WHY COURTS SHOULD NOT SANCTION UNFAIR DISCRIMINATION IN THE PRIVATE SPHERE: A REPLY

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ABSTRACT
This article addresses the question as to whether religious associations should be granted an exemption from legal anti-discrimination provisions relating to their employment practices. It focuses on responding to criticisms mainly by Patrick Lenta of my position that, in general, no such exemptions should be granted. The key issues I address are the following. Firstly, I shall consider the relationship between South Africa’s particular context and the approach to be adopted towards interpreting and balancing fundamental rights in South African constitutional law. Secondly, I shall contend that religious associations do violate liberal reciprocity when seeking such an exemption and respond to Lenta’s argument in this regard. Thirdly, I shall consider the harms of discrimination by religious communities upon the equal citizenship of vulnerable groups and distinguish these from the distress caused by refusing members of religious associations exemptions from anti-discrimination legislation. Finally, I shall discuss the question of remedies and the possibilities they allow for encouraging religious associations to act in ways that are consonant with South Africa’s constitutional democracy.

I ARTICULATING THE DIFFERENCES
Lerato is a well-qualified expert in the public policy relating to water. She applies for a job as a senior advisor to the Minister of Water Affairs. She receives a letter of regret indicating that despite her being the most highly qualified person for the job, the department is unable to appoint her as the minister has strong religious beliefs which forbid him as a married man to work in close association with a woman. Only men will be appointed to the job. Lerato is outraged and sues the department for unfair discrimination on grounds of sex or gender. Most lawyers would agree that such a case would in all likelihood succeed as an example of egregious unfair discrimination on grounds of sex/gender.

* Associate Professor, University of Johannesburg; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law. I would like to thank Juha Tuovinen for some research assistance with this article and Stu Woolman for engaging discussions on these fascinating issues. Though some differences remain in our normative approach, we have become closer in our thinking as to how courts should ultimately address cases of discrimination by religious associations. I would also like to thank participants in the Symposium on Religious Rights and Freedoms held at Constitution Hill from 15 to 16 September 2011 and the anonymous referees for their helpful comments. Though some differences remain in our normative approach, we have become closer in our thinking as to how courts should ultimately address cases of discrimination by religious associations. 

1 This response should be read together with my original article titled D Bilchitz ‘Should Religious Associations be Allowed to Discriminate?’ (2011) 27 SAJHR 219. The original article outlines both the historical and normative arguments underlying the position I adopt. This response can only seek to address some of the key criticisms that have been advanced against the position I articulated there and, hopefully, to deepen some of the arguments.
Consider another case, whereby Joan is an expert in the policies and doctrines of a well-known church in Braamfontein. She applies for the position of advisor to the pastor. After her interview, she receives a letter of regret indicating that, despite her being the most highly qualified person for the job, the church is unable to appoint her in this position as the pastor who is a married man is forbidden – in terms of the strong religious beliefs of the denomination – from working in close association with a woman. Joan is outraged and wishes to sue the church for unfair discrimination on grounds of sex and gender. Should she succeed?

In recent literature on the topic, Patrick Lenta has argued that Joan should (in all likelihood) not succeed in her claim. For him, there is fundamental dissimilarity between the case of Lerato and that of Joan. For Lenta, in the case of Lerato, the discrimination occurs in the public sphere, where constitutional values should permeate throughout all interactions including within the realm of employment. However, the case of Joan relates to the sphere of private religious associations: the values of freedom of association and freedom of religious belief should allow religions in particular to order their internal affairs in accordance with their own values. This is particularly so in relation to matters that lie at the ‘core’ of religious doctrine and applies even if those values are fundamentally at odds with the important value of equality and prohibition on unfair discrimination in the Bill of Rights and legislation: this leads Lenta to defend a right on the part of ‘private associations to discriminate’.

The notion of a right to discriminate for private associations is, in my view, repugnant considering the history of South Africa as well as the foundational values of the Constitution of the Republic of South Africa, 1996 and the blueprint it outlines for a society that respects the freedom, equality and dignity of all. In the view that I have sought to defend in a recent article, the cases of Lerato and Joan are fundamentally similar and both constitute unfair discrimination.

2 Lenta can be credited with stimulating the ensuing debate which focused on the case of *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* 2009 (4) SA 510 (T) with his article P Lenta ‘Taking Diversity Seriously: Religious Associations and Work-related Discrimination’ (2009) 126 SALJ 827. The debate has centred on discrimination on grounds of sexual orientation, yet, as I try to show with the above example, it could be replicated in the context of race or sex/gender as well and the issues are similar. Iain Benson, in a response presented at the above-mentioned Symposium titled ‘Inside/Out and Outside/In: Civil Society, Civic Totalism and the Right to Discriminate within Religious Associations’, treats discrimination on grounds of sexual orientation differently to discrimination on grounds of race or sex largely on the basis that such differential treatment usually takes place on the basis of someone’s sexual conduct rather than on the grounds of an unchosen, determinate feature of their identity. There are many things wrong with this view: as the South African Constitutional Court has recognised, sexual orientation is a fundamental feature of the make-up of individuals and is not reducible to sexual conduct. Moreover, sexual orientation conditions whether individuals will seek out relationships with members of the same or opposite sex and places constraints upon any choices they have. The confines of this response do not allow any detailed discussion of this issue but it should suffice to point out that Benson’s approach is at odds with that adopted in South African constitutional law: see, for instance, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 20–7.


