IN DEFENCE OF THE RIGHT OF RELIGIOUS ASSOCIATIONS TO DISCRIMINATE: A REPLY TO BILCHITZ AND DE FREITAS

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ABSTRACT

In a recent Special Issue of the South African Journal on Human Rights (SAJHR) devoted to the theme ‘religion and human rights’, David Bilchitz and Shaun de Freitas reply to arguments advanced by me in support of according religious associations a right to discriminate on grounds such as gender, sexual orientation and race in their employment practices relating to positions sufficiently close to the religion’s doctrinal core. Bilchitz continues to think that I allow too much discrimination on the part of religious associations. He rehearses arguments in defence of his view that religious associations should not be allowed to discriminate in employment practices on otherwise prohibited grounds and presses new objections to the position I favour. By contrast, De Freitas is of the view that I do not afford religious associations enough opportunity to discriminate. Between them, Bilchitz and De Freitas charge that I ‘owe’ several arguments. I offer here a final reply to Bilchitz and De Freitas in defence of the right of religious associations to discriminate, as I understand it. Although I respond towards the end to a criticism of my position by De Freitas, most of this article is given over to a reply to Bilchitz, whose arguments represent the more drastic challenge to my claim that religious groups should be permitted sometimes to discriminate. My purpose is to show that, although he contends adroitly in support of denying to religious associations a right to discriminate, Bilchitz’s efforts are unavailing. His arguments are not nearly strong enough to justify denying to religious associations a right sometimes to discriminate.

Keywords: equality, discrimination, freedom of association, freedom of religion, privacy

I INTRODUCTION

In a recent Special Issue of the South African Journal on Human Rights (SAJHR) devoted to the theme ‘religion and human rights’, David Bilchitz and Shaun de Freitas reply to arguments advanced by me in support of according religious associations a right to discriminate on grounds such as gender, sexual orientation and race in their employment practices relating to positions sufficiently close to the religion’s doctrinal core.1 Bilchitz replies to an article in which I defend my view against objections he previously levelled against my position.2 De Freitas replies, for the most part, to an article in which I

first made the case for according to religious groups a right sometimes to discriminate.'

Bilchitz continues to think that I allow too much discrimination on the part of religious associations. He rehearses arguments in defence of his view that religious associations should not be allowed to discriminate in employment practices on otherwise prohibited grounds and presses new objections to the position I favour. By contrast, De Freitas is of the view that I do not afford religious associations enough opportunity to discriminate. Between them, Bilchitz and De Freitas charge that I ‘owe’ several arguments.

Since the clash of rights out of which the present debate arises is of great importance to South African constitutional law, I offer here a final reply to Bilchitz and De Freitas in defence of the right of religious associations to discriminate, as I understand it. Although I respond towards the end to a criticism of my position by De Freitas, most of this article is given over to a reply to Bilchitz, whose arguments represent the more drastic challenge to my claim that religious groups should be permitted sometimes to discriminate. My purpose is to show that, although he contends adroitly in support of denying to religious associations a right to discriminate, Bilchitz’s efforts are unavailing. His arguments are not nearly strong enough to justify denying to religious associations a right sometimes to discriminate.

II REPLY TO PROFESSOR BILCHITZ

Bilchitz’s view is that religious associations should never be permitted to discriminate on otherwise prohibited grounds, except in one case: discrimination on the grounds of religion should be permitted to allow religious associations to appoint co-religionists to positions of religious leadership. Whereas I believe that the issue of the permissibility of employment discrimination by religious associations occasions a genuine conflict between the rights to freedom of religion and association on the one hand, and equality on the other, and that the balancing of the important interests of religious believers and victims of discrimination respectively should, if carried out correctly, result in religious associations sometimes being permitted to engage in employment discrimination on grounds such as sexual orientation – that is, in respect of positions sufficiently close to the doctrinal core of the religion concerned – Bilchitz contends that, except in the case of religious associations appointing religious leaders in accordance with religious criteria, courts should intervene to prevent all employment discrimination by religious associations on otherwise prohibited grounds. He repudiates my characterisation of his view as ‘equal opportunity absolutism’ and professes not to think ‘that there is an absolute prohibition of discrimination in the Constitution’. Yet, since he argues that in South Africa the right to equality outranks the rights to freedom

