FREEDOM OF ASSOCIATION AS A FOUNDATIONAL RIGHT: RELIGIOUS ASSOCIATIONS AND STRYDOM v NEDERDUITSE GEREFORMEERDE GEMEENTE, MORELETA PARK

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ABSTRACT

In Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park the applicant was appointed as an independent contractor by the respondent (a church) to teach music to its students. The respondent terminated the services of the applicant when it was discovered that he was involved in a same-sex relationship. However, it was decided that the respondent had discriminated unfairly against the applicant. This decision has prompted earnest debate regarding the parameters of appointments by (and membership of) religious associations in South Africa. This investigation contributes to such debate arguing that appointments by (and membership to) a church may require an adherence to the core tenets of such a church, irrespective of the functions emanating from such an appointment. Also, the view that same-sex sexual conduct should not be used as a discriminatory ground in appointments (membership) by a religious association is critically analysed, hereby presenting some insights as to the relationship between the right to equality and religious rights and freedoms, especially in the context of diversity and identity in a pluralist and democratic society.

I INTRODUCTION

In Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park1 the applicant, Mr Strydom, was appointed as an independent contractor (organ teacher) by the respondent namely, the ‘Nederduitse Gereformeerde Kerk’ (Dutch Reformed Church) to teach music to students at the Arts Academy of the congregation. The church terminated Mr Strydom’s services when it was discovered that he was involved in a same-sex relationship.2 Mr Strydom instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, against the church as he was not an employee and he could therefore not proceed in terms of the Labour Relations Act 66 of 1995, or the Employment Equity Act, 55 of 1998. The Equality Court found that the church had unfairly discriminated against Mr Strydom and

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1 2009 (4) SA 510 (EqC, TPD) (Equality Court).
2 Here it is important to note that the respondent omitted, when appointing the applicant, to make it clear that same-sex sexual conduct is in opposition to the tenets of the said church. This was emphasised in Strydom. However, this does not form the crux of this investigation. Rather, the question as to how far a religious institution may go regarding appointments and membership is investigated and in this regard, Strydom allows for furtherance of the debate.
ordered the church to apologise to him, and pay him R75,000, for emotional suffering, the balance owing on his contract for 2005, amounting to R11,970, and his legal fees. The church relied on the right to freedom of religion in s 15 of the Constitution of the Republic of South Africa, 1996 to justify the discrimination. The respondents argued that the complainant was ‘a spiritual leader and as such cannot by way of his example of living in a homosexual relationship deliver his services as lecturer in music at the church’s art academy. In other words, as a role model the complainant was to follow an exemplary Christian lifestyle’. According to Judge Basson, there was no convincing evidence presented by the church that the complainant was in a position of ‘spiritual leadership’. The Court also found that the complainant was not even a member of the church, was not an employee of the church (he was merely a contract worker) and therefore the complainant, according to the Court, ‘was removed or distanced from the church’ (and did not even participate in its activities).

Strydom raises the question of how far a religious association may go in deciding whom to admit to membership or to employ. Scholarship in this regard has provided various insights. David Bilchitz, for example, is of the view that a church should accommodate those who practise same-sex sexual conduct: regardless of the nature of the functions to be exercised by an appointment, a church should not be prohibited from appointing a person who practises same-sex sexual conduct. Patrick Lenta postulates a different theory from that of Bilchitz, placing more emphasis on the autonomy of religious associations. Lenta believes that religious institutions such as churches must not be forced to appoint persons practising same-sex sexual conduct, where such persons are expected to perform a ‘core function’ within such an institution. When a church wants to appoint someone who practises same-sex sexual conduct, and such an appointment is not aligned with a core function in the church (such as a typist, for example), then such a person ought to be accommodated within such a church. This article looks critically at the views of Bilchitz and Lenta, and argues that a religious association represents a unique and important ethos (especially and foremost to its members), and that appointments (and

3 Strydom (note 1 above) para 16.
4 Ibid para 17.
5 Ibid 20. Basson added that: ‘There was not a shred of evidence that the complainant wanted to influence the students or any other church member. In fact, he wanted to keep his homosexual relationship to himself as he regarded it as a private matter.’ Ibid 22. Also see para 17. This led Basson to come to the conclusion that ‘it would not have been devastating to the church to keep the complainant on in his teaching position’. Ibid 23. From this it can be deduced that according to Basson, where a religious association appoints someone who is not ‘distanced’ from the relevant religious community or church (and which consequently has the power to exert some sort of influence on the members of the religious institution), then such a church should have the freedom to exclude such a person from membership or services to the church.
membership) to such an ethos require one to adhere to the core tenets of such an institution to the extent required by such tenets, provided that this is in accordance with the public order and peace, and that it does not violate the foundational dictates of human dignity.

