admirable job disposing of a poorly presented case. The question that drives this article is as follows: Could the Court, counsel and the Beth Din have done better under South Africa’s law of evidence and the Constitution?

(b) Questions of evidence and the ability of our courts to determine whether ‘alleged’ core tenets of a faith comport with constitutional dictates

Determining who is in, and who is out, is a hot topic in debates about membership in religious communities, and the bodies, state and sectarian, that have the power to make decisions regarding such membership. For the most part, the state and the courts have taken a decidedly hands-off approach to interference in religious association decision-making. High Court judgments such as Taylor v Kurtstag and Wittmann v Deutsche Schulverein have reinforced the proposition that individuals who ‘voluntarily’ commit themselves to a religious association’s rules and decision-making bodies must be prepared to accept the outcome of fair-hearings conducted by those bodies. At the same time, a number of

3 Ibid para 58.
4 In our view, Malan J discharged his duties admirably in Taylor v Kurtstag NO. Admiration does not entail agreement.
5 Wittmann v Deutscher Schulverein, Pretoria 1998 (4) SA 423 (T).
Constitutional Court judgments – from Prince,6 to Christian Education,7 from Bhe8 to Fourie to Shilubana,9 when understood from an insider’s view of traditional, indigenous religion – have demonstrated a willingness to intervene quite profoundly in the affairs of a variety of different religious communities. In some instances, the Court deems the religious or traditional practice in question as incompatible with the basic tenets of our modern, secular Constitution. In other cases, the Court attempts to mediate the relationship between the sacred and the profane.10

The aforementioned cases challenge us in a host of ways. Our intervention concentrates on but two features of a court-driven, constitutional review of a religious association’s decisions regarding membership or participation in a given community.

First, we suggest how the law of evidence can provide appropriate guidance to courts faced with the challenge of interrogating the validity of decisions taken by religious bodies. We do not claim any expertise in Jewish law. However, even the most cursory review of a case like Taylor reflects how poor evidence led by counsel and the absence of unbiased expert witnesses can adversely affect judgments that require a court to come to grips with the meaning of sacred texts and rituals. In Taylor, Judge Malan largely stayed clear of the miasma of Jewish law surrounding cherems. He had little choice. A full, accurate and unbiased elucidation of that law was not placed before him. Yet Judge Malan still felt constrained to accept the respondent’s debatable thesis that cherems or excommunications are a ‘central feature of Jewish law’, while protecting himself by asserting, quite rightly, that the supreme law of the Republic remains the Constitution and that no religious practice can be

6 Prince v President, Cape Law Society 2002 (2) SA 794 (CC), 2002 (1) SACR 431 (CC), 2002 (3) BCLR 231 (CC).
7 Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC).
8 Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).
9 Shilubana v Nwamitwa 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC).
10 Minister of Home Affairs v Fourie (Doctors for Life International, amici curiae); Lesbian and Gay Equality Project v Minister of Home Affairs 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC). We also have a burgeoning body of Equality Court judgments that have tipped the balance of analysis away from the protection of religious associational rights. See, for example, Strydom v Nederduisse Gereformeerde Gemeente, Moreleta Park 2009 (4) SA 510 (EqC). For slightly different takes on this case, see P Lenta ‘Taking Diversity Seriously: Religious Associations and Work-Related Discrimination’ (2009) 126 SALJ 828; S Woolman ‘On the Fragility of Associational Life: A Constitutive Liberal’s Response to Patrick Lenta’ (2009) 25 SAJHR 280. For a somewhat truculent critique of the positions allegedly adopted by Prof Lenta and myself, see D Bilchitz ‘Should Religious Associations be Allowed to Discriminate?’ (2011) 27 SAJHR 219. For an account that would appear to close down most differences between Prof Bilchitz and myself, see S Woolman ‘Seek Justice Elsewhere: An Egalitarian Pluralist’s Reply to David Bilchitz on the Distinction between Differentiation and Domination’ (2012) 28 SAJHR 273. (I express my gratitude to Prof Bilchitz in these pages for taking the time to work through initial misunderstandings and to arrive at a position more expressly congenial to both of us. He remains free to kibitz at the margins with respect to outstanding differences, and does so in this volume of the SAJHR.)
immunised from constitutional scrutiny. We offer a de minimus exploration of Jewish law on the subject of cherems. We do so not for the purpose of establishing a baseline for this vexed and peripheral part of Jewish religious practice. Our purpose is to demonstrate just how difficult it can be for courts to determine the content of religious law on the basis of heads of argument and inexpert evidence.

Second, we offer a theory of religious community life in a constitutional democracy that can guide courts in determining when and where they should and should not interfere in the decision-making of religious bodies. We subject law regarding rules of membership in the Jewish community to scrutiny because (a) they encompass an inveterate legal history that makes them particularly useful subjects for academic examination; (b) Jewish law in this arena speaks directly to (apparently) conflicting constitutional norms regarding associational/community rights and equality/dignity claims; and (c) we are sufficiently familiar with some nuances of Jewish law, the law of evidence and constitutional law to justify the claims articulated in this article. We do not leave matters there. For what goes for Judaism must hold true for most religions across the board. Fortunately for us, South Africa has a burgeoning body of decisions that engage religious practices and take their measure against the demands of constitutional desiderata. Taylor then is but a weigh station, a brief detour before a discussion of how one mediates the demands of a deeply religious society against the formidable requirements of an egalitarian pluralist constitution.

II EVIDENTIARY QUESTIONS AND AN INQUISITION INTO JEWISH LAW ON EXCOMMUNICATION

Three introductory points. Any legal system would ossify, to the breaking point, if it did not adjust to substantial changes in its social environment over a prolonged period of time. At any given moment in time, lawyers will often fail to agree on intricate questions of law that occur ‘on the margin’ of what most of us view as settled practice. It is absurd to talk about most bodies of well-developed, long standing systems of law as if they were monolithic structures that consisted of immutable rules.