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4 Bilchitz (note 1 above) 298.
5 Ibid 303.
of religion and associational autonomy combined so that almost every conflict between them should be resolved in favour of equality, his position reflects an absolutist commitment to non-discrimination in the context of employment practices as it is possible for any sane person to have.  

(a) History and context

In any dispute that implicates a clash of fundamental rights, the right (or rights) on which one party’s claim rests will have to give way. There will be cases in which claims grounded on the right to religious freedom should yield to claims based on other fundamental rights. There will, however, also be cases in which claims based on the right to religious freedom should prevail. Claims based on rights to ownership, for example, will sometimes be outweighed by claims based on the right to religious freedom, and sometimes claims based on the right to a fair trial will be outweighed by claims grounded on the right to religious liberty.

Which claim should prevail depends on a sensitive and highly contextual balancing that takes account of the facts of the dispute relevant to, as well as the reasons offered by the claimants having a bearing on, the just resolution of the case.

A serious difficulty with Bilchitz’s approach to the collision between the rights to freedom of association and religious freedom on the one hand, and the right to equality on the other, in the context of the claims of religious groups to be allowed to practise employment discrimination, is that on his approach claims based on equality so outweigh any religious claim that the need for a proportionality exercise in the context of particular cases is rendered redundant. Bilchitz professes to think that in the context of the present collision of rights a ‘balancing process needs to be conducted’, but in fact a balancing exercise will be superfluous since its results will be determined in advance – the balancing exercise will be unaffected by the facts of and reasons provided in particular cases having to do with, for example, the distance of the relevant job from the doctrinal core of the religion – by his insistence that equality should have priority over religious and associational interests.

Bilchitz’s claim that equality should be accorded priority over religious freedom and associational autonomy combined finds no support in the constitutional jurisprudence of the US and Canada, or in the work of the vast majority of American and British political philosophers and constitutional...
theorists of consequence who have applied their minds to this issue, in which overwhelming support for permitting at least some employment discrimination by religious associations on otherwise illegal grounds is clearly discernible.\(^9\) Perhaps for this reason, Bilchitz advances an *exceptionalist* argument: *in South Africa* religious associations should not be accorded a right to discriminate because in this country priority should be given to the realisation of equality. He invokes the history and context of South Africa in support of his privileging of equality over other fundamental rights – specifically, the racial discrimination that was the defining characteristic of apartheid. He says that:

> 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.\(^10\)

An initial difficulty with this argument is that even *were* Bilchitz correct that in consequence of the systematic racial discrimination that occurred during colonialism and apartheid, discrimination occurring in post-apartheid South Africa inflicts more serious harm than discrimination in other liberal democracies, and that this justifies elevating in importance the right to equality over other fundamental rights in South Africa, this argument would apply not to all unfair discrimination, but only to *race-based* discrimination. That is so because what made apartheid distinctive compared to other countries was not unfair discrimination *in general*, but the apartheid government’s policy of race-based discrimination. I do not wish to deny that discrimination on the grounds of gender and sexual orientation was widespread in South Africa during and prior to apartheid. Yet there is no evidence of which I am aware to suggest (and Bilchitz does not contend) that, historically, discrimination on the grounds of gender and sexual orientation was more pervasive and egregious in South Africa than in other liberal democracies. So even if we accept Bilchitz’s argument, there is no reason to think that discrimination taking place in post-apartheid South Africa on the grounds of gender or sexual orientation is more seriously harmful than discrimination on these grounds in countries like the US and Canada. It follows that there is no special reason to accord priority to equality relative to religious and associational liberty combined in cases involving discrimination by religious associations on the grounds of gender or sexual orientation. Bilchitz’s argument fails to justify giving priority to equality in a case like *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park,*\(^11\) the decision that occasioned the present debate, which involved discrimination by a church on the grounds of sexual orientation.