II  THE RIGHT TO FREEDOM OF ASSOCIATION AND SAME-SEX SEXUAL CONDUCT

Judge Basson (in *Strydom*) states: ‘The right to equality of the complainant must … be balanced against the freedom of religion of the church’¹⁸ and:

The question remains whether the right to religious freedom outweighs the Constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation. The Constitutional right to equality is foundational to the open and democratic society envisaged by the Constitution. As a general principle therefore, the Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation.⁹

Also, Basson views ‘equality’ as a core value,¹⁰ and bearing in mind the equating of ‘equality’ with that of prohibiting discrimination based on ‘same-sex sexual orientation’ (as inferred from the above),¹¹ Basson is in fact proclaiming that ‘same-sex sexual orientation’ is therefore also a core value which may trump the right to freedom of association. There is however a risk in this generalised view when focusing on the parameters of membership of a religious association. This risk lies in having same-sex sexual conduct as an equality norm forced onto religious associations as a universal moral right that permeates all sectors of society, including the private. In this regard, the views of David Bilchitz are critically analysed.

Bilchitz states that it seems clearly justifiable for a Christian community to refuse to employ a Jewish or Muslim minister, or any person who does not profess the faith of that community, and this Bilchitz bases on the idea of ‘religious leadership’. However, according to Bilchitz, ‘this is a different matter altogether from refusing to employ, for example, a gay individual as a minister, where such an individual belongs to such a community, professes its beliefs and identifies with that community’.¹² Bilchitz adds:

… if the discriminatory practice or policy is indeed a precept of the faith, then that precept excludes individuals from the community … on the basis of a fundamental element of their identity that they can do very little about. These are people within the community who, through a deep-seated characteristic of self, are treated detrimentally by that community.

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¹⁸ *Strydom* (see note 1 above) para 8.

⁹ Ibid para 14. See para 30, Basson stating that: ‘The reference to the case of *Taylor v Kurstag NO* … is not helpful in deciding the issue of balancing the right to freedom of religion against the right to equality protected by the Constitution and in terms of the Act’ and para 31: ‘ … It was already spelt out above that the fact that the freedom of religion must be balanced against the complainant’s right to equality, in essence, forms the context of the question whether the unfair discrimination was fair’.

¹⁰ Ibid para 10.

¹¹ As well as Basson’s view that it was discriminatory (due to a violation of equality) for the church not to treat those with a same-sex sexual orientation the same as it treats heterosexuals. In this regard, see, for example, para 25.

¹² Bilchitz (note 6 above) 246.
The precepts of the faith here are incompatible with the values of South African society within which the religious association resides.\(^\text{13}\)

Bilchitz’s approach in this regard is substantially invasive towards the freedom of association of religious institutions. In the above, Bilchitz states that where a Christian church refuses to appoint a gay minister, and such a refusal is based on a precept of faith, then this is incompatible with the values of South African society within which the religious association resides. But what are these values? Bilchitz states that the prohibition on unfair discrimination contained in s 9 of the Constitution has a special place in South African constitutional democracy.\(^\text{14}\) The prohibition on discrimination in s 9 of the Constitution is there to ensure that individuals are not disadvantaged on the basis of certain characteristics that render them different from other individuals.\(^\text{15}\)

To Bilchitz therefore, the equality clause in the Constitution is paramount in justifying a church having to appoint a gay person as the pastor and leader of such church even though this comes into conflict with the doctrine of the said church. This Bilchitz further qualifies against the background of sexual orientation. Arising from this is the question of whether ‘equality’, understood against the background of the protection and accommodation of ‘same-sex sexual orientation and consequent practice’ of members or employees within religious associations, should form part of the Constitution’s reflection of an ‘objective normative value system’ which is viewed as superior to the right to freedom of association (and by implication, the right to freedom of religion).