No scholar familiar with ‘the Roman law’ that applied from the primitive Rome of the 12 tables in 449 BCE to the sophisticated Byzantium of Justinian in the sixth century CE would assert that this thousand-year-old body of law was susceptible or reducible to the simple, straightforward instructions that accompany a box containing the pieces of a model airplane. Any casual

11 See, for example, Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO [2011] ZACC 13, 2011 (8) BCLR 761 (CC). The Constitutional Court invited the Child Law Centre and the Socio-Economic Rights Institute to offer expert evidence on difficult constitutional matters that confronted the Court.

reference to the Digest will reveal that Ulpian differed from Paulus on some matters. It would be surprising, to say the least, if Gaius did not offer a third, somewhat different set of views than both of his fellow Roman law jurists. Indeed, the expression ‘Roman law’ conveniently forgets that Roman law was home to so many opinions and schools of thought that in 426 CE Theodosius II and Valentinian III undertook the vainglorious attempt of settling this teeming sea of difference by decree and through the creation of a ‘law of citations’ that ranked the authoritative order to be attached to the written opinions of historically notable jurists. At least Theodosius II and Valentinian III acknowledged the variety of positions, even as they attempted to bring them to heel.

Just as the exigencies of time, place and circumstance required the modification of subsisting rules and the creation of new norms in Roman law, Jewish law, forged by rabbinical authorities over more than two thousand years, reflects a similar variety of inflection and today gives rise to debates between extant authorities with unabated intensity. Not surprisingly, every new authority claims that its development of the Jewish law is the rational consequence of immutable basic rules, principles or values applied to novel circumstances. The proliferation of different rules emanating from identical circumstances suggests that we approach ‘Jewish law’ with exactly the same caution with which we would approach a similar claim about the state of ‘the Roman law’.

A simple yarn captures the spirit of this vast, complex, intricate two-millennia-old project. ‘What do you say if, in the course of a legal disquisition on an aspect of Jewish law, your teacher wakes you up from a heavy sleep with a question relating to a rule?’ The safe and correct answer, according to this instructive tale, is: ‘The answer is the subject of considerable debate.’ As far as the Jewish legal tradition goes, rarely will the sleeping student be wrong with respect to the most interesting and arresting areas of the law worth teaching. Of course, outside the halls of study, answers must be given to real life problems. And they must be grounded in the law.

We can now turn back to the case that got us off the ground – Taylor v Kurtstag NO – with both understanding and sympathy for the presiding judicial officer, Malan J. Judge Malan was obliged to decide whether, in terms of South African law, an ecclesiastical tribunal had validly imposed a particular kind of cherem – a communal shunning – that fell short of the kind of out-and-out ex-communication that utterly excluded a person from Jewish life.

On the basis of limited expert evidence placed before him, Malan J found that a cherem is ‘a central tenet of the [Jewish] faith’. The finding is odd. The

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13 Taylor (note 1 above) para 56.
issuance of a cherem – unlike a niddui¹⁴ – generally reflects a failure to follow dictates of the Jewish faith so severe that it warrants neither rehabilitation nor restorative justice. In constitutional terms, the cherem is the remedy. It’s not the conduct that violates the basic tenets of the legal order. Indeed, the characterisation of the cherem qua remedy coheres with the first respondent’s description. Rabbi Kurtstag stated that the cherem purported to do nothing more than demonstrate ‘the communal disdain of conduct which flouts the faith’s standards of conduct and give[s] notice to members of the community that the conduct is unacceptable’.¹⁵ Malan J agreed.¹⁶ The disdain fell short of full-blown shunning. Mr Taylor could still attend shul. However, his flouting of various edicts allegedly justified the imposition of a series of punitive measures.¹⁷ These measures prevented Mr Taylor from (1) being a full member of an Orthodox congregation; (2) being counted as part of a prayer quorum; (3) saying grace after meals; (4) leading communal prayers; (5) having a Jewish burial in a Jewish cemetery; (6) serving as a witness in Jewish matters; and (7) receiving any honour in any Jewish services. While severe, Mr Taylor’s punishment falls short of the penalty doled out to the philosopher Benedict Spinoza. Jews were forbidden to communicate with Spinoza, to be of service to him in any way, reside under the same roof, approach him within four

¹⁴ A niddui constitutes a ban of seven days for a breach of the law. During the ban, no person outside the immediate family is permitted to sit within four cubits of the offender, associate with the offender or eat in his company. Limits on the offender’s religious participation track those penalties imposed by a cherem. The critical difference between the niddui and the cherem is time and purpose. The niddui’s goal is to cause the offender to repent. The cherem reflects communal retribution. Its purpose is not the rehabilitation of the offender, but to send a message to the community that certain forms of behaviour are so far beyond the pale that the Jewish community would no longer be a Jewish community were they permitted to continue or if the perpetrators were not shunned. See <www.jewishencyclopedia.com>.

¹⁵ Taylor (note 1 above) para 56.

¹⁶ The directive in question was held by Malan J to do no more than show its disdain of the applicant’s refusal to adhere to Beth Din’s findings – given that he had voluntarily submitted to arbitration by the Beth Din. Earlier cherems in the matter issued by the Beth Din were not in issue because the Beth Din itself recognised that they did not comply with South African law. (For example, one withdrawn cherem took cognisance of the fact that the Beth Din’s order relating to the custody of children was invalid in terms of the South African statute that governed such arbitrations. Section 2 of the Arbitration Act 42 of 1965. Another withdrawn cherem would have conspicuously abrogated South African common law and constitutional law.)

¹⁷ Had the learned judge thought somewhat differently about the matter, and had the assistance of an expert on matters of Jewish faith, he might have concluded instead that the entire inquiry constituted little more than pursuit of a chimera into the wastes of religion. Had the Beth Din issued a week-long niddui or simply called upon the community to treat him with disdain, and said that it would not treat him with respect or admit him to its rites, it is difficult to see how Mr Taylor could have sought relief against the tribunal. (Moreover, given Mr Taylor’s execrable behaviour, even the suit for damages in defamation would have likely fallen away.) The Beth Din, acting within the express terms of its constitution, possesses the right to expel a devotee-member for heresy or breaking its rules. No argument there. However, the Beth Din’s initial reaction, the extreme cherems, and its subsequent cherem-lite, suggest that the Beth Din’s saw Mr Taylor’s misbehaviour, and its response to that misbehaviour, as an opportunity to assert broader power over the Orthodox Jewish community as a whole. The cherem looks more like a form of social control directed at the faithful, than an act of retribution peculiar to the individual.
cubits, or read any document emanating from one of the western tradition’s greatest philosophers.18

Mr Taylor’s cherem did push (beyond) the envelope in at least one respect. His cherem infers, without stating as much, that the Beth Din has sole jurisdiction over Jewish burials and Jewish cemeteries in South Africa. As matters currently stand, non-Orthodox Jews in Johannesburg are buried in a section of the Jewish cemetery in West Park according to non-Orthodox rites. As a rather obstreperous member of the Orthodox community, that consideration may have been of little concern to Mr Taylor. Nevertheless, the wording of the direction – a likely result of sloppy drafting – would appear far from innocuous, say, to a Reform rabbi.