Even in the case of racial discrimination, however, Bilchitz is incorrect that as a result of apartheid South Africa’s history of systematic racial discrimination, acts of racial discrimination taking place in post-apartheid

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9 See Lenta (note 2 above) 236 fn 19.
10 Bilchitz (note 1 above) 301.
11 2009 (4) SA 510 (T).
South Africa will necessarily be more injurious than similar discrimination occurring in other liberal democracies. Systematic racial discrimination is not ‘unique’\textsuperscript{12} to South Africa. In the US, for example, there was also in the past ‘a policy of deliberate and systematic discrimination enforced by law’. Bilchitz provides no reason to think that an act of racial discrimination in the US nowadays would be less harmful and affronting to the dignity of the individual or individuals discriminated against than an identical incident occurring in South Africa. Accordingly, his invocation of South African history provides no reason to deviate from the constitutional jurisprudence of the US and Canada (whose history also reveals some use of law as an instrument of racial discrimination)\textsuperscript{13} and the accounts of almost all liberal philosophers and constitutionalists, in which the rights to freedom of religion and association and the right to equality are equally important. The South African exceptionalism that Bilchitz advocates is groundless.

Bilchitz misunderstands the significance of the example of apartheid discrimination for post-apartheid South Africa. The example that South Africa’s history of systematic racism provides should motivate us to treat as urgent the eradication of all systematic discrimination: all unfair discrimination in the public, political and ordinary commercial spheres. What it does not show is that occasional discrimination by religious associations should not be tolerated. Bilchitz worries about the severity of the harms resulting from discrimination by religious associations in South Africa, but in fact there is reason to think that the harm produced by occasional discrimination based on ascriptive characteristics by religious associations is less serious than that resulting from systematic discrimination in the public, political and ordinary commercial spheres, both because such discrimination injures fewer individuals and because discrimination by economic, government and public institutions harms the citizenship of those discriminated in a way that discrimination by religious associations does not. I shall return to this point below, in my reply to Bilchitz’s argument that employment discrimination by religious associations should not be tolerated because of the harm it produces.

Bilchitz provides a second reason for privileging equality relative to religious and associational freedom: religion ‘played a significant role in buttressing discrimination’ in South Africa’s past.\textsuperscript{14} Yet the support provided by certain groups for discrimination during apartheid provides a strong reason to insist on a robust separation of church and state; it does not diminish the urgency of the interests protected by the rights to religious and associational freedom in post-apartheid South Africa. The importance of the interests of certain religious believers in acting consistently with their beliefs, about which I shall have more to say in subsection (c) below, cannot be discounted on the grounds that some religious groups supported discrimination by economic, government and public institutions in the past.

\textsuperscript{12} Bilchitz (note 1 above) 302.
\textsuperscript{14} Bilchitz (note 1 above) 302.
Bilchitz chides me for adhering to an ‘a-historical, a-contextual’ approach to constitutional interpretation and with failing to appreciate that the Constitution of the Republic of South Africa, 1996 ‘seeks to correct the central injustices in our past’.\(^{15}\) Both charges are inaccurate. I have never claimed that constitutional interpretation ought to take place in a way that ignores either history or context more generally. Like Bilchitz, ‘I deny that this is … possible or desirable’.\(^{16}\) To mention just one example of my attentiveness to context in constitutional interpretation, an example relating to the right to religious freedom, I believe that even if the Canadian Supreme Court is correct to interpret the right to freedom of religion to permit Sikh pupils to carry kirpans (daggers) at school, I do not think that the right to freedom of religion should be interpreted to permit the carrying of weapons by religious pupils in South African schools, in view of our far higher rate of crime and violence.\(^{17}\)