To approach matters pertaining to membership of religious associations from a specific conceptual viewpoint (which is inherently conducive to differing views) introduces subjectivity into the formula, which in turn runs the risk of enforcing a specific meaning of a moral matter onto society. This in turn runs the risk of threatening the flourishing of plurality in society. Understanding associational rights as a foundational human rights concept supports the view that a religious association has the potential of serving as an important interpretive medium regarding an understanding of ‘human dignity’, ‘identity’, ‘freedom’ and even ‘equality’ itself. Kent Greenawalt points to problems of understanding arising from the puzzling nature of equality, one of them being ‘the uncertainty among lawyers and judges about the significance of legal norms formulated in the language of equality’\(^\text{16}\).

Religion is an equality right itself and religious people are entitled to non-discriminatory treatment in terms of their religion as well.\(^\text{17}\)

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\(^\text{13}\) Ibid 246. According to Bilchitz, a law that prevents a religious group from discriminating on grounds of sexual-orientation should be defended. Ibid 240.

\(^\text{14}\) Ibid 226.

\(^\text{15}\) Ibid 228.


\(^\text{17}\) Bilchitz, when referring to the ‘prohibited grounds of discrimination’ recognised in the Constitution, omits to specifically refer to ‘religion’ as also being a listed ground. In this regard, see for example, Bilchitz (note 6 above) 226, 228, 230, 232 & 240. By doing so, the emphasis on religious associations not to be discriminated against due to their core creeds is excluded from the argument. See for example, LM du Plessis ‘Religious Freedom and Equality as a Celebration of Difference: A Significant Development in Recent South African Constitutional Case-law’ (2009) 12 PER 10.
over religion, or viewing some forms of non-discrimination (say, same-sex sexual conduct) as more important than the religious person's freedom to disagree with the associational acceptance of same-sex sexual conduct, is questionable.

Many religious and non-religious believers, cultures and religious associations in South Africa have as part of their core belief, requirements pertaining to sexual conduct, which are inextricably connected to foundational views on marriage, family, child-rearing and purpose in life. Human rights jurisprudence supports the sacredness of the human body, the protection of which is prioritised by human rights instruments around the world. Irrespective of race, creed or culture, the living (and dead) human body is sacrosanct. The creeds of, for example, the mainstream religions in South Africa are in agreement with this. In fact, many believers and religious groups support the idea that human life commences long before birth (where many non-religious persons and interest groups do not) due to, among other things, the ‘bodily element’. This is why, for example, the ethical nature of cloning and genetic engineering is, morally speaking, such a heated debate. Questions as to how and for what purposes we use our bodies are therefore of fundamental concern and naturally overlap with our foundational beliefs and consequently our right to freedom of religion, belief and opinion. This is one reason why the right to freedom of religion, belief, conscience and opinion is such an important right.

The autonomy of religious associations and their independence from the state, are vital to a conscience-honouring social order. The state's interference therefore should be limited to protecting vulnerable members from readily discernible, serious harm (for example, physical or sexual abuse of a child and financial fraud by church officials), not from moral claims that the political community rejects. The manner in which we use our bodies (including sexual activities) overlaps with our individual identity, introducing the relevance of this for the fruition of our human dignity. Justice Langa states in MEC for Education, KwaZulu-Natal v Navaneetham Pillay, that ‘religious and cultural practices are protected because they are central to human identity and hence to human dignity. This experience of a specific identity via religious practices is also attained within a collection of individuals who have the same religious beliefs and interests and respective practices, and who are but an extension of the private domain.

The way we think of our bodies and the purposes for which our bodies are to be used (including sexual activities) according to each of our beliefs, overlaps with our moral views on the matter (whether driven by genetic influences or

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19 2008 (1) SA 474 (CC).
20 Para 62.
not) – moral views that differ from believer to believer and from group of believers to group of believers. Genetic reasons for sexual arousal are not only limited to reasons for same-sex sexual conduct but other types as well. This however does not rid forms of sexual conduct from loyalty to specific moral positions for the reason already explained. Sensitivity and an accommodative approach regarding differing moral opinions on the body against the background of sexual conduct is reflected in South African legislation that even allows for marriage officers, for example, not to serve before marriages between same-sex couples when such officers conscientiously object to doing so. This moral aspect is further considered against the background of race, as there might be the implication that if a church may discriminate on grounds of sexual orientation, then this implies a qualification for discrimination on ground of race as well.