4 D Bilchitz (note 1 above). This article is the one that has been the subject of many responses in this volume.
on the grounds of sex/gender. The state and courts, in particular, are required to declare that such behaviour constitutes unfair discrimination and to recognise that it is at odds with the fundamental values underlying the South African state. Apart from such a declaration, any court hearing such a matter must design appropriate relief. At this point the distinction between the realm of the state and that of religious (or cultural) associations becomes important and courts will need to consider the nature of the association concerned as being one factor that is relevant to determining the kind of the relief that is to be granted. This could range from a simple declaratory order, to requirements for engagement between a religious community and vulnerable minority (or individual), to civil damages and reinstatement in appropriate cases. What is crucial in terms of the position I defend is that courts should not declare that blatant discrimination on grounds of race, sex or sexual orientation (amongst other prohibited categories) is fair simply because it emanates from the doctrines of a religious or cultural association. To do so would render the institutions of the state complicit in the very acts of discrimination taking place in the private sphere. Furthermore, unfair discrimination in the private sphere – particularly in a society so scarred by the effects of discrimination in the past – easily spills over into the public realm, seriously affecting the equal citizenship of those who have been historically discriminated against, such as women, black and gay people.

The positions I adopted in my original article have elicited critical responses from Patrick Lenta, Iain Benson and Stu Woolman, amongst others. I am grateful for the attention that these authors have paid to my arguments, even though in many cases we continue to disagree strongly. In the course of our discussions, Woolman and I have become closer in our positions, whilst Lenta and Benson have become more polarised. In some cases, these authors have caricatured my arguments, appending labels that are misleading such as ‘equal opportunity absolutism’ or ‘scorched earth egalitarianism’ and making charges such as ‘intolerance’, which are inaccurate and inflate the disagreement beyond its scope. Instead of retaliating rhetorically, it seems more important to sharpen the areas of disagreement and demonstrating the powerful case for the positions I defend.

5 Stu Woolman wrote an article in response to Patrick Lenta, namely, S Woolman ‘On the Fragility of Associational Life: A Constitutive Liberal’s Response to Patrick Lenta’ (2009) 25 SAJHR 280. I provided a critique of this article in Bilchitz (note 1 above) as well, and Woolman provides a rejoinder in this volume. Iain Benson provided a response to my article at the Symposium on Religious Rights and Freedoms (note 2 above) which is under consideration for publication in a future edition of this journal.

6 See Lenta 231.


8 Lenta also in his article often overstates a defensible liberal position: see, for instance, ‘the difficulty with his state-interventionist and homogenizing approach is that it effectively prevents religious communities from expressing their religious views through their core practices – exactly what the right to religious and associational freedom protect’ (note 3 above) 231. As is pointed out, religious associations can only express their liberty, according to very traditional liberal principles, to the extent that they do not cause ‘harm to others’.
It is important though not to allow red herrings to distract from the actual disagreement that exists. Lenta, for instance, contends that ‘the refusal to tolerate some discrimination by religious associations in their internal practices is illiberal’ and represents a ‘refusal of toleration’. It is important at the outset to recognise that this dispute is not about religious toleration or accommodation in general. I have clearly written in another co-authored piece in this volume about the importance of the state affirming the unique identities of its citizens and thus I believe demonstrate a strong commitment to religious freedom and association. I have no desire to live in a society that imposes uniformity on its members or refuses to respect their comprehensive visions of the good. The issue at hand, however, is about whether the state is required to tolerate unfair discriminatory practices in employment by religious associations. This is a much more focused question and concerns the very limits of toleration in a liberal democracy.

Most people will agree that the state need not tolerate terrorism or child abuse even if committed in the name of religion. The general liberal reason for refusing to tolerate such practices is famously articulated by John Stuart Mill who saw the limits of liberty as arising when behaviour causes harm to others. Indeed, Lenta accepts the fact that ‘certain religiously-motivated practices, because of the seriousness of the harm they inflict, fail to merit accommodation'. The central question that must be engaged within this legal (and political philosophical) debate is whether discrimination in employment by private associations on prohibited grounds in the Constitution (and statute) constitutes harm of such a nature that it justifies restricting the liberty of such associations. This is a matter that falls squarely within the realm of liberal political theory and the very justifications that can be provided for a state refusing to tolerate certain practices. As such, I reject the notion that my position – which holds that the harms caused by discriminatory employment practices justify a limitation of the liberty of religious associations – constitutes a rejection of toleration in general or is outside the bounds of disagreement within liberal political theory.

In this response, it is not possible to address all the arguments that have been made nor to provide a rejoinder to all the responses. Instead, I shall focus on Patrick Lenta’s response to my original article and some of the most salient arguments in his piece. The key issues I shall address are the following. Firstly, I shall consider his argument that history and context are not relevant in determining the weight to be accorded to such values as equality and freedom in our constitutional order. I shall contend that context and history are essential in assessing the very nature of the harm caused by discriminatory actions and in the process of balancing competing values. Secondly, I shall seek to show why, despite Lenta’s response, liberal reciprocity requires that religious associations

9 Lenta 2012 (note 3 above) 231. Iain Benson too made this charge in his paper.
10 D Bilchitz & A Williams ‘Religion and the Public Sphere: Towards a Model That Positively Recognises Diversity’ (2012) 28 SAJHR 146.
12 Lenta (note 3 above) 231.
13 I also believe the language of ‘misunderstanding’ or ‘illegitimacy’ is inappropriate for a real substantive disagreement. See, for instance, Lenta (note 3 above) 231.
not be allowed to use the value of respecting diversity to enable them to discriminate against others. Thirdly, I shall attempt to elaborate on the serious harms caused by unfair discrimination, of which Lenta fails adequately to take account. I go further and seek to show why Lenta is mistaken to suggest there is any adequate comparison to be made between the distress caused to members of some religious communities in prohibiting their discriminatory behaviour and the harms caused to victims of unfair discrimination. Two further arguments are made in this section: the first seeks to show that the actions of religious associations in relation to employment cannot in any simple manner be classified as ‘private’. The second involves the contention that Lenta cannot adequately show why any exemptions from the prohibition on unfair discrimination should be confined only to the realm of religious associations. Finally, I shall conclude by considering the manner in which courts should take into account the nature of the association when determining appropriate remedies in cases where unfair discrimination has taken place.