Equally, I am cognisant of the Constitution’s role in bringing about social justice, which represents a necessary corrective to the social injustices of the past. But I take it that correcting the injustice of the past in this context means prohibiting in post-apartheid South Africa unacceptable practices that occurred during colonialism and apartheid, not disallowing those practices that were acceptable. Not everything that occurred during apartheid was unjust. It was not unjust that religious associations were during apartheid permitted to engage in employment discrimination in respect of positions of religious leadership to the extent that they were legally permitted to do so. Almost all liberals think this should be permitted. What was intensely unjust was the systematic racial discrimination that occurred in the public, political and ordinary commercial spheres. All such discrimination needs, of course, to be eliminated by realising the right to equality. Bilchitz professes to advocate attunement to context and history, but what he really wants, at least as far as South Africa is concerned, is for religious freedom not to be considered as important or fundamental as the right to equality. As liberal democrats we have a strong reason to dissent.

(b) Diversity and reciprocity

Bilchitz seems to think that the only religious associations whose employment practices should legally be tolerated are those that are internally liberal, those that ‘play by the same rules’ as everyone else, by which he means those that act consistently with liberal principles.\(^{18}\) Liberal religious groups are those that are inclusive and diverse in the sense that they include and refrain from disdaining members of particular racial groups and homosexuals and do not consider women inferior to men. Such groups include Reform Jews, liberal Catholics and several liberal Protestant churches.

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15 Ibid 303.
16 Ibid 301. I emphasise the importance of context in Lenta (note 2 above) 240 fn 34.
18 Bilchitz (note 1 above) 304.
Bilchitz contends that claims by religious associations to be permitted to discriminate exhibit a failure of reciprocity and fairness inasmuch as these groups are claiming immunity from anti-discrimination legislation ‘under the guise of diversity where they fail to respect the diversity of others’.\textsuperscript{19} He thinks there is something perverse about ‘asking a court … to derogate from a law that was passed precisely to protect the diversity of individuals’, in the sense of ‘respect[ing] the equality, and freedom of association of some (women, black and LGBT people)’.\textsuperscript{20} He writes, with evident puzzlement, ‘it is hard to see why the state should grant 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 respect’\textsuperscript{21}

The trouble with Bilchitz’s insistence that respect for diversity requires that all religious associations be internally liberal – that is, inclusive (accepting of all who wish to be members and affording everyone an opportunity to continue as members regardless of the beliefs that they hold) and diverse (in the sense that no one will be discriminated against on grounds such as gender, sexual orientation and race) – as a condition for non-interference by the state is that this takes diversity between individuals so far that it damages diversity between groups, which liberals value under the aegis of pluralism. To make every group ‘inclusive and diverse will further reduce many differences, and get rid of the identity of many people and their communities’.\textsuperscript{22} What Bilchitz seems not to realise is that:

[a] relentless diversity flattens the pluralism of society … a society that strives to make every community adhere to the same principles narrows group differences … A pluralistic society is not a place where every institution mirrors the ethnic, racial, and gender composition of society … A society full of diverse and inclusive institutions will have little pluralism … This is the irony of a diversity that is taken too far: eventually it makes society more homogenous rather than heterogenous …. Society will be most pluralistic when its diversity fall short of reaching into religious institutions.\textsuperscript{23}

A (restricted) right to discriminate (and to exclude members with beliefs inconsistent with the shared beliefs of the group) permits religious associations and their members to retain their identities and thereby fosters pluralism.