‘Beingness’ and ‘conduct’ are two separate ideas regarding the topic dealt with here. Whether born white or black, disabled or not disabled, or genetically inclined to be sexually aroused in a certain manner does not take away my being a human deserving respect. However, when I interact with the world around me – in other words in my conduct – I allow myself, in many instances, to follow a specific moral path that is not always in agreement with others. This still does not imply that I disrespect persons whose conduct differs from mine, although I may differ on the moral rightness of their conduct. This also does not imply that the state should disrespect persons whose conduct clashes with my views on what form of moral conduct should be acceptable, nor does it imply that I must exclude myself from interacting with those whose conduct is morally unacceptable to mine in the normal affairs of day-to-day living. Membership of a sports club or workers’ union for example, due to the nature and purpose of such a club or union, should allow for the accommodation of members reflecting a diversity of ‘moral conduct’ participators. However, membership of a religious association where the nature and purpose of such an association can be inextricably linked to specific forms of conduct (for example, sexual conduct), qualifies that such an association should be allowed to align its requirements for membership with adherents to a certain form of conduct (including sexual conduct). As explained earlier, it is not only the nature and purpose of the religious association that calls for this approach, but also the bodily intimate, personal and sacred aspect accompanying sexual activity.

In this we also find, as explained above, a substantial difference from the matter related to differences in, for example, race. For this very reason one cannot expect to accommodate a marriage officer who does not want to serve before marriages between couples who are of a race to which the marriage officer takes exception. What is more, the core doctrines of, for example, the mainstream Christian denominations in South Africa certainly do not require a person to be of a certain race so as to obtain membership to such a denomination. Yes, there may be some groups out there who believe that race is a requirement for membership, just as there is still racism in society, but these are exceptions, exceptions that are certainly not warranted by the
doctrines upon which the congregation of Moreleta Park (and many others) base their belief (including the Bible – biblical interpretation is certainly open to abuse, but it is also open to a proper interpretation). The creeds of especially the mainstream religions in South Africa do not prohibit membership based on the colour of a person’s skin. Similarly the Moreleta Park community, which we find in Strydom, does not prohibit membership on the grounds of race. For reasons mentioned above, the sexual activities someone chooses to exercise are a different matter when it comes to qualifying for membership of, and appointments by, a religious institution. As explained above, the type of sexual activities a person chooses to practise is different, allowing someone to disagree with others, whilst simultaneously respecting those others with whom he or she disagrees as human beings of an equal nature and deserving of equal respect.

Bearing in mind that the private sphere should be free to choose forms of conduct (including sexual conduct) that are in line with one’s moral framework, and provided that the public order and peace as well as the foundational dictates of human dignity are not violated in the process, a church may prohibit membership or an appointment where the applicant exercises sexual conduct that is not in agreement with the core tenets of such a church. Implied in this is a more extended understanding of the law, where religious institutions find their freedom in activities dictated to by their specific cosmological and consequently normative context. This is also in accordance with Margaret Davies’ view that ‘pluralism includes the understanding that law’s hierarchy should be flattened – the law should be viewed as a complex horizontal as well as a vertical structure’. Also, says Davies, ‘the spatial diversity of law is to be found in an irreducibly plural multicultural landscape, in non-essential social groupings, and in the formation of identities in relation to such multiple normative environments’.

Alvin Esau questions our assuredness of our moral superiority that we can use the violence of the law to coerce religious groups into conformity with our inclusivist views: ‘Is our society so illiberal that it cannot accommodate groups that generate a diversity of normative practices? At what point do

21 And similarly, non-religious creeds as well.
23 D Cooper cited in Davies ibid 94. Referring to Robert Cover’s Nomos and Narrative, Davies refers to the associations of ‘normative meaning inhabited by religious sectarian communities … each constructs its own nomos … The state is one element of such a nomos, but not necessarily the most significant … State law is interpreted through religious norms: thus, a plurality of possible meanings arises from law’s intersection with various normative worlds and subject-positions. It is the task of legal officials, in particular judges, to contain this plurality.’ Ibid 94. Also see pages 96–7. Referring to the Canadian position, Benjamin Berger states that: ‘… law’s is not a cultural understanding of religion. It does not seek to understand religion as an interpretive horizon, composed of sets of symbols and categories of thought, out of which meaning can be given to identity, history, and experience. Instead it molds religion to the shape of its own set of normative and symbolic commitments’. BL Berger ‘Law’s Religion: Rendering Culture’ (2007) 45 Osgoode Hall LJ 277, 310–1.
we have the moral confidence to justify limiting liberty through law.'