II Approach to History and Context

In my original article, I took both Lenta and Woolman to task for failing to engage with the unique context of South Africa, which is emerging from an apartheid past characterised by serious violations of equality and dignity of black people and other groups such as women and lesbian, gay, bisexual, and transgender (LGBT) people. I challenged Lenta for conducting a very learned analysis of foreign case law but for failing to engage with the particularities of South Africa’s context; similarly, I contested the refusal of these authors to engage with the way in which the private sphere has been skewed by apartheid and the manner in which religion, particularly, had played a role in South Africa in buttressing and supporting the apartheid system (and, in some cases, opposing it). Given that the Constitution was designed expressly to address this legacy of discrimination in the private sphere, simply referring to freedom of association or religion to defend the continuation of discriminatory practices will not do. When rights and values collide in this context, the balancing process needs to be conducted in a manner that reflects one of the core transformative purposes behind the constitutional order, namely, to move away from the unfair discrimination of the past and ensure substantive equality for all.

Lenta has responded to my claims by contending that the importance we should attach to equality and non-discrimination rests ‘on the importance of the interests they protect, not on the extent to which they were violated in the history of this (or any other) country’.14 Transformative constitutionalism, according to Lenta, simply requires affording the principle of equality ‘parity of protection’ with other core liberal principles. Unfair discrimination, he claims is ‘equally wrong wherever it occurs’.15 Moreover, no primacy should be

14 Lenta (note 3 above) 240.
15 Ibid 231.
accorded to equality over other important rights such as the right to religious and associational freedom from a moral of view.

There are several points of disagreement between us in this area. First, Lenta’s reasoning suggests that he sees constitutional interpretation as involving the weighing up of the different interests that are at stake in a matter considered in some kind of a-historical, a-contextual manner. I deny that this is both possible or desirable. The very nature of the harm to the equality and dignity of an individual that occurs in South Africa as a result of unfair discrimination is fundamentally affected by the history of the country and its meaning within this context. There is no doubt that unfair discrimination is wrong as a matter of universal principle: yet, the hurt and harms caused by discrimination on grounds of race have a particular severity and timbre in light of South African history where there was a policy of deliberate and systematic discrimination enforced by law.

Lenta’s approach is also not desirable for it seeks to construct constitutional adjudication, when it is confronted with competing values, as involving some kind of disembodied balancing process that seeks to achieve the best result (understood as the most just result from some kind of disembodied universal point of view). Yet, constitutional law (as with other forms of law) involves a confrontation between universal principles and particular realities. The particular realities condition the application of those universal principles. They also affect the weight that is to be given to particular universal principles in cases of conflict. What we have in the debate under discussion is a conflict between fundamental liberal values and principles: freedom of religion and equality. Each is of importance – indeed, at no point do I wish to deny this – but the question arises as to the weight that is to be given to the particular value or principle in a situation of conflict. In my view, history and context is of vital importance in helping us determine that question, the more so in light of the transformative nature of the Constitution.

To adopt an example from afar, let us take the German law that criminalises Holocaust denial. This is a law that seriously violates the right to freedom of expression of an individual who wishes to deny the Holocaust. On the other hand, denying the Holocaust constitutes a deep violation of the dignity of members of the Jewish, Roma, and lesbian/gay communities who lost relations and compatriots during the Nazi genocide. Holocaust denial also constitutes an expression of current prejudice and hatred towards these groups. The German Constitutional Court has expressly invoked the history of Germany in its finding that laws prohibiting Holocaust denial are in conformity with the German Constitution. It is not clear to me, however, that such laws would, in all contexts, be found to be a universally justifiable limitation on freedom

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of expression. Indeed, in the United States, the courts were prepared to allow a group of neo-Nazis to march through the streets of Skokie, despite many Holocaust survivors being resident there.\textsuperscript{18} Freedom of expression (protected in the first amendment of the US Constitution) is accorded a very high level of protection and is seldom limited. Such an emphasis on freedom of expression may be justifiable in light of the differing history and context of the US. Yet, in Germany today, with its historical backdrop of genocidal anti-Semitism and the key foundational importance of dignity in its constitution, the weight to be placed on the different interests in question shifts. Given the historical backdrop, it is at least strongly arguable the Holocaust denial laws in Germany are justifiable where they may not be in all other contexts. I find it difficult to claim that there could be some kind of universal balancing process in this regard given that balancing by its very nature requires a consideration of context.\textsuperscript{19}

The same is true in my view concerning the relationship between equality and freedom of religion in South Africa. For South African society, in light of the horrendous history of discrimination and inequality that we have suffered, it seems wholly justifiable to have a very strong prohibition against unfair discrimination that generally weighs more heavily than other values in the balance. This is particularly so in the context of a clash with religious associational rights, where the history of religion has been such that it played a significant role in buttressing racial discrimination. Mindful of the role religion played, should we not be wary of allowing it too much leeway in continuing to discriminate against other groups? And is this not particularly the case where religious groups request the protection of the law in being allowed to discriminate?\textsuperscript{20} Take an example where a university such as Stellenbosch would claim that its Christian ethos mandates that it prohibit interracial dating. In South Africa, universities generally are public entities but, if they were private Christian universities, Lenta would seem to advocate allowing such a policy to stand (and not regard it as constituting a form of unfair discrimination) though he would allow for the removal of any tax benefits granted to the university in question.\textsuperscript{21} In my view, and in light of the unique history of South Africa, we

\textsuperscript{18} See \textit{Collin v Smith} 578 F 2d 1197 (1978).

\textsuperscript{19} As A Barak \textit{Proportionality Constitutional Rights and Their Limitations} (2012) 368–9 puts it ‘alongside the basic rule of balancing there is always specific or concrete balancing . . . [t]he specific rule of balancing always stands alongside the basic rule of balancing and reflects its fulfilment regarding a specific constitutional context’.