That such wording was effectively validated by the High Court once again raises questions about the absence of reliable expert witnesses in this matter and in similar matters. Rabbi Kurtstag must be taken, by virtue of his office as Av Beth Din (the Beth Din’s most senior dayan (judge)), to be an expert on Jewish law. However, such expertise is offset in a secular court by the inevitable implicit bias that flows from his status as the first respondent. Kurtstag possessed a stake in defending the validity of a decree of the ecclesiastic tribunal that had heard Taylor and his spouse, and then issued the subsequent decree. The applicant, Mr Taylor, did not claim to be an expert and did not adduce expert evidence regarding the nature of cherems and their application to his case in the High Court.19

It seems rather strange and incongruous to non-experts such as ourselves that a High Court judge, with somewhat less off-hand experience of Jewish affairs than we possess, would come to the conclusion that a ‘cherem’ was central to the (Orthodox) Jewish faith and that its imposition on Mr Taylor did not constitute a violation of his South African constitutional rights to equality, dignity, religion, association and religious communal practice. The judgment reveals scant engagement with the history and the various denotations of cherem, the rules governing its imposition, its effect on the applicant and the community, how the institution might have been altered by changing political and social conditions, whether a cherem imposed by one community could bind the members of another, the incidence of its imposition in the last few hundred years and the justification for such an imposition. None of these material questions appear to have been well-ventilated (let alone heard) during the course of the proceedings.20

18 Taylor (note 1 above) para 57.
19 Ibid.
20 High Courts rarely call for experts of their own. Rarely is not never, ever. See Elandshoek Trading Co Ltd v Mia 1963 (3) SA 162 (W) (Court requested the expert evidence of a priest when confronted with a vexing matter of Muslim law). Given the Constitutional Court’s penchant for requesting outside assistance where necessary, and the High Court’s ability to regulate its own process under s 173 of the Constitution, good reasons exist for judges faced with Malan J’s quandary to seek out a more accurate account of the profound religious doctrines and decisions with which he was confronted. We acknowledge that Malan J followed the traditional path of most High Court judges in South Africa – whether the Superior Court rules actually demands that they follow this path or not. Times change, as do legal traditions. In a recent judgment, Davis J cited Terblanche v
Leon Trotsky and a person under the age of 25 found reading a philosophical text by Maimonides (perhaps the foremost (12th century) Jewish scholar on record)\textsuperscript{21} have been on the receiving ends of cherems. Such matters are certainly of historical interest. However, cherems today are almost only executed when a husband refuses to grant a gett (a religious bill of divorcement) to his wife and thereby prevents her remarriage. The matter of securing a religious divorce is deemed so serious that the South African legislature (following a trend set by legislatures around the world) provided a measure of statutory relief in 1996.\textsuperscript{22} (The threat of a cherem hangs as a sword of Damocles over the recalcitrant husband in jurisdictions where he cannot be incarcerated for contempt of court.) If the cherem today is employed largely in instances where no other sanction can effect justice, then the cherem imposed on Taylor now looks more and more like a case of overreach by the Johannesburg Beth Din. Given its limited knowledge of Jewish law, should the High Court have asserted jurisdiction over the matter, let alone validated the finding of the Beth Din? Spinoza, Trotsky, Taylor and underage readers of Maimonides. Add the understandable issuance of cherems to husbands who refuse to grant a gett. We are, to be sure, aware of other cherems. But not in great numbers. None of consequence would have appeared to have been issued in our lifetimes – on the four different continents upon which we have been collectively resident. (Cherems thus hardly seem ‘central’ to the Jewish faith.) No doubt a person more knowledgeable in these matters might greatly supplement the list above. But that fact – our ignorance and the need for someone more knowledgeable to assist the court – is the crux of the whole business. Only an expert can give an admissible opinion on (a) the frequency or the incidence of the practice in democratic countries in the last and the present century; (b) the circumstances that are regarded as appropriate for the imposition of the ban in the Jewish law now current; and (c) its centrality to the Orthodox Jewish faith in the 21st century in South Africa. Neither the applicant, nor Rabbi Kurtstag qua respondent, nor Judge Malan qualifies on this score.

\textit{Terblanche} 1992 (1) SA 501, 504 (W) with approval for the following proposition: ‘When a Court sits as upper-guardian in a custody matter, it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes’. \textit{Schneider No v AA} 2010 (5) SA 203 (WCC) 214.

\textsuperscript{21} JL Kraemer \textit{Maimonides The Life and World of One of Civilization’s Greatest Minds} (2008).

\textsuperscript{22} See s 5A of the Divorce Act 70 of 1979 as inserted by s 1 of Divorce Act 95 of 1996. South African legislation has now come to her rescue when the husband seeks a divorce. The court may refuse to make an order unless he takes all necessary steps to issue a gett. For Canadian law on the topic, see \textit{Bruker v Marcovits} [2007] SCC 54. See, further, I Benson ‘Taking Pluralism and Liberalism Seriously: The Need to Re-Understand Faith, Beliefs, Religion and Diversity’ (2010) 23 \textit{J of the Study of Religion} 17, 29 fn 11.
Despite the learned judge’s careful and thoughtful analysis of the facts placed before him, we cannot help but conclude that if genuine attention had been paid to the requirements of the South African law of evidence, greater illumination would have been shed on the ‘constitutional’ curb over which an ecclesiastic tribunal had stumbled. More importantly, the real onus with regard to a proper understanding of the law of evidence in a tricky constitutional matter lay with a sitting judge on a South African High Court, Judge Malan.

According to the Supreme Court of Appeal ‘[t]he principles applicable to the admissibility of expert evidence are well established’. 23 One such principle is that:

where the court by reason of its lack of special knowledge and skill [is] not sufficiently informed … the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. 24

The High Court in Taylor was such a court when it came to Jewish law. When it comes to the duties of the expert, her evidence must be ‘uninfluenced by the exigencies of litigation’ in its form and content; she must not assume the role of an advocate, but must give an unbiased opinion on matters that are within her expertise; and she should not omit to consider matters that would detract from her opinion. 25 A failure to observe these criteria will have a bearing on the value to be attached to the opinion.