Iain Benson comments that there are good reasons why law should be understood to have its own limited jurisdiction. One is that many of the things that must inform the law (such as politics, philosophy and theology) are outside of it. This is especially relevant to the matter of same-sex sexual conduct which, as stated earlier, is open to a variation of opinions of whether such conduct is right or wrong and which consequently play an important role in determining membership of, for example, a church.

David Bilchitz's view that, on the basis of equality being a foundational norm with the meaning of also allowing for an across-the-board enforcement of non-discrimination against same-sex sexual conduct, is not what I view as ‘an egalitarian form of liberalism that recognizes that individuals and associations should be accorded the freedom to practise their own ways of life only insofar as they do not undermine the capacity of other individuals to do likewise’. Bilchitz's egalitarian form of liberalism is based on a non-egalitarian norm seeking dominance over core religious doctrines that cannot be proven to be less truthful than his own views. Diversity necessitates that society accommodate different and acceptable forms of sexual conduct (such as heterosexual and same-sex sexual conduct) and religious associations, due to their nature, are ideal for the furtherance of such accommodation. For reasons already stated, this does not mean that the acceptance of different forms of sexual conduct should be enforced on religious associations because doing so would be contrary to the flourishing of diversity in society. Bilchitz’s use of diversity assumes that the acceptance of same-sex sexual conduct must take place in all sectors of society, hereby understanding same-sex sexual conduct as a moral inherent good for everyone. Even beyond the matter related to same-sex sexual conduct, can it really be that a prohibition against discrimination on grounds of sexual orientation (and consequently conduct), that a church may be required to have its spiritual leader married to three wives or partaking in pre-marital sexual intercourse where the doctrine of such a church prohibits this? If so, then why?

The inextricable relationship of ‘identity’ and ‘the right to religious freedom’ as emphasised by Justice Langa in Pillay, and the extension of this against the background of membership of a religious association (as referred to earlier) also deserves emphasis. Bilchitz’s understanding of identity in this regard is questioned. A member of a religious association whose membership is terminated due to his or her sexual orientation (and consequent conduct) is, according to Bilchitz, being required to rupture a part of his own identity.

26 Bilchitz (note 6 above) 222.
27 Ibid 231.
Bilchitz does not address the possible ‘rupturing of identity’ of other members of the religious association if the said member were not told to leave. Bilchitz states: ‘Being forced to leave that faith because of discriminatory practices within a religious denomination is to require them to rupture a part of their own identities.’ Note here how Bilchitz aligns ‘that faith’ with ‘the faith’ of the person who is required to leave. How I understand ‘that faith’ is that it refers to the creed of the association in question, and how I understand ‘the faith’ of the person required to leave is that it refers to a system of belief of an individual that is not in agreement with the faith of the religious association. Bilchitz therefore assumes that ‘the faith of an association’ should always be in agreement with a specific person’s belief in and consequent exercise of a certain form of sexual conduct – the two are not always aligned with one another.

Bilchitz’s example of Themba who is dismissed by the leadership of the church that he belongs to, after the leadership finds out that he is gay, also does not deal with the importance of distinguishing between Themba’s faith and that of the said church. Although Themba believes that being (genetically) gay is to be supported by the doctrine of the church that he belongs to, this does not mean that this is what the church believes in (even though there might be other members who agree with Themba). It is the prerogative of the respective church to decide what the core doctrines of the church should be, irrespective of whether or not Themba can find another church with the same religious tenets as the one that he is currently in. In fact, it cannot be that Themba is in agreement with the doctrine as a whole of the said church in the first place (even though he might think so), because sexual conduct as explained earlier, can form a core doctrine of a religious association, and such a core doctrine might see things differently from the way that Themba does. This might just be the case in the example that Bilchitz uses. The fact that there are other members taking Themba’s side on the matter also does not alter the argument. If the leadership of the church is not approached by such members then it needs to be left at that – in a scenario where some members take the matter further with the leadership, or where some members of the leadership itself do the same, then the discussions need to follow the natural processes of argumentation, convincing and final decision-making.