\textsuperscript{20} Reference to the role of religion in South African history is not an attempt to make a ‘categorical ad hominem attack’ on religion, as Iain Benson has accused me of (note 2 above). It may indeed be hurtful to religious conservatives such as Benson to accept the role religion played in legitimising apartheid, but this is no reason not to grapple with this history sincerely and to try to learn from it. As I seek to argue below (and contended in my previous article), the role of religion in the past suggests the powerful impact it can have on society (both positive and negative) and the part it can play in harming the equal dignity and citizenship of some individuals in society. The lessons of history – which have a particularly acute resonance in South Africa – require that a liberal state concerned with defending such equal dignity must place constraints upon the ability of religious associations to harm other vulnerable groups.

\textsuperscript{21} This approach is in accord with that adopted in \textit{Bob Jones University v United States} 461 US 574 (1983).
have strong reason to refuse to allow the law to sanction such forms of unfair discrimination, which cause particular harm in light of our history. Other societies with differing histories may reach different conclusions.  

The upshot of my reasoning is not that there is an absolute prohibition on discrimination in the Constitution. Nevertheless, there is a very strong presumption in favour of equality and against discrimination that cannot easily be outweighed. This conclusion also suggests something important about the nature of the Constitution, which Lenta leaves out, namely, that it is very much a remedial Constitution that seeks to correct the central injustices that have occurred in our past.

These points also condition how courts and lawyers should use comparative law in South Africa. Obviously, I do not object to the use of such material, whether legal or academic. The question must always concern its relevance and how it should be applied within the South African context. In Fose, for instance, the Constitutional Court undertook a lengthy examination of comparative approaches towards punitive damages. Although punitive damages were recognised in some other jurisdictions that the court surveyed, the Court found against recognising such damages as being claimable against the state in South Africa given (amongst other reasons) the ‘general demand on scarce resources’ and the need for the government to be able to spend its money in making social and economic reforms and addressing violations of rights in a systemic manner. This kind of reasoning is an exemplification of how, in my view, to use comparative material: we should recognise the approaches adopted in foreign jurisdictions yet consider deeply how and whether they apply within our own context.

III Reciprocity

I contended in my original article that Lenta’s argument for religious associations to be allowed to discriminate on grounds of diversity undermined itself given that those very associations demonstrate through their actions a failure to respect the racial, gender or sexual orientation diversity of others. I argued that associations should not be able to claim protections under the guise of diversity where they fail to respect the diversity of others. This was what I

22 A Gutmann *Identity in Democracy* (2003) 103, contrary to Lenta’s contentions, recognises the importance of context on the harms caused to individuals by discrimination in the following passage: ‘[s]econd-class membership in discriminatory associations often does express second-class citizenship – a combination of unequal freedom and civic inequality – in societies that have a long history of discrimination against the groups whose members are relegated to second-class membership’. At 103. This leads her to support upholding anti-discrimination laws against private associations in such contexts. At 103.

23 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 72.

termed a violation of liberal reciprocity. We may equally see this as a duty of fairness: to play by the same rules we wish to be applied to ourselves.\textsuperscript{25}

Lenta, however, claims in his response that I misunderstand reciprocity and ‘its demands on religious believers’.\textsuperscript{26} He distinguishes between two cases. The first concerns a religious association’s claim that the state should pass laws that reflect the beliefs of the association. Some religions, for instance, thus do not limit their condemnation of homosexuality to their own doctrines: they advocate for lesbian and gay people to be persecuted through the criminalisation of same-sex relationships in legislation. Lenta admits that, in such a context, religious believers have a duty to justify their claims with ‘public reasons’ that could be accepted by others who do not share their beliefs: religious believers who fail to do so violate the requirements of reciprocity. In respect of their own doctrines, on the other hand, religious believers have no duty to justify these according to public reason. In terms of their internal organisation, they simply ask that others in society permit them to hold their own doctrines and to organise their internal affairs according to their beliefs. Even if these beliefs and actions are discriminatory, they should be allowed as these individuals are simply asking for toleration of their views. ‘There is in this case no violation of reciprocity, because secular citizens are not required to occupy the religious standpoint of the religious believer as a condition of appreciating the force of the latter’s claim.’\textsuperscript{27}

Lenta’s distinction, however, does not provide an adequate response to my initial argument for two reasons. Firstly, we both agree that religious believers do not have a duty to justify their own doctrines according to the standards of public reason. Yet, this does not end the matter. If they wish to be provided with a constitutional exemption from anti-discrimination laws applicable in the private realm, they need to provide public reasons as to why they should be accommodated in this manner. Lenta ultimately is arguing that, in the second case, the law must simply permit discriminatory conduct to occur within the domain of the association, rather than enshrine such discrimination in the laws of the country that are applicable to all. Yet, he is effectively asking a court in such instances, to derogate from a law that was passed precisely to protect the diversity of individuals in these protected categories.\textsuperscript{28} A court must thus effectively be prepared to reduce the protection for the diversity, equality, and freedom of association of some (women, black or LGBT people), in order to respect the diversity and freedom of association of others (the religious association). Simply referring to the freedom of association of the

\textsuperscript{25} Indeed, Mill (note 11 above) 84 in a related manner rejected principles that exhibited what he termed the ‘logic of persecutors’, namely, that ‘we may persecute others because we are right, and that they must not persecute us because they are wrong’. This is indeed relevant as well to the application of the harm principle, which I shall elaborate upon below.

\textsuperscript{26} Lenta 243.

\textsuperscript{27} Ibid 244.

\textsuperscript{28} The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) (PEPUDA) sought to enshrine the equality of all South Africans and prevent anyone from being discriminated against, particularly, on the prohibited grounds, for reasons relating to respect for the diversity of all individuals in the country.
religious grouping will not do as the very purpose of these laws involves limiting what people may do in the private realm. There is a need for some special justification for such an exemption: Lenta seemed to be arguing in his earlier article that the value of protecting diversity is particularly affected in this context and thus provides this special reason. As I have sought to point out, however, it is hard to see why the state should grant such an exemption as part of a desire to respect diversity where the association in question is asking permission to disrespect the very diversity that the initial law was seeking to protect. As Gutman points out:

[s]ince being a civic equal entails enjoying equal freedom of association, people who are excluded from voluntary associations out of prejudice are treated as less than the civic equals of their fellow citizens.  