I agree with Bilchitz that diversity connected with individuals is important and that the state has a strong interest in promoting it. But I also think (like all liberal pluralists, but apparently unlike Bilchitz) that a society in which there is a diversity of groups is preferable to a society in which there is not. Bilchitz fails to appreciate that requiring religious associations to respect diversity (and equality) as far as their individual members are concerned will have the effect of homogenising groups and seriously undercutting pluralism. His exclusive, near-fetishistic preoccupation with individual diversity at the expense of group diversity fails to command support. The view I favour is

\textsuperscript{19} Ibid 303.
\textsuperscript{20} Ibid 304.
\textsuperscript{21} Ibid 305.
\textsuperscript{23} Ibid 171.
preferable because it effects a workable compromise between individual equality and diversity on the one hand, and group diversity or pluralism on the other. Conceding to religious groups a right sometimes to discriminate protects individual diversity in the public, political and economic spheres and where the job in respect of which religious associations wish to discriminate is distant from the doctrinal core of the religion, yet permits groups to retain their identity and preserves a significant degree of pluralism.

My case for tolerating religious associations that discriminate by granting them an accommodation from anti-discrimination legislation is, however, tempered by the recognition that discrimination on otherwise prohibited grounds is morally wrong. Although I do not think that such discrimination should be outlawed, toleration of religious associations, such as the church in *Strydom*, which discriminate on the grounds of sexual orientation, or on other normally impermissible grounds, does not mean celebration. The spirit in which we should tolerate religious associations that act inimically to the interests of certain of their employees or members should be one of ‘grudging tolerance’, rather than ‘celebration of their culture’.24 Langa CJ’s claim in *Pillay* that the post-apartheid constitutional project ‘celebrates’25 diversity goes too far, representing a mistakenly ‘categorical valorization’26 of groups that may be permeated with patriarchal, homophobic or racist values. That liberals should take diversity seriously by accommodating the demands of illiberal religious groups, yet not uncritically celebrate the practices of these groups in the name of diversity represents, I concede, a tension within liberalism. This tension is not, however, fatal.

(c) Harm

Bilchitz thinks that it is ‘reasonable and justifiable’27 to restrict the right to religious freedom in cases in which the religious practices for which protection is sought would cause any harm to others. My view, however, is that the infliction of serious harms such as child abuse, corporal punishment, terrorism and murder by religious believers should be illegal, but that the infliction of lesser harms such as those resulting from employment discrimination by religious associations relating to positions close to the doctrinal core ought to be tolerated to prevent harm to religious believers. The harm inflicted by child abuse, corporal punishment, terrorism and murder is more severe and widespread, I believe, than the harm to victims of occasional discrimination by religious associations.

In reply, Bilchitz states that my examples of harmful practices that ought not to be tolerated, practices involving physical violence, suggest that I fail to take the psychological harm caused by unfair discrimination sufficiently

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27 Bilchitz (note 1 above) 305.
seriously; that I mistakenly ‘view physical harm as always being more serious than harm to dignity, emotions and the psyche’. ‘Arguably’, he writes, ‘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’.

I do not in fact think that harm resulting from physical violence is always worse than psychological harm, but only that it tends to be worse. Accordingly, I have no quarrel with Bilchitz’s claim that where psychological harm reaches a certain threshold of severity religious practices that inflict it ought not to be legally tolerated. Even so, I do not think that the injury produced by religious groups sometimes discriminating in their employment practices reaches this threshold.

I disagree with Bilchitz that the injury to the gay teacher discriminated against in Strydom was more severe than that resulting from the administration of corporal punishment on children. In countries in which corporal punishment of adults is criminalised as assault (most countries nowadays), corporal punishment of children has in common with discriminatory employment practices that it is unfairly discriminatory. It involves discrimination on the grounds of age. As former Canadian Supreme Court Justice Ian Binnie puts it, corporal punishment of children ‘effectively designate[s] children as second class citizens’ in a way that is ‘destructive of dignity from any perspective including the child’s’.

We might, of course, be inclined to think that corporal punishment of children, though discriminatory, is not unfair were there compelling reasons to support this practice. But, as I have shown elsewhere, there are not.