Judge Malan had a second option: reliance on the constitutional doctrine of entanglement. He could have concluded that in a radically heterogeneous society governed by a Constitution committed to pluralism and private ordering, a polity in which both the state and members of a variety of religious communities must constantly negotiate between the sacred and the profane, courts ought to avoid enmeshment in internecine quarrels within communities regarding the content or the truth of particular beliefs. 26 The doctrine of ‘doctrinal entanglement’ 27 has been endorsed by a number of South

23 P v P 2007 (5) SA 94 (SCA) para 16.
24 Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schadlingsbekämpfung MbH 1976 (3) SA 352 (A) 370.
25 Schneider NO v Aspeling 2010 (5) SA 203 (WCC) 211.
26 See F Cachalia ‘Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry’ (1993) 56 THRHR 392. Cachalia writes: ‘Thus Islam is a “revelational culture”, which does not differentiate between law and religion, positive legal rules and moral prescripts, the religious and the profane, and the public and the private …. Holy Quran is the fundamental source of Islamic law, and in the Muslim belief system, it constituted the ipsissima verba of Almighty God. The Holy Quran, together with compilations of the practices and traditions of the Prophet Mohammed form a body of commandments (sharia) which govern all aspects of a Muslim’s life, including marriage, divorce and devolution of property on death.’ Ibid 400. (Emphasis added)
African courts:28 Ryland v Edros,29 Worcester Muslim Jamaa v Valley,30 and Mankatshu v Old Apostolic Church of Africa.31

Mr Taylor’s cherem now appears to push the envelope in a second respect. Judge Malan – in finding that constitutional norms that flow from the right to freedom of association govern the issuance of a cherem by the Orthodox Jewish community of Johannesburg – does not egregiously err in his conclusions. However, his implicit acceptance of the still judicially accepted, but pre-constitutionally formed rule that a court may not call a witness in a civil matter, coupled with the parties inept approach to evidentiary issues, may have led him to collapse, in a manner entirely unjustified, general rules regarding membership in voluntary associations under a secular Constitution with general rules regarding membership in associations regulated by religious law.32 As we have already seen, cherems look rather rare, and one might pause to consider whether the flouting of a religious ruling warrants the degree of disassociation imposed by the Beth Din.33 Operating in the absence of expert opinion, Judge Malan treats Mr Taylor as he might the member of golf club who refuses to pay his dues or abide by other rules of the club and the game. While we have little doubt that Mr Taylor acted in bad faith throughout these proceedings, it remains unclear to us that his action warranted the type of exclusion meted out by the Beth Din and reinforced by the High Court. First, an expert opinion – such as that described by the Supreme Court of Appeal – had it been adduced might have led Judge Malan to an alternative conclusion: that Mr Taylor had not abrogated the laws of Judaism in a manner that warranted a cherem of this magnitude. The judge might have availed himself of another option. He could have declined to endorse the cherem on the grounds that, unschooled in matters of Jewish faith, and unguided by acceptable expert evidence, he ought not to become entangled in a dispute over the appropriate punishment for a violation of religious law.

28 The term found its way into South African jurisprudence through US precedent and academic texts. For critical engagements with this doctrine, see K Greenawalt ‘Hands Off! Civil Court Involvement in Conflicts over Religious Property’ (1998) 98 Columbia LR 1843; S Levine ‘Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief’ (1997) 25 Fordham LJ 85. For case law that gave rise to these doctrines, see, for example, Lemon v Kurtzman 403 US 602 (1971) (a statute should not foster ‘an excessive government entanglement with religion’); Jones v Wolf 443 US 595 (1979); Serbian Orthodox Diocese v Milivojevich 426 US 696 (1976); Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church 393 US 440 (1969); Kedroff v St Nicholas Cathedral 344 US 94 (1952). This notion has, of late, also been described as the doctrine of ‘Church Autonomy’. See, for example, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos 483 US 327 (1987). For a general discussion of these doctrines, see D Laycock ‘Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy’ (1981) 81 Columbia LR 1373. CH Esbeck ‘Differentiating the Free Exercise and Establishment Clauses’ (2000) 42 J of Church and State 311.
29 1997 (2) SA 690 (CC), 1997 (10) BCLR 1348 (CC).
30 2002 (6) BCLR 591 (C).
31 1994 (2) SA 458 (TKA).
32 This general rule should be re-evaluated, and perhaps disaggregated for constitutional matters that engage decidedly different kinds of associations.
33 On disassociation, see S Woolman ‘Freedom of Association’ in Woolman & Bishop (note 27 above) Chapter 44.
III  OF CHEREMS AND CONSTITUTIONS

The South African Constitution serves two masters. As with most constitutions, it provides a significant degree of protection for the private ordering of social affairs. By safeguarding rights to privacy, religious belief, expression, assembly, association, movement, residence, property, trade, occupation and profession as well as religious, linguistic and cultural community autonomy, our basic law recognises that our republic encompasses many different, discrete sub-publics. Moreover, it protects the contours and the content of the various sub-publics, associations and communities that provide those comprehensive visions of the good which give our lives the better part of their meaning. At the same time, our Constitution holds out the promise of revolutionary change. By making equality and dignity the first amongst equals in rights analysis, it sets its face firmly against our discriminatory and radically inegalitarian past. The basic law’s rather unique array of justiciable socio-economic rights – from education to a healthy environment, from health and housing, to water, food and social security – aims to disrupt extant patterns of oppression and to prevent the re-inscription of privilege.

Our courts must chart a careful course between the Scylla of conservation and Charybdis of revolution. No easy task. And yet our courts’ ability to establish an analytical framework that gives each realm their due has proven truly remarkable.

Seven years down the road, and the better part of Judge Malan’s efforts hold up. However, we wonder whether his judgment would have benefitted, not just from truly expert evidence, but from more cogent analysis of the constitutional rights at play.

(a)  Taylor on two competing notions of dignity

In any multicultural, multi-religious constitutional order, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Charles Taylor calls a politics of equal dignity. A politics of equal dignity is based on the idea that each individual human being is equally worthy of respect. The second issues from a politics of difference. This form of politics tends to revolve primarily around the claim that every group of people ought to have the right to form and to maintain its own – equally respected – community.

These competing conceptions of dignity turn on the following critical distinctions.