Secondly, Lenta asks us to imagine a dialogue between a secular philosopher and a religious believer in which the latter simply asks the former to accommodate her given the clash between her beliefs and anti-discrimination law. However, I can imagine a more real-life example where a religious believer in a Christian community in Pretoria asks a gay music teacher (such as Mr Strydom) to understand the religious ‘burdens’ that render it essential to dismiss him from his job. Mr Strydom, I can imagine, replying: ‘I am sorry that anti-discrimination law clashes with your beliefs but I fail to see why I should be sympathetic to your burdens when you have no sympathy for my own plight or respect for my dignity and identity.’ The conversation between the religious believer and Mr Strydom is likely to break-down precisely because that believer wishes to have respect accorded to her beliefs but to disrespect the dignity and person of his interlocutor.

IV Harm

Lenta clearly argues for the need to allow associations to hold points of views and to organise their internal affairs in a manner that may not neatly track the values of the public sphere nor reflect its mode of organisation. The question, however, again relates to ascertaining the limits placed upon these groupings. We have already seen one criterion that prevents associations from claiming the benefits of liberal principles whilst not being prepared to accept their burdens. The second criterion relates to the central principle articulated by John Stuart Mill as to when liberty may be limited, namely, ‘to prevent harm to others’. Translating this principle into South African constitutional law, we could say that it would be reasonable and justifiable to limit liberty where the exercise of such liberty causes harm to others. This principle, however, requires further elaboration as to what constitutes harm and how to balance different forms of harm. In this context, I shall attempt to consider the nature of the harm

29 Gutmann (note 22 above) 87.
30 This would, as far as I understand it, be part of what J Rawls Political Liberalism (1993) 16 terms ‘fair terms of cooperation’.
31 Mill (note 11 above) 9.
caused by discrimination, whether the distress caused to members of religious associations through being refused exemptions from anti-discrimination legislation is similar to the harms caused to the victims of unfair discrimination, whether employment discrimination is ‘private’ in nature, and, finally, whether there are any principled grounds to restrict an exemption from general non-discrimination legislation to the domain of religion.

(a) The nature of the harm

Lenta concedes that there is indeed harm done by discrimination. He also accepts that ‘certain religiously-motivated practices, because of the seriousness of the harm they inflict, fail to merit accommodation’. 32 This suggests that there is indeed room for agreement between us on the principled basis upon which liberty may be restricted and that my position is not an example of what Lenta wishes to brand as ‘intolerance’. However, it is in the application of this principle that we differ. Lenta claims that religions should not be entitled to endanger the basic interests of children, through child abuse or corporal punishment. The state is also justified in intervening to protect basic order and physical safety. ‘The state, however, is not always justified in intervening to prevent less serious harms, such as discrimination.’ 33

The examples Lenta employs suggests that he views physical harm as always being more serious than harm to dignity, emotions, and the psyche. I do not believe this is correct. Some forms of humiliating punishments for children may be equally, if not more harmful, in my view, than corporal punishment. Arguably, the serious harms caused to Mr Strydom by the discriminatory practices of the church for which he worked were more severe than would occur for many children in being subject to corporal punishment in church-run schools. These harms included both patrimonial loss – Strydom had to sell his piano and house – as well as emotional and psychological harm – he suffered from depression after the dismissal. If exemptions may, as Lenta agrees, be refused in the *Christian Education* case 34 concerning corporal punishment, why should they be allowed where severe harms are caused by discriminatory behaviour to an individual such as in *Strydom*?

The nature of the harm of discrimination again, cannot fully be evaluated without considering the pattern of disadvantage against the particular group in question. Such patterns exist strongly in relation to race, sex and sexual orientation and are a requirement for assessing whether discrimination can be regarded as fair in terms of the test laid out by the Constitutional Court in *Harksen v Lane*. 35 Given the context of the *Strydom* case, the following eloquent dicta by Ackermann J are relevant to assessing the nature of the harm caused:

> [t]he sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-

32 Lenta (note 3 above) 251.
33 Ibid 251.
34 See *Christian Education South Africa v Minister of Justice* 2000 (4) SA 757 (CC).
35 1998 (1) SA 300 (CC).
sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.36

These significant harms are not confined to discrimination in the public sphere; as the Strydom case evidences, employment discrimination by a religious association can have a similarly devastating impact on an individual.

Moreover, Lenta, in his response, does not adequately address the argument I made that the harms attendant upon unfair discrimination do not remain neatly confined within the private association. Stu Woolman, in his response to my original article, recognises this point and provides, through an analysis of the work of Michael Walzer, a compelling analysis of its implications that leads him to come close to the position that I advocate.37 Woolman recognises that powerful groupings in society such as religions cannot simply impose the harms caused by their doctrines on vulnerable others. Such associations must bear the costs associated with their doctrines (if they force people to leave their communities) and this may require that courts declare that their behaviour is at odds with the Constitution and legislation, and, in suitable cases, require them to pay damages.