III  THE RIGHT TO FREEDOM OF ASSOCIATION AND RELIGIOUS ETHOS

The freedom of individuals to share and practise the same interests of substance (such as that which pertains to a religious association) with one another forms a foundational part of a democratic and pluralist society. This freedom implies the freedom that an individual has to collectively experience and practise the same views on ‘freedom’ itself, with other like-minded individuals. A religious association is an example of a collectively exercised
interest, where the members fulfil and maintain not only their basic right to freedom of religion but also their basic right to human dignity mainly due to their acceptance of, and participation in, the core creeds of such an association. It is such creeds that in many instances provide the framework of the believer’s sense of the self, which adds to a dignified experience for the believer. Churches form a substantial part of South African society and represent specific cosmological and epistemological interpretations of reality no different from those of the non-religious believer or non-religious association practising a collective interest. Consequently, the right to freedom of association allows for the accommodation of collective interests which, in many instances, differ in foundational views on existence and purpose, from beliefs external to an association. Needless to say, this is especially true for religious associations.

Inherent to the establishment and purpose of a religious association is difference. Naturally flowing from this understanding is an overwhelming sense for the private and the exercise thereof in a manner conducive to the civil law and the public order and peace, and that it does not violate the foundational dictates of human dignity – ‘the religious association is an extended conception of privacy, an idea which is the cornerstone of constitutional security for church autonomy’. What makes religious practice distinct is that it involves the extensive, communal enactment of behaviour and relationships of the sort that ordinarily take place in a far more cloistered, personal context.

Accordingly, the choices that a religious association makes regarding the requirements for membership should be accompanied by an elevated sense of respectability. There are various theories furthering this respectability. Here, the ‘organic’ (instead of the ‘instrumental’) approach serves as an example. In this regard, Alvin Esau states:

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

This emphasises ‘membership’ of a religious institution as an important factor, irrespective of the task expected of such a person – the person (employee or independent contractor) is invited into a relationship and into membership with

31 Ibid 1249. Eisgruber & Sager add: ‘The aspects of religious practice that are uncontroversially secure from the reach of some state commands are so secure because they are private in general and recognizable ways, not because they are religious.’ Ibid 1276.
32 Esau (note 24 above) 734–5 (author’s emphasis).
the group,33 and on obtaining membership, the person becomes inextricably related to the religious ethos of the relevant group which has a core relational understanding encompassing it.34 What is the implication of this understanding for religious associations regarding the parameters of employment by such associations?

Patrick Lenta states that latitude should be given to religious associations to allow them to govern their internal affairs, and this includes accommodating their otherwise illegal work-related discrimination. According to Lenta, ‘a religious association does not have the right to discriminate on otherwise prohibited grounds in respect of all activities performed by its employees and contract workers’.35 More specifically, religious bodies should not be permitted to engage in work-related discrimination ‘where the activity to be performed by the employee or contract worker bears no significant relationship to the settled religious convictions of the organisation’.36 This idea that where ‘the activity to be performed by the employee or contract worker bears no significant relationship to the settled religious convictions of the organisation’, which Lenta relies on so as to justify a religious association’s appointment of someone who does not follow the core doctrine of the association, is also confirmed by Lenta in other parts of his article. For example, Lenta refers to ‘sacerdotal office appointments’,37 ‘religiously based jobs’,38 and ‘proximity to the doctrinal core’39 as qualifiers so as to allow a religious association to discriminate when appointing an employee or contract worker. The question arises from this as to what Lenta means by ‘significant relationship to the settled religious convictions’, ‘sacerdotal office appointments’, ‘jobs that are religiously based’, and ‘proximity to the doctrinal core’. In other words, do these qualifiers acquire a similar meaning when interpreted through the lens of for example, Esau’s organic (relational) model referred to above? Does a typist’s position in a church, whose members view the workplace itself as constituting a community of believers where relationships are as important, if not more so, than narrowly defined role-tasks (where matters of faith rather than roles are to a degree the point of the emphasis), not qualify as a ‘religiously-based job’ or a ‘job in proximity to the doctrinal core’ or ‘a job