So, both corporal punishment of children and employment discrimination by religious associations produce the psychological harms of discrimination. But of the two practices, only corporal punishment of children violates in addition the rights of children to security of person and not to suffer degrading punishments and poses a risk of serious psychological harm to children (to which children are more susceptible than adults since they have fewer psychological resources) that is independent of the psychological harms produced by the discriminatory nature of its application. It follows that corporal punishment of children constitutes both a greater wrong and results in more serious harm than employment discrimination against adults. We can add to this the further point that the harm inflicted by corporal punishment

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28 Ibid 306.
31 For arguments supporting these claims, see Ibid.
32 It might be objected that victims of employment discrimination suffer financial losses relating to loss of income that are not suffered by children on whom corporal punishment is inflicted, as the teacher in Strydom did. But victims of employment discrimination will not always suffer significant financial losses, and may experience no financial losses at all. I take it that Bilchitz’s view is that religious associations should not be permitted to discriminate even if those discriminated against suffer no financial losses as a result.
of children is greater than the harm resulting from religious associations sometimes discriminating in their employment practices in the sense that the harm is more widespread. Thousands of children are vulnerable to the harms of corporal punishment. Relatively few adults are liable to suffer the harm inflicted by occasional employment discrimination on the part of religious associations. For these reasons, the liberal state should intervene to prevent corporal punishment of children, but should tolerate some discrimination by religious associations even if victims feel slighted and experience some loss of dignity.

Not only are the harms experienced by adult victims of employment discrimination by religious associations less severe than the harms resulting from corporal punishment of children, the harms experienced by victims of employment discrimination by religious associations are less serious than the harms generated by unfair discrimination on the part of the state or by public or commercial institutions. Bilchitz fails to appreciate this. After quoting a pronouncement by Ackermann J in the Constitutional Court’s decision decriminalising sexual intercourse between homosexuals concerning the severity of the harms to gays and lesbians as a result of the state’s discriminating against them on the basis of sexual orientation, he asserts that ‘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’.

In fact, the harms caused by unfair discrimination on the part of the state and institutions that serve the public are more serious than the harms caused by private religious associations. John Rawls includes self-respect amongst his list of primary goods – things ‘citizens need as free and equal persons’ no matter what their conception of the good. In understanding self-respect ‘we need to focus on the standard of losing respect and opportunity as a citizen. This means looking at the political basis for self-respect in the matter of discrimination. The political basis is located in public institutions and those institutions that serve the public’. That is, discrimination by economic and governmental institutions should be illegal because the citizenship of victims of such discrimination will be ‘diminished’. However:

[i]nstitutions that do not serve the public should be allowed to discriminate, regardless of its effects on one’s dignity. Discrimination in these settings may make people feel bad, but does not affect their standing as citizens. The political basis for self-respect is found in public institutions and those that serve the public. These institutions can publicly humiliate citizens. It is when these institutions single out certain people or a group of people for discrimination that these people are publicly humiliated.

33 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 42.
34 Bilchitz (note 1 above) 307.
36 Spinner-Halev (note 22 above) 174 (emphasis in original).
37 Ibid.
38 Ibid 176 (emphasis added).
The harm resulting from discrimination by government and commercial institutions is greater than the harm produced by discrimination on the part of religious associations because it affects individuals’ standing as citizens.

Bilchitz argues that religious associations discriminating in respect of positions close to the doctrinal core of the religion may be harmful in the further sense that discriminatory attitudes and practices can lead to ‘the sanctioning of violence and repression’ in society and that ‘the prejudice of powerful collective groupings such as religions can have a major public impact … that undermines the creation of a society founded on equal respect for all’. As I understand it, his claim is that the unfairly discriminatory practices of religious groups will, by their influence on the climate of opinion, adversely affect members of vulnerable groups by ‘legitimis-ing’ discriminatory attitudes and beliefs that motivate repression of and violence against members of vulnerable groups.