The first focuses on what is the same in all of us. We all have hopes and aspirations. We should all be allowed to pursue our dreams and goals in a relatively equal manner.

The second focuses on a specific aspect of our identity – our membership in a group. The claim suggests that the purpose of our politics ought to be,

ultimately, the nurturing or the fostering of that particularity. The power of this second form of liberal politics springs largely from its involuntary character – the sense that we have no capacity to choose this aspect of our identity. It chooses us.  

One of the problems South Africa faces is that it is difficult to accommodate both kinds of claim. Charles Taylor writes as follows about collective rights to dignity:

> it makes sense to demand as a matter of right that we approach … certain cultures with a presumption of their value … it can’t make sense to demand as a matter of right that we come up with a final concluding judgment that their value is as great as, or equal to, others.

But the demand for political recognition of distinct religious, cultural and linguistic communities often amounts to that second demand. Moreover, such recognition often reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods – and the manner in which group affiliation distorts that distribution – necessarily interferes with national identity formation as well as a constitutional commitment to the creation of a more egalitarian polity. The African National Congress (ANC) has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend significant support to group politics. The Constitutional Court is also predisposed towards claims of equal respect (for individuals) grounded in a politics of equal dignity.

Should we be group identity sceptics? Amartya Sen contends that:

> Our shared humanity gets savagely challenged when the manifold divisions in the world are unified into one allegedly dominant system of classification – in terms of religion, or community, or culture, or nation, or civilization (treating each as uniquely powerful in the context of that particular approach to war and peace). The uniquely partitioned world is much more divisive than the universe of plural and diverse categories that shape the world in which we live. It goes not only against the old-fashioned belief that ‘we human beings are all much the same’ … but also against the less discussed but much more plausible understanding that we are diversely different. The hope of harmony in the contemporary world lies to a great extent in a clearer understanding of the pluralities of human identity, and in the appreciation

36 Taylor (note 34 above) 16.
38 Whatever failings may exist in execution, Black Economic Empowerment and Broad-Based Black Economic Empowerment initiatives are clearly designed to secure redress for the large-scale disenfranchisement of the majority of South Africans under apartheid and are largely protected by s 9(2) of the Constitution.
39 See National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) paras 28–30 (‘[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.’) See also President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) para 41 (‘[D]ignity is at the heart of individual rights in a free and democratic society … [E]quality means nothing if it does not represent a commitment to each person’s equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens.’)
that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division.\textsuperscript{40}

That much seems incontestable. Totalising views of identity (with their ostensibly comprehensive visions of the good) have led to a hardening of boundaries between groups. The hardening of boundaries has led, in turn, to a hardening of hearts that enables many nations (and many communities or groups with claims to nationhood) to pillage, bomb and plunder with increasingly greater abandon. The more difficult question for group identity sceptics in South Africa is how to draw down on our constitutive attachments in a manner that both protects the social capital we require to build the many institutions that make us human and prevents specific religious, cultural, and linguistic communities from using that social capital to undermine our ‘more perfect union’.\textsuperscript{41}

\textsuperscript{40} A Sen Identity and Violence The Illusion of Destiny (2006) xiii–xiv.

\textsuperscript{41} Here Sen knows he is in trouble, but can only state the problem thus: ‘The sense of identity can make an important contribution to the strength and the warmth of our relations with others, such as our neighbours, or members of the same community, or fellow citizens, or followers of the same religion. Our focus on particular identities can enrich our bonds and make us do things for each other and can help us to take us beyond our self-centred lives … [But] [t]he well-integrated community in which residents do absolutely wonderful things for each other with great immediacy and solidarity can be the very same community in which bricks are thrown through the windows of immigrants who move into the region from elsewhere. The adversity of exclusion can be made to go hand in hand with the gifts of inclusion.’ Ibid 2–3. Sen’s last sentence is telling – ‘can be made to go hand in hand’. Not must, not inevitably, and certainly not ought. But again, Sen’s invocation of diverse difference (within individuals, as within nations) and his ringing defence of the freedom to think critically about our multiple identities does not do the hard work – the line-drawing and the rule-making – that constitutional law requires. Perhaps, as one commentator has suggested, Sen does do some of the ‘hard work’. As our reader rightly notes, Sen’s views about the singularity of identity (hence the book’s subtitle: ‘The Illusion of Destiny’) has ‘important implications for constitutional design and, in particular, for the nature and extent of recognition that constitutions must give to a particular identity ethnic, religious, racial or linguistic identity’ (Notes on file with authors). Our interlocutor contends that one possible implication of Sen’s argument is that ‘a constitution must not give any particular identity a primary recognition to the exclusion of other identities; that constitutions must avoid the freezing or institutionalising of any particular identity.’ (Notes on file with authors). That’s probably a fuller, more complete, statement of Sen’s position. We are indebted to our commentator for this close reading of Sen. However, two responses to Sen and our interlocutor (for our South African purposes) remain. First, we South Africans are no longer at the stage of constitutional design. (Of course, it remains within our power as citizens to change our basic law.) As it stands, the Constitution recognises the importance of 11 official languages (s 6), the right not to be unfairly discriminated against on the basis of religion, culture and language (s 9) (amongst other largely ascriptive characteristics), and community rights to religious, cultural and linguistic practices (ss 30 & 31). The Constitutional Court has recently come to recognise the need for greater ‘group respect’ in a recent judgment that turned, in large part, on the need for greater inclusivity in terms of the languages used for tuition in our public schools and in society at large. Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) paras 46–50 (Deputy Chief Justice Moseneke writes: ‘That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education … Of course, vital parts of the “patrimony of the whole” are indigenous languages which, but for the provisions of s 6 of the Constitution, languished in obscurity and underdevelopment with the result that, at high-school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity … And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue.'
(b) Rawls and Scheffler on the division of constitutional labour: egalitarian liberalism as political pluralism

Despite tiffs in local literature, and spats in the broader world of political philosophy, the vast majority of political philosophers – with the fall of the Berlin Wall – mine roughly the same territory: that of social democracy. The ur-text for on-going debates regarding the contours and the content of contemporary social democracy remains John Rawls’ *A Theory of Justice.*

Rawls’ project identifies two components of heterogeneous, constitutional orders that Charles Taylor, in somewhat different language, identified above: (a) our partiality toward kin, clan and community; and (b) the responsibility that we have, in a just political order, to persons with whom we have no special relationship. Rawls mediates the tension between these two facets of the lives of members of a constitutional order by attending to what he describes as the ‘basic structure’ of a society’s ‘major social, political and economic institutions.’ Scheffler elucidates the manner in which Rawls’ adroitly and