Indeed, it is naïve to think that individuals and religious groupings can neatly compartmentalise their discriminatory behaviour within the domain of their associations. Numerous examples show how discriminatory attitudes affect the treatment of vulnerable groups in society and, often, lead to advocacy that imperils their equal citizenship. Moreover, at times, negative discriminatory attitudes can lead to the sanctioning of violence and repression, particularly in a climate already filled with homophobia, patriarchy and hatred. In Uganda, for instance, church groups have played a central role in whipping up a strong hatred for lesbian and gay people. It does not strain credulity to attribute the brutal death of David Kato, a brave gay rights activist, to this atmosphere.38 Those attitudes have also led to proposals in that country to impose the death penalty in some circumstances for same-sex sexual conduct. Similarly, in South Africa, discriminatory cultural/religious doctrines and behaviour no doubt legitimise patriarchal and homophobic attitudes that have resulted in

36 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 42.
37 S Woolman (note 7 above).
38 See, for instance, the report by J Gettleman ‘Ugandan who Spoke up for Gays is Beaten to Death’ [http://www.nytimes.com/2011/01/28/world/africa/28uganda.html] and the statement therein by Val Kalende ’David’s death is a result of the hatred planted in Uganda by US evangelicals in 2009’.
black lesbians being savagely raped and killed. What the South African and Ugandan examples (and many others) teach us is that the prejudice of powerful collective groupings such as religions can have a major public impact and one that undermines the creation of a society founded on equal respect for all. A democratic government must distinguish ‘between exclusions that do and do not undermine civic equality and between exclusions that it can and cannot tolerate consistently with its basic principles’. Clearly, private forms of discrimination by powerful civil society groupings in a context where prejudice has a long history can fundamentally undermine the civic equality of previously disadvantaged groups such as gay and lesbian people. The law, in my view, should thus in general refuse to grant exemptions to such associations that wish to perpetuate the second-class status of certain groups or individuals in their practices.

(b) What of the harm to religious believers?
Lenta, however, argues, that the harm principle does not fully support my argument, as there are also harms to the ‘integrity interests’ of religious believers where the state refuses to sanction their discriminatory practices. An integrity interest for a believer involves ‘living authentically, in accordance with the moral and religious commitments that give their lives meaning and value, in a group which makes this life possible’. Forced association with lesbian and gay people will ‘cause them hurt’ and prevent them from living honestly.

I find it hard to see that religious believers in the church community for which Mr Strydom worked are affected in a ‘devastating’ way by having to employ a gay teacher. If, indeed, this is the case, it demonstrates the extreme intolerance being exhibited by these believers. Nevertheless, there is a more important point to be made here about the operation of the harm principle itself. I have no doubt that the state’s prohibition on unfair discrimination may cause some distress to certain believers. However, as Jeremy Waldron points out in the context of freedom of expression, the fact of experiencing moral distress is not sufficient to constitute a harm that would justify restricting a right: indeed, part of living in a democratic society involves the possibility of confrontation with people whose beliefs and practices cause one distress.

39 D Nath ‘We’ll Show you You’re a Woman’ <http://www.hrw.org/reports/2011/12/05/we-ll-show-you-you-re-woman> details the horrific occurrence of rape of black lesbian women in South Africa.
40 Gutmann (note 22 above) 88.
41 Lenta (note 3 above) 250.
42 A similar argument was made by Iain Benson (note 2 above).
Moreover, the harm caused to religious believers in these cases cannot be compared to that caused to the victims of discrimination.\textsuperscript{44} When we look at the interests of believers in a case such as \textit{Strydom}, for instance, it is indeed to have a community that embodies a religious ethos in such a way that exhibits utter disrespect to an individual or group because of a central part of their identity. In other words, the harm caused to believers results from their beliefs whose content involves promoting negative attitudes towards and treatment of other individuals as a result of a fundamental feature of their identity. On the other hand, a person such as Mr Strydom simply seeks to live his own life, does not prescribe what others should do nor does he seek to treat anyone else in a negative manner.\textsuperscript{45} The difference is key. To see why, let us take a more extreme example. It may indeed cause distress to prevent a homophobic terrorist from realising his deep religious beliefs that motivate him to blow himself up at a gay pride march, which he perceives as running counter to his entire world-view. Yet, the distress to that terrorist (no doubt severely felt) should not count in the balance when deciding whether to allow him the liberty to do so as it is directed towards harming others and preventing them from realising their own conceptions of the good. Similarly, the harm to religious believers of being prevented from discriminating against women or LGBT people results from beliefs – no doubt sincerely held – that fundamentally disrespect the equal worth and citizenship of others in society. As such, those harms should not count (or have very minimal weight) in any balancing process where distinctive rights are seen to clash.

This point goes back to one made by Mill in \textit{On Liberty} where he considers the case of what he terms ‘religious bigots’ ‘who consider as an injury to themselves any conduct that they have a distaste for, and resent it as an outrage to their feelings’.\textsuperscript{46} Mill responds to the case by noting that ‘there is no parity between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it, no more than between the desire of a thief to take a purse and the desire of the right owner to keep it. And a person’s taste is as much his own peculiar concern as his opinion or purse’.\textsuperscript{47}

Similarly, the difference between the distress of the religious believer and the harms to the victims of unfair discrimination can also be understood in relation to a distinction made by Ronald Dworkin in his critique of preference utilitarianism. Dworkin distinguishes between a \textit{personal} preference for an individual’s ‘own enjoyment of some goods or opportunities’, and an \textit{external} preference which involves an individual’s:

\textsuperscript{44} Indeed, I am indebted to a referee of this article for pointing out that this distinction is in fact recognised already by our law of delict, which would provide a remedy for the victim of discrimination in these cases, but not to the religious believer for the moral distress caused by having to behave in a non-discriminatory manner.

\textsuperscript{45} I assume here that Mr Strydom, as was evidenced in the facts of the case, goes about his own life without actively advocating for beliefs that run counter to the doctrines of the church within the domain of the association.

\textsuperscript{46} Mill (note 11 above) 82.