This argument implicitly appeals to the consequences of denying to religious associations permission to discriminate in respect of positions to which religious duties are attached: Bilchitz’s claim is that it will have the effect of increasing toleration of and reducing repression of and violence against vulnerable groups. I find it difficult to assess the force of this speculative conjecture. I accept, of course, that discriminatory beliefs and attitudes motivate some people to commit violent and other crimes against those they deprecate as inferior. I am less certain that the state’s forcing religious associations to refrain from discriminating in respect of positions to which religious duties are attached will result in religious believers (and others) becoming more tolerant of and less violent towards members of vulnerable groups. We are entitled to demand evidence of a high probability that permitting some discrimination on the part of religious associations will adversely affect the common interest in public order and security. I shall content myself with setting another speculative conjecture against Bilchitz’s. It may be that forcing religious associations to act inconsistently with their convictions will alienate them from the project of liberalism; that it will provoke resistance on the part of religious groups to the liberal project in South Africa – Bilchitz himself refers to the possibility ‘of scoring an own goal through a serious backlash’; that in the long run, tolerating some discrimination by currently intolerant religious groups ‘offers the best hope of generating gratitude toward the regime that makes this possible and hence support for the principle of toleration itself’.

39 Bilchitz (note 1 above) 308.
40 Ibid 307.
42 Ibid 314.
43 W Galston Liberal Pluralism The Implications of Value Pluralism for Political Theory and Practice (2002) 118 fn 13. See also Rawls (note 41 above) 219: ‘The liberties of the intolerant may persuade them to a belief in freedom. This persuasion works on a psychological principle that those whose liberties are protected by and who benefit from a just constitution will, other things being equal, acquire an allegiance to it over a period of time. So even if an intolerant sect should arise … it will tend to lose its intolerance.’
It is a paradox inherent in liberal toleration that although the liberal state can discourage religious communities from having and acting on illiberal commitments, ‘it must often tolerate illiberal communities’.\(^{44}\) We should condemn discrimination on prohibited grounds by religious groups and attempt to dissuade them from it through persuasion and by removing all forms of state support and subsidy from religious groups that discriminate. The state should also take crimes against members of violent groups extremely seriously and punish them severely in the hope that this will deter wrongdoers. Nevertheless, the liberal commitment to religious freedom, associational autonomy and pluralism prevents the state from acting on insufficiently substantiated fears about the consequences of religious associations engaging in some employment discrimination by disallowing it. ‘Sometimes liberalism is handcuffed by its own principles.’\(^{45}\)

Whereas Bilchitz overstates the (not insignificant) harm to victims of employment discrimination by religious groups, he fails to appreciate the extent and severity of the harm done to religious believers by refusing to allow them to engage in employment discrimination. Referring to the *Strydom* decision, he professes to ‘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 the employ a gay teacher’.\(^{46}\) His inability to see things from the standpoint of the religious believers concerned reflects what Leslie Green has called a failure of ‘understanding’ — a failure to engage in strenuous effort to comprehend, through an exercise of what Green, following Thomas Nagel, calls as ‘imaginative sympathy’ what is at stake for the religious believers concerned.\(^{47}\) His exclusive preoccupation with eliminating all unfair discrimination stands in the way of his getting a clear fix on the important interests of religious believers in regulating the internal affairs of their associations harmoniously with their religious beliefs and convictions.

Bilchitz considers that the only harm experienced by religious believers as a result of the state’s prohibiting employment discrimination in respect of jobs close to the doctrinal core of the religion is that they will experience ‘distress’. He argues that ‘experiencing moral distress is not sufficient to constitute a harm that would justify restricting a right’, by which he means the right to equality.\(^{48}\) However, by restricting the harms suffered by religious groups to ‘distress’, Bilchitz slights, for example, the harm done by forcing a group of religious believers, who believe that homosexual sex is a cardinal sin, to hire a

\(^{44}\) Spinner (note 24 above) 7.