This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education … However, I need say no more about this irony because the matter does not arise for adjudication.’ Second, unlike Sen, who tends to leave significant space for the adaptive and the involuntary preferences of any given citizen in a democratic order, other voices in debates around development theory and the capabilities approach recognise the need for ‘group rights’. In *Women and Human Development* (2000) 78–80, Sen’s long-time collaborator, Martha Nussbaum provides a Decalogue of primary goods and capabilities that must obtain in order for most individuals to flourish. Number 7 reads: ‘Affiliation. Affiliation. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship; protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, freedom of association, freedom of assembly and political speech.’ Ibid. Nussbaum doesn’t do all the hard work here, but she is generally inclined to spell out in detail what rights – including group rights – are necessary in a just, political order. See MC Nussbaum ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9 Feminist Economics 33; M Nussbaum ‘Constitutions and Capabilities: “Perception” Against Lofty Formalism’ (2007) 121 Harvard LR 4. For a substantially more optimistic view about our capacity to recognise diverse difference, and our ability to sustain political institutions, in heterogeneous societies, through rational discourse, see KA Appiah *Cosmopolitanism Ethics in a World of Strangers* (2006) 113, 144 (‘We do not need, have never needed, settled community, a homogenous system of values. The odds are that, culturally speaking, you already live a cosmopolitan life, enriched by literature, art, and film that comes from many places, and that contains influences from many more. And the marks of cosmopolitanism in [my] Asante village soccer, Muhammed Ali, hip-hop entered [our] lives, as they entered yours, not as work, but as pleasure … One distinctly cosmopolitan commitment is to pluralism. Cosmopolitans [therefore] think that there are many values worth living by and that you cannot live by all of them. So we hope and expect that different people and different societies will embody different values. But they have to be values worth living by.’) Perhaps, as our helpful commentator would have it, Sen and Appiah are merely flip sides of the same coin, the latter more sanguine about the possibilities of living in radically, heterogeneous societies that contain groups still prone to totalising views of the world. The hard question remains a hard question in South Africa, only 18 years after liberation. How do we manage differences between (and within) groups in our society that tend to have totalising views of the world? Since Sen is not writing about South Africa, it should hardly come as a surprise that his work does not answer the ‘hard question’ as we have laid it out.

44 Ibid.
compellingly finesses the conflicting demands of partiality and impartiality in such a just order as follows:

Individuals have a duty to support just [egalitarian] institutions, but within the framework established by such institutions their actions may be guided by the values appropriate to small-scale interpersonal settings. In this way, both sets of values can be accommodated without either being reduced to or derived from the other. 45

It sounds easy. But as we have seen from Taylor’s writings, mediating these two demands is no simple matter. What distinguishes Rawls from Taylor is what might be called the lexical ordering of these two sets of values. The basic structure and background conditions of fairness must be granted priority: just institutions must not only come first as a matter of justice, but the basic structure of our just institutions must also inform a citizenry’s comprehensive vision of the good. That said, the two domains of political action invariably overlap. The basic structure contains principles and systems – income, property, value add and inheritance taxation – that ensure that various associations, networks and corporate entities are not permitted to undermine the basic structure’s commitment to egalitarianism. At the same time, the basic structure contains an array of mechanisms that mediate relationships and transactions between individuals and associations that vouchsafe the requisite space to pursue alternative conceptions of the good. 46 In Political Liberalism, Rawls describes his political division of labour and its ability to accommodate multiple, overlapping, conceptions of the good as follows:

What we look for, in effect, is an institutional division of labour between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division of labour can be established, individuals and associations are then free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made. 47

Despite the priority of Rawls’ ‘basic structure’, it’s critical to note that this basic structure – or what might otherwise be called his conception of distributive justice – is rather thin in scope. 48 Once the members of a polity have committed

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45 Ibid.
46 What many readers of Rawls fail to recognise is that he does not shy away from offering a comprehensive conception of the good – both A Theory of Justice and Political Liberalism do just that. However, once his somewhat thin conditions for the realisation of that conception are met, multiple alternative comprehensive conceptions of the good may co-exist. Rawls’ conception of liberalism has teeth. But so long as individuals, associations and communities play by the rules of the basic structure, the legal strictures of the egalitarian liberal polity need not bite. 47
47 Rawls Political Liberalism (note 42 above) 268–9.
48 This thinness of the ‘basic structure’, and its ability to do the heavy lifting Rawls’ requires of it, has been the subject of multiple forms of criticism. See GA Cohen ‘Where the Action Is: On the Site of Distributive Justice’ (1997) 26 Philosophy and Public Affairs 3, 16; L Murphy ‘Institutions and the Demands of Justice’ (1998) 27 Philosophy and Public Affairs 251, 258. Although Rawls is clear that moral content of the basic structure has priority over secondary conceptions of the good pursued by individuals and communities within the polity, both Cohen and Murphy contend that the institutions established to maintain the egalitarian nature of the basic structure are too weak to overcome inegalitarian arrangements reflected in individual economic transactions, associational mores and traditional communities.
themselves to the maintenance of the background conditions of for a just society, they are free to, indeed ought to, ‘strive to realize other values and ideals’.49

Rawls’ conception of egalitarian liberalism resounds, quite profoundly, with the broad outlines of the South African Constitution as understood by South Africans. The Constitutional Court has made clear on innumerable occasions that the Constitution is the supreme law and the law by which other regimes of law within South Africa are measured. At the same time, the Court has made clear that other ‘sub-publics’ within South Africa are entitled to pursue particular comprehensive visions of the good within the broad conception of the good found in our basic law. It falls then to our Constitutional Court to give greater flesh to the basic structure articulated by the Constitution and to delineate, as best as possible, the space for private ordering that the Constitution contemplates. It is to that on-going, and by and large successful, effort by our highest court that we now turn.