33 Ibid 735.
34 Another theory pertaining to the furthering of respectability of religious associations has to do with the principle of subsidiarity, which means that the state is posited as the entity that is to help the smaller or lesser entities, such as families and voluntary associations. This aid by the state towards smaller entities seeks, according to J Bryan Hehir, to establish how the state should assist other entities in a society to achieve their legitimate purposes, see SV Monsma ‘The Relevance of Solidarity and Subsidiarity to Reformed Social and Political Thought’ (2006). A paper prepared for the International Society for the Study of Reformed Communities, Princeton NJ 3; and GJ Spykman ‘The Principled Pluralist Position’ in GS Smith (ed) God and Politics. Four Views on the Reformation of Civil Government (1989) 78, 97.
35 Lenta (note 7 above) 859.
36 Ibid 859.
37 Ibid 828.
38 Ibid 844.
39 Ibid 859.
that bears a significant relationship to the settled religious convictions of the organisation? Although Lenta refers to the possibility of difficulty in judging when positions of employment are ‘sufficiently close to matters of faith’, he does not refer to other possible interpretations of associational rights such as that which Esau might have in confirming this difficulty of judging. Rather, Lenta only refers to the example of a teacher whose duties extend only to non-religious subjects as confirmation of this potential difficulty. What about ‘Typist A’ appointed by ‘Church B’ which has as part of its core doctrine, the belief that even a typist whose functions are important to the functioning of the church, forms part of the ‘community of believers in covenant with God’? The same applies to the teacher who teaches non-religious subjects to members of a religious association. Religious commandments are not necessarily founded on or limited by reasons accessible to non-believers – after all such commandments can be understood to depend on ‘fiat’ or ‘covenant’.\footnote{Eisgruber & Sager (note 30 above) 1283.} Lenta needs to explain why the appointment of ‘Typist A’ by ‘Church B’ does not involve ‘a religious’ activity or why such an appointment and its consequent functioning is to be viewed as being distanced from the religious beliefs of ‘Church B’? Lenta implies that ‘typists’ and ‘janitors’ always form part of the same category of appointees in the nature of their work always having to be viewed as distanced from ‘religious activities’ or from ‘the core tenets of faith of a particular religious community’, which is not an approach that is sufficiently layered or nuanced.\footnote{See for example Lenta (note 7 above) 855.} Added to this is the question of whether all typist positions in religious associations are always distanced from some or other religious activity? Does a typist for example not sometimes participate in messages of bereavement where there is a death or illness in the congregation? This may necessitate activities such as prayer and other forms of spiritual upliftment. A typist may also be required to provide religious inputs at church meetings, for example, as the margins between spirituality and administration are not always clearly separated from one another.

I agree with Lenta that ‘the right of a liberal state to enforce public principles such as non-discrimination is limited by the rights to freedom of association and freedom of religion’\footnote{Galston cited in Lenta (note 7 above) 859.} and that associations should not always be expected to conform to public principles such as non-discrimination, when those principles clash with the convictions of members.\footnote{Ibid 833.} The state, says Lenta, should refrain as far as possible from interfering with the internal affairs of associations, as

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\item \footnote{Eisgruber & Sager (note 30 above) 1283.}
\item \footnote{See for example Lenta (note 7 above) 855.}
\item \footnote{Galston cited in Lenta (note 7 above) 859.}
\item \footnote{Ibid 833.}
\end{itemize}
this is what the protection of diversity requires.\textsuperscript{44} However, Lenta, although supporting the importance of associational rights,\textsuperscript{45} does not clarify as to why religious associations themselves may have different interpretations regarding what the ‘religious’ and ‘non-religious’ are, hereby influencing the interpretation of ‘the extent of the religious interference’ pertaining to the test of whether discrimination may take place with the appointment of employees or contract workers by a religious association. Therefore, I disagree with Lenta’s comments in his referral to the United States Supreme Court judgment of \textit{Amos v Corporation of the Presiding Bishop},\textsuperscript{46} that the finding of the said Court that ‘if an exemption were restricted to religious activities, courts would restrict the group’s self-understanding and will fail to give due consideration to the religious association’s own account of the religious foundation of an employee’s activities’, is incorrect.\textsuperscript{47} Lenta states:

\begin{quote}
True, there is always a danger that when deciding whether to grant or withhold an exemption, courts will employ criteria that are not part of the church’s self-understanding and will fail to give due consideration to the religious association’s own account of the religious foundation of an employee’s activities. Even so, this does not mean that religious associations should not be required to demonstrate to the court that the position related to the unfair discrimination is sufficiently closely connected to the doctrinal core of the church.\textsuperscript{48}
\end{quote}