\textsuperscript{47} Ibid.
preference for the assignment of goods and opportunities to others, or both. A white law school candidate might have a personal preference for the consequences of segregation, for example, because the policy improves his own chances of success, or an external preference for those consequences because he has contempt for blacks and disapproves social situations in which races mix.48

External preferences may also not be entirely independent of personal preferences.49

This distinction is, in my view, of relevance in this context too. Mr Strydom has, in Dworkin’s terms, a personal preference to live his life as a gay man with a same-sex partner. His only external preference is that others leave him alone to live his life in his own way and, perhaps, be tolerant of his conception of the good.50 The church, however, has a personal preference that homosexuality is wrong but also an external preference that others – even those who were not members of the church – must conform to its doctrine in this regard. For the church, Mr Strydom’s expression of identity was sinful, unacceptable, and could be sanctioned through such active methods as dismissing him (as an individual who is gay) from their employment. Thus, the problem is that religious believers in this instance are not willing to respect others whose beliefs and identity differs from theirs; they are intent on actively expressing their external preferences in prejudicial treatment of those different others. Mill’s harm principle must also, in my view, be construed in such a manner so as to exclude the distress caused in the process of preventing individuals from actively expressing their harmful or intolerant preferences in relation to others. To do otherwise, would negate the very meaning of the principle itself as there will always be some distress caused when an individual is prevented from actively expressing in harmful treatment their external preferences for how others should conduct their lives (take, the homophobic or racist terrorist motivated out of religious zeal as an extreme example).

Some may regard it as unfortunate that not all preferences of individuals can be accommodated in a liberal democracy. Famous liberal philosophers, however, recognise, as Gutman does, that a just democratic government cannot:

expect to provide each citizen with a social environment that fulfills the demands of conscience. This expectation is unreasonable given the diverse commitments of conscientious persons. It is also undesirable in light of the content of some consciences... democratic justice is likely to be at odds with what some people take to be a basic element of their identities.51

In a similar vein, Rawls draws on Isaiah Berlin, for the important proposition that ‘there is no social world without loss: that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental

49 Ibid 235.
50 He may of course have also hoped that others would accept him and his partner but the fact that, in the course of a lengthy employment with the church, he never publicly asserted his identity suggests that he simply wished to be left alone.
51 Gutmann (note 22 above) 209–10.
He goes on to argue that a ‘just liberal society may have far more space than other social worlds but it can never be without loss’. Where individuals feel distress as a result of being forced to abandon modes of behaviour that are harmful to others, this is a form of distress that is necessitated by living in a democracy with equal respect at its core. The harm caused is not comparable to the harm caused to those who are the victims of discrimination and the prejudiced beliefs and doctrines.

(c) Is employment discrimination ‘private’?

The academic dispute that is the focus of this response is centred on unfair discrimination in employment by religious associations. It could be argued that the employment decisions made by such bodies are essentially private matters and that, as such, they should be accorded an exemption from the general statutory prohibition on unfair discrimination.

The argument, however, cannot succeed within the South African constitutional framework. Indeed, the Constitution expressly prohibits individuals from engaging in acts of unfair discrimination and thus demonstrates the application of this provision within what is traditionally regarded as the ‘private realm’. As has been explained, this represents an attempt to try and address the legacy of apartheid, which had a severe impact upon the private realm as well. Thus, what would traditionally be regarded as a private transaction has come to involve a public law dimension. Take, for instance, the decision to whom to rent one’s own property. Ordinarily, this would be regarded as the essence of a private property transaction. Yet, s 4(1) of the Rental Housing Act 50 of 1999 prohibits any acts of unfair discrimination on any of the prohibited grounds in the Constitution (including race, sex and sexual orientation) when advertising a property, negotiating a lease or during the term of the lease in relation to any tenant or even the visitors of such a tenant. In terms of s 16 of the same Act, any failure to comply with these provisions is criminalised and can attract a prison sentence of up to two years. No doubt, such a provision will be difficult to enforce; yet, importantly, the prohibition on discriminatory leasing has an important symbolic and normative dimension.

Similar points apply to a contract of employment in South Africa. Though seemingly a private relationship, the employer and employee, when entering into a contract of employment, trigger the operation of a whole host of statutory provisions. These include the strictures of the Labour Relations Act...
65 of 1995\textsuperscript{56} and Employment Equity Act 55 of 1998\textsuperscript{57} which both prohibit unfair discrimination on the prohibited grounds. What is clear is that South African law does not conceive of the employment relationship as a domain immune from regulation nor as an area that is in any simple way ‘private’.\textsuperscript{58} There are many reasons that can be advanced for this that relate to South African history, the importance of employment in the economy and society, its impact upon individuals and the unequal power relationships between an employer and employee. It is clear though that when any individual or private association engages in an employment relationship, it is required to follow the law and desist from any forms of unfair discrimination. In the same way as a religious association operating a private school must refrain from punishing children with corporal punishment, so a religious association engaging in acts of employment must refrain from discrimination on the prohibited grounds identified in the Constitution and legislation.\textsuperscript{59} The alleged ‘privacy’ of the employment contract does not accurately capture the nature of this relationship nor does it constitute a ground for an exemption from this general regulatory framework.

\textbf{(d) Should only religion be afforded an exemption?}

Lenta’s position also raises the fundamental question, why is religion so special that it is able to command an exemption from non-discrimination laws which are of such import for our society? Indeed, Lenta’s use of the notion of ‘integrity interests’ seems difficult to confine to religious believers alone. If these are sufficient to justify an exemption from the prohibition on discrimination in the case of religious believers, then surely this is also the case in relation to individuals or groupings with strong racist, sexist or homophobic convictions that arise from other sources and world-views. Lenta thus owes us some account of how his justification for exemptions can be limited to the domain of religion and not lead to more widespread exceptions, which fundamentally undermine the purpose of anti-discrimination legislation.