(c) How the Constitutional Court cuts the Gordian Knot in matters that raise questions of religious practice

Here, at least, is one place where the Constitutional Court’s jurisprudence offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. In Fourie, the Constitutional Court found (a) that the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages; but (b) that the Constitution had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership.50 The Fourie Court wrote:

In the open and democratic society contemplated by the Constitution there must be mutually respectful coexistence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy … The test … must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom … The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm.51

The Fourie Court simultaneously commits itself to the proposition that religion is a critical source of meaning for the majority of South Africans, while at the same time recognising two further constitutional norms: (a) while religious associations are entitled to articulate through action their ‘intensely held world views’, they may not do so in a manner that unfairly discriminates

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50 Fourie (note 10 above) paras 90–8. See also Fourie v Minister of Home Affairs 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) paras 36–7 (no religious denomination would be compelled to marry gay or lesbian couples).
51 Fourie (note 10 above) paras 90–8.
against other members of South African society; and (b) although ‘intensely held [religious] world views’ must, by necessity, exclude other members of South African society from some forms of membership and of participation, such exclusion does necessarily constitute unfair discrimination.52

The easy question is whether communities possess the power to exclude members who initially agree to follow the rules of the community, but then subsequently refuse to do so. Of course they do. To the extent then that Mr Taylor had voluntarily agreed to subject himself to the rules and the rulings of the Beth Din of Johannesburg, his refusal to abide by its edicts appears to justify the cherem that followed.

The hard question – as the Fourie Court notes – is whether such discrimination rises to the level of an unjustifiable impairment of a party’s dignity – and thus the impairment of the capabilities and the flourishing of some of our fellow South Africans. Again, this question turns on access to the kinds of goods that enable us to lead lives that allow us to flourish. The hard question should give us pause as we reconsider Taylor.

The initial cherems issued by the Beth Din clearly violated a panoply of rights – from equality (s 9) to dignity (s 10) to association (s 18) to communal religious practice (s 31) to freedom of trade, occupation and profession (s 22). The Beth Din wisely rescinded them. But what of the remaining edict that ultimately bore the imprimatur of approval by the High Court?

For Mr Taylor, the exclusion from meaningful participation in the practices of the Orthodox Jewish community clearly impaired his rights to religious practice. Moreover, the Beth Din and the High Court itself acknowledged that the cherem was designed to impair his dignity. Mr Taylor, if he were to be seen at shul, would bear a scarlet letter.

What does the Constitutional Court tell us regarding these breaches of Taylor’s constitutional rights? In Christian Education of South Africa v Minister of Education, the Court held that the dignity interests of learners at school – be it public or private – trumped religious beliefs regarding the virtue of corporal punishment.53 At the same time, the Court noted that what happened at home – outside the public realm – was not regulated by the Constitution. Christian Education intimates that corporal punishment might well be meted out at home for infractions that occurred at school. However, it is important to remember that the dignity interest at stake in Christian Education belonged to children. Children, the Court held, are especially vulnerable to such abuse and incapable of making decisions that would enable them to protect themselves from the meting out of public forms of physical harm.

Christian Education might then be read in support of the Beth Din and High Court’s claim that Mr Taylor had brought the punishment upon himself.


53 Christian Education (note 7 above).
As an adult member of the community he could be presumed to be aware of the consequences of his actions. So while he might have legitimately established prima facie infringements of his dignity, associational and religious community rights, his awareness that his flouting of the Beth Din’s ruling would likely have deleterious consequences suggests that the Beth Din’s ruling was justifiable (if not more than a little bit over the top).

The Constitutional Court in *Bhe v Magistrate, Khayelitsha* also offers some constructive instruction for instances in which individual religious rights conflict with communal religious rights. For our purposes, traditional customary law and religious law occupy the same status in South Africa’s constitutional order. The *Bhe* Court found that the customary law rule of male primogeniture – and several statutory provisions that reinforced the rule – impaired the dignity of, and unfairly discriminated against, the deceased’s two female children because the rule and the other impugned provisions prevented the two female children from inheriting part of the deceased’s estate. Again, the dignity claim articulated by the representatives of the children reflected the inability of female children to take a stand against inequitable treatment that had become, as the *Bhe* Court was quick to note, an ossified part of traditional, customary law in colonial and apartheid South Africa. Such ossification of the law, and the discrimination that flowed from such outré rules of traditional self-governance, have no place under the Constitution.

The Constitutional Court has thus proved itself quite adept at distinguishing circumstances in which neither child nor adult can meaningfully vote with their feet, and thereby flourish, from those instances in which adults willingly remain members of traditional or religious communities in which their rights and privileges may well be subordinate to the rights and the privileges of other members of the community. The Court’s ability to distinguish the objective conditions of second-class citizenship from the subjective decisions of equal citizens has blunted critics of religious and cultural communities who attribute ‘false consciousness’ to any individual or group of individuals who remain within their community’s traditional confines. Mr Taylor and others in his position cannot benefit from a holding that finds that the dignity of women had been impaired by rules of law that denied them equal status or the ability to act as ‘autonomous’ adults. Mr Taylor can assert neither that he was treated

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54 *Bhe* (note 8 above).
56 Not everyone agrees. Justice Ngcobo’s dissent in *Bhe* gives voice to the beliefs of many South Africans. A significant cohort of South Africans view the Constitutional Court as being out of step with the traditional mores of many communities, thus no matter how objectionable lobolo might appear to me, many South African men and women alike identify lobolo with both a bringing together of families into a tighter community and a recognition of the dignity of the woman for whom the lobolo is offered. They view lobolo as designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community of which they are a part. See S Woolman & M Bishop ‘Slavery, Servitude & Forced Labour’ in Woolman & Bishop (note 27 above) 2005 Chapter 64.
as a second-class member of the community nor that he suffered from ‘false-consciousness’. Losing in every conceivable forum is indeed a possibility when one forum shops with little by way of good arguments to offer.

With respect to navigating the Scylla of revolution and Charybdis of conservation in cases that require the interrogation of rule-making and decision-making in traditional and religious communities, the Constitutional Court’s most useful decision to date may be Shilubana v Nwamitwa. One feature of the judgment jumps out immediately: the number and variety of applicants and amici, in addition to the respondent (who, himself, is not without support amongst the amici): The eleven applicants are: Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana, Walter Mbizana Mbhalati, the District Control Officer, the Premier: Limpopo Province MEC for Local Government and Housing, Limpopo, the House for Traditional Leaders, Christina Somisa Nwamitwa, Mathews TN Nwamitwa, Ben Shipalana, Ernest Risaba, Stone Ngobeni; the respondent is Sidwell Nwamitwa and the amici curiae are the Commission for Gender Equality, the National Movement of Rural Women, the Congress of Traditional Leaders of South Africa. No one can claim that the Shilubana Court lacked the benefit of numerous voices, with varying perspectives, and relatively unique access to information relevant to any final decision taken.