In this I do agree with Lenta, in that a religious association should be required to show to the court that the position related to the unfair discrimination is sufficiently closely connected to the doctrinal core of the church. But ‘doctrinal core’ also has to do with a possible encompassing religious ethos of the specific religious association (as explained earlier), hereby also possibly including positions such as typists. Also, what \textit{Amos} emphasised remains relevant to factual situations where the courts need to be sensitive to the church’s self-understanding and the church’s own account of the religious foundation of an employee’s activities. \textit{Amos}, according to Lenta, by permitting the church to discriminate in respect of a job so distant from the doctrinal core of the Mormon religion, allowed a scope for discrimination so broad that it threatens religious liberty itself. The reason for this was that because requiring employees to comply with the tenets of the employer’s faith has the effect of ‘coercing belief by conditioning vital secular benefits on declarations of faith’.\textsuperscript{49} As argued earlier, where the religious association’s ethos requires an appointment which is on the face of it not spiritually related, to be aligned with the creeds of such an association, then this should be prioritised. Needless to say, the religious association should be required to demonstrate that the position in respect of which they seek to discriminate is sufficiently close to the doctrinal core

\textsuperscript{44} Ibid 833.
\textsuperscript{45} See Ibid 829 & 831–2.
\textsuperscript{46} 483 US 327 (1987).
\textsuperscript{47} Ibid 843.
\textsuperscript{48} Ibid 843.
of their religion.\textsuperscript{50} \textit{Amos} dealt with a janitor, which I suspect will require a lighter burden of demonstration than for example the position of a secretary, although both, on the face of it, might seem to be positions far removed from the spiritual workings of a religious association.

It is Lenta's own concern for the accommodation of the right to freedom of association as presented in his reference to William Galston's statement,\textsuperscript{51} that is not extended enough upon so as to accommodate those functions which might generally seem to always be distanced from the core doctrines of a given religious association (or those functions which might generally seem to always be excluded from spiritual leadership). By looking at a more nuanced approach to the status of functions in a religious association that may, on the face of it, appear to be distanced from spiritual leadership and core doctrine, we are ‘enlarging our sympathies by imagining what it would be like to be in the shoes of the other.’\textsuperscript{52}

\section*{IV Conclusion}

The journey between the shoals of strongly held religious beliefs and the affirmation of the otherness whose marginalisation has been justified by those very beliefs, should, according to Lourens du Plessis, present a challenge worthy of commitment.\textsuperscript{53} \textit{Strydom} serves as a catalyst for the scholarly furtherance of this commitment. This article argued against the view that equality, against the background of non-discrimination on grounds of sexual orientation, may qualify the enforcement of membership of, and appointments by, religious associations, of those who practice same-sex sexual conduct. It was emphasised that the way we think of our bodies and the purposes for which our bodies are to be used (including sexual activities) are inextricably connected to morally-based predilections. A society seeking the protection and furtherance of ‘identity’ and ‘diversity’ needs to accommodate morally-based predilections regarding sexual activity in the private sphere, which includes the religious association. Secondly, this article argued for an approach to appointments by religious associations, based on ‘religious ethos’ which does not necessarily exclude those functions that on the face of it seem to be ‘distanced from religion’ or ‘excluded from the domain of spiritual influence or leadership’. How we perceive of ‘distance’ and ‘spiritual leadership’ is in itself a matter of religious interpretation

\textsuperscript{50} See Lenta (ibid) 27.
\textsuperscript{51} ‘Because of the content of your deepest beliefs, you experience no conflict between your beliefs and anti-discrimination law. But if you believed what I believe, you would experience that conflict and the burden it places on me, and you would seek an accommodation, one that I would readily grant were our positions reversed. I am not asking you to enter into the perspective of my particular beliefs. But I am asking you to enlarge your sympathies by imagining what it would be like to be in my shoes.’ Lenta (ibid). Lenta notes here that this quotation ‘was slightly altered to suit his present purposes, of an imagined conversation between a religious believer and a secular philosopher that one finds in Galston’s thoughts’.
\textsuperscript{52} Ibid.
\textsuperscript{53} Du Plessis (note 17 above) 31.
sacred to the relevant collective belief. In other words, the status of functions in a religious association that may, on the face of it, appear to be distanced from spiritual leadership and core doctrine, might in fact not be so on closer inspection. In all of this, an understanding of the right to freedom of association, with specific reference to religious associations, as a foundational right that in turn furthers identity and diversity in society, is attained.