\begin{itemize}
\item Section 187 declares any dismissal automatically unfair if it flows from unfair discrimination on any of the prohibited grounds.
\item Section 6 deals with the prohibition on unfair discrimination.
\item See K Klare ‘The Public/Private Distinction in Labour Law’ (1982) 130 \textit{Univ of Pennsylvania LR} 1358 ff for a detailed discussion of the difficulty of drawing the boundary between public and private in labour law.
\item Woolman (note 7 above) raises the example as to whether the law should interfere with people’s decisions regarding who to invite to dinner if made on a discriminatory basis. As I have sought to show in the brief discussion above, the law is clear that in the operation of contracts of lease or employment, norms relating to unfair discrimination apply. It is hard to see that an invitation to a dinner party engages any domain of the law such as lease or employment. Such invitations are by their nature highly discretionary, often may be arbitrary and it seems hard to claim that anyone has the right to such an invitation. It may also fall within the realm of the core of the right to privacy, that the Constitutional Court articulates in \textit{Bernstein v Bester} 1996 (2) SA 751 (CC). The liberty of the home, though not inviolable, would usually attract a higher level of constitutional protection than the realm of the workplace (whether in companies or other associations). See Investigating Director Serious Economic Offences v Hyundai 2001 (1) SA 545 (CC).
\end{itemize}
The Constitutional Court has clearly ruled that the fact that a practice or law that unfairly discriminates on grounds of sex or gender has been part of African customary law and culture is not an adequate basis upon which to justify the continuation of that practice. In this context, the Court has been prepared to intervene in a stringent manner to protect equality and refused to sanction unfair discrimination. This was so despite their ruling affecting the deeply-held cultural beliefs and practices of many communities in South Africa. Lenta owes us a strong justification why a similar approach should not be taken to religious practices that unfairly discriminate in employment. Indeed, the very importance and power of religion in society that seems to motivate Lenta to grant an exemption provides a strong reason, in my view, for no such exemption to be granted. Since its social power and impact is so large, religion has the ability to impact upon South African society in ways that harm the equal respect and citizenship of vulnerable groups. This would point towards not giving them any exemption from such crucial laws.

V CONCLUSION: REMEDIES AND RELIGIOUS ASSOCIATIONS

I have sought largely in this response to argue for the claim that the state should declare discrimination unfair where it exists and should not make exemptions for religious groupings and thus effectively sanction such discriminatory practices. The finding that unfair discrimination exists, however, does not automatically lead to any specific remedies. It seems to me that the concern of many of my interlocutors is that such a finding would lead the state to try to change religious doctrine and involve highly coercive measures that force individuals to choose between their obedience to the law or to their religion. Some of these concerns can be addressed by recognising that the courts in South Africa have a wide remedial jurisdiction in relation to constitutional matters. In terms of s 172(1)(a), courts are required to declare any law or conduct inconsistent with the Constitution to the extent of its inconsistency. In terms of s 172(1)(b), courts may make any order that is just and equitable.

As I have argued in this piece, some religious (and other private) associations have practices that discriminate unfairly on grounds of gender and/or sexual orientation. Some used to have practices that discriminated unfairly on grounds of race. The latter are largely regarded as being repugnant today and few would defend the right of religious associations to discriminate on grounds of race. I argue that the same should apply to discrimination on grounds of gender or sexual orientation: the mere fact that associations which engage in such detrimental treatment are religious or private should not lead courts to declare that unfair discrimination is in fact fair. Where such practices are challenged, courts are duty bound to declare discrimination that meets the requirements of the Harksen test and which has a severe impact on the dignity of an individual or group of persons unfair.

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60 See, for instance, Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC).
61 Indeed, it is often difficult to determine where culture ends and religion begins and vice versa.
Such a declaration has an important symbolic effect: it sends a message to the religious association concerned that its behaviour is at odds with the values of the society in which it exists. This may in itself provide a catalyst for change. Should the courts go further than a declaration? The arguments I have made certainly justify further interventions but the exact nature thereof will depend on the circumstances of the case. Courts will also need to be mindful of the limits of their ability to coerce change in the hearts and minds of individuals in religious associations and be cognisant of the possibilities of scoring an own goal through a serious backlash. Some possibilities include requiring an apology to the victim of the discrimination and ordering an association to engage in a process of internal deliberation concerning the practice in question. More stringent remedies would also be justified where individuals are harmed – such as in Strydom – and damages should be given in such cases (as the High Court did) to compensate for the harms that are suffered. In relation to an individual in a position such as Mr Strydom who was a music teacher and thus not fulfilling a religious leadership function, reinstatement could also be appropriate. Reinstatement would be much more difficult to order in relation to a religious leader who has been discriminated against as it simply does not lie within a court’s power to force a community to accept a particular leader. The circumstances of that particular leader and their community will dictate whether such an order is appropriate. The point I am seeking to make is that courts can sensitively balance a number of factors at the remedial stage that take account of the need to redress the harms of unfair discrimination whilst avoiding draconian interventions that, in the longer term, create a backlash, and impede the movement towards equality. Courts can function to delineate what constitutes unacceptable conduct in South African society whilst also nudging associations to move away from their discriminatory practices.

The approach I am advocating thus recognises that there are individuals and religious associations that wish to discriminate unfairly against historically disadvantaged groups such as women and lesbian and gay people on the basis of sincere religious beliefs and doctrines they hold. Liberal political principles, considered in light of the South African context, require that such discrimination in the employment context not be tolerated. Courts should

62 On the value and importance of apology, see the judgments of Mokgoro J & Sachs J in Dikoko v Mokhatla 2006 (6) SA 235 (CC).

63 These may be appropriate if the sexist doctrines of such powerful groupings as the Catholic Church, Orthodox Judaism or Islam relating to religious leadership (for instance) are challenged where sustainable change will involve internal shifts within the doctrine. Such innovative remedies can be ordered together with compensation for individuals negatively affected by these doctrines.

64 Indeed, it may be the case, for instance, that a particular Anglican community argues in favour of retaining a religious leader who is openly lesbian or gay and lives with a same-sex partner, yet is highly popular in that community. The central synod of Anglican bishops insists that the community dismiss the leader. Here, the central, religious structures within the church are at odds with what a particular community wants. In my view, a court could legitimately side with the community in this instance in rejecting such discrimination, affirming their right to religious freedom and association and, if the circumstances allow, order reinstatement.
declare such behaviour unfair discrimination and provide effective remedies to address the harms caused by such treatment. The remedial jurisdiction of the courts provides the necessary flexibility for judges to design solutions that both provide redress to the victims of such discrimination whilst encouraging internal shifts in religious associations in a direction that accords equal concern and respect for all.