The second revelation is the bottom-up quality of the Court’s analysis. Having established the parameters for constitutional analysis – the right to equality, the right to dignity, the right to language and culture, the right to community practice of religion, culture and language, the power of traditional authorities to develop customary law and the manner in which customary law engages constitutional law – the Court spends the better part of its time tracing the factual and historical narrative behind Ms Shilubana’s rise to Hosi of the Valoyi community. The Court does not deny that the Constitution remains the supreme law and the law by which all other law is measured. However, in reaching its decision in Shilubana, the Court allows for various voices beyond its chambers to shape the constitutional norms at play. The third pleasant surprise is that the Court’s use of experimentalist tools enables it to chart successfully a path from conservative understandings to revolutionary conceptions of traditional law that stay true to the original moorings of customary norms and practices. We have no doubt that many readers of Shilubana will find its conclusions repugnant to their conception of African customary law. Could it be otherwise when so many voices are heard and when the conception of ascension to Hosi remains contested territory? And yet we

57 Note 9 above.
have no qualms in asserting that in the context of constitutional adjudication, the Shilubana Court’s method of analysis is largely beyond reproach because it takes the commitment to (traditional and revolutionary forms of) flourishing and experimentalist modes of investigation seriously.60

Does the post-Shilubana Court’s method of analysis when parsing these hotly contesting claims advance our understanding of Mr Taylor’s associational rights? It does indeed. First, from Gauteng Education Bill to Christian Education to Fourie, the Constitutional Court (a) acknowledges the high degree of private ordering (and associational life) protected by our basic law; (b) recognises that South Africans, as members of a heterogeneous array of deeply religious and traditional communities, draw much of life’s meaning from the sacred domain; and (c) curtails, to a degree consistent with most liberal-egalitarian-pluralist constitutional orders, the extent and the intensity of state inference with the many religious and traditional ‘sub-publics’ found within our republic. Second, from Bhe to Shilubana to Juma Musjid, the Court articulates the now largely unassailable thesis that the rights to equality and dignity are the first rights among equals and that any community accused of a prima facie violation of these two rights bears a significant burden, and sometimes insuperable hurdles, in overcoming any infringement.61 Third, the Court now approaches many a polycentric problem – as it did in Shilubana – by allowing interventions, easing the entrance of amici and calling upon experts that might assist the tribunal in establishing facts, discovering the nonconstitutional norms in play and ensuring that all parties with a meaningful view on an issue (say, whether a woman could be Hosi) are heard. Though hardly an easy case, the Shilubana Court clearly benefitted from the large number of participants, the record of democratic decision-making within the Valoyi community, the explanation offered for its less than transparent rules of succession and the egalitarian and revolutionary bent of our basic law. A similar approach to Taylor’s constitutional claims would have ensured that they were reasonably well ventilated. But even assuming the law on cherems


61 Sandra Lovelace v Canada, Communication No R6/24 (29 December 1977) UN Doc Supp No 40 (A/36/40) 166 (1981) paras 15 & 17. (However, in the opinion of the UN Human Rights Committee, the right of Sandra Lovelace access to her native culture and language ‘in community with the other members’ of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. Her exclusion from the community, based upon a marriage (now terminated) to a non-Maliseet husband, was found to violate her ICCPR art 27 right to belong to her community of origin. The Committee wrote: ‘The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe’.)
had been clarified, it remains less than clear whether the basic law would have had anything meaningful to say regarding the interaction between the sacred and the profane on the disposition of this particular matter. Of one issue we are relatively sure. The Constitutional Court would not have taken kindly to Mr Taylor’s forum shopping.

IV CONCLUSION

Seemingly easy cases can make for less than adequate law if one allows for seven years of academic reflection. As we suggested near the outset, *Taylor v Kurtstag* initially looked like a poster child for freedom of association matters: members who voluntarily submit to the rules and the regulations of an association can hardly complain when the association expels them for failure to abide by the rules and regulations of the association.

But *Taylor v Kurtstag* is not your run of the mill association case. It engages some of the more difficult questions secular courts must handle when asked to assess the decisions taken by ecclesiastical bodies.

As to evidentiary matters, none of the voices heard adequately discharged their function. Mr Taylor, the applicant, failed to lead evidence that a cherem was an inappropriate sanction for merely flouting a ruling of the Beth Din. The Beth Din, for its part, should not have allowed the first respondent, Rabbi Kurtstag, to act as an expert deponent in a trial to which he was party. As for the High Court, whilst we are sympathetic to Judge Malan’s plight, we believe that he could have done more to assure an appropriate outcome. If he had doubts about the meaning, the contours, the implications or the incidences of cherems, then he could have asked either party or a court-called independent expert to provide him with elucidation of Jewish law. In the absence of truly independent expert evidence, he could and should have declined to endorse the proposition that cherems play a central role in Judaism or that the doctrine was appropriately applied to Mr Taylor. His acceptance of the assertion that cherems are a central part of Orthodox Jewish faith seems, to us, dubious at best. And yet Judge Malan’s acceptance of this debatable assertion allows him to dispose of the matter as a garden variety associational dispute.

As to constitutional matters, both the Beth Din and the High Court must thank the heavens for having sent them Mr Taylor as the applicant. When Mr Taylor did not like the civil law, he sought sanctuary in a Jewish ecclesiastical court. When Mr Taylor did not like the Beth Din’s views about the appropriate maintenance order to which his wife and children were entitled, he scuttled back to the High Court in search of relief. Had Mr Taylor not been such a piece of work, prima facie claims that his dignity, associational rights and religious community rights had been breached might have been more compelling. But let us assume the prima facie breach of a constitutional right. The constitutional learning in similar matters suggests that as an autonomous male adult, Mr Taylor had the capacity to take informed decisions on his

chances in both the High Court and the Beth Din, and thus had to accept the consequences of his actions and the apparent weakness of his arguments on the merits. Were Mr Taylor deemed to lack the capacity to take informed decisions, both the Beth Din and the High Court might have had greater difficulty explaining why religious law dictated the outcome in this matter. The lesson, if there is one, is that courts should either steer clear of such vexed questions of religious law, or ensure that they have adequate expert insight into how the sacred law works and how it can be squared with our law of laws – the Constitution.