\(^{45}\) Ibid 112.

\(^{46}\) Bilchitz (note 1 above) 308.


\(^{48}\) Bilchitz (note 1 above) 308.
homosexual participating in a same-sex relationship in a position of religious leadership.\textsuperscript{49}

We should permit religious associations to engage in some religious discrimination not only because prohibiting it brings about a diminution in the well-being of members of such associations, but also because religious believers have important interests in doing so, that are protected by the rights to religious freedom and freedom of association. Martha Nussbaum writes convincingly concerning the right to religious freedom:

The liberty of religious belief, membership, and activity is among the central human capabilities ... To be able to search for an understanding of the ultimate meaning of life in one's own way is among the most important aspects of a life that is truly human ... to burden [religious] practices is thus to inhibit people's search for the ultimate good ... Because religion is so important to people, such a major source of identity, there is also a strong argument from respect for persons ... When we tell people that they cannot define the ultimate meaning of life in their own way – even if we are sure we are right, and that their way is not a very good way – we do not show full respect for them as persons.\textsuperscript{50}

Religious believers have an important interest that is closely connected to their identity and to the value of integrity in being allowed to form groups and run the internal affairs of these associations autonomously and consistently with the precepts of their faith. When they are prevented from discriminating in respect of religious positions, their identity is undermined and their integrity may be violated in a way that constitutes a serious harm.

Another reason in favour of exempting religious associations from anti-discrimination law to allow them to discriminate in respect of jobs close to the doctrinal core of the religion concerned is that such discrimination occurs in the private sphere. ‘Liberals normally think that discrimination within the home is acceptable – this is what traditional liberal doctrine dictates – even if it is ethically questionable.’\textsuperscript{51} If some people refuse to invite people of a certain sexual orientation, gender or race to dinner, they should be permitted to do so, even if this results in those who are not invited to dinner feeling distressed, or that they are of lesser worth.

Bilchitz denies that its occurring in the private sphere gives us a reason legally to tolerant employment discrimination by religious groups, since, he says, the Constitution outlaws unfair discrimination in the private as well as the public spheres.\textsuperscript{52} He refers, by way of example, to the Rental Housing Act 50 of 1999, which provides, in s 4(1):}

In advertising a dwelling for purposes of leasing it or in negotiating a lease with a prospective tenant or during the term of a lease, a landlord may not unfairly discriminate against such

\textsuperscript{49} Bilchitz denies that in \textit{Strydom} the music teacher discriminated against on the grounds of his sexual orientation by the authorities of the church-run school that employed him occupied a position of religious leadership. I disagree, for reasons I provide in \textit{Lenta} (note 2 above) 238 fn 27 and accompanying text.

\textsuperscript{50} M Nussbaum \textit{Women and Human Development} (2000) 179–80 (emphasis in original).

\textsuperscript{51} Spinner-Halev (note 22 above) 169.

\textsuperscript{52} Bilchitz (note 1 above) 311.
prospective tenant or tenants, or the members of such tenant’s household or the *bona fide* visitors of such tenant.

In most cases, certainly, unfair discrimination by landlords should be illegal. As the Canadian philosopher Thomas Hurka says, ‘it would be intolerable if government, or landlords and companies operating in the public economy, withheld services on the basis of race or sex. Normal accommodation and jobs must be available to all’. But suppose two people, flatmates A and B, members of a religion with a shared belief that homosexual sex is sinful, advertise for a third housemate. C applies and discloses during the course of the discussion between A, B and C that he is a sexually active homosexual. A and B refuse to rent a room in their flat to C on the grounds that they do not wish to live with someone they believe to be engaging in a cardinal sin. Are A and B within their rights? I think that they are. This is an area where, as Hurka puts it, ‘discrimination, however distasteful, must be allowed’ by granting ‘exemptions for people renting out rooms to boarders, who will share their bathroom and kitchen’, since this ‘fall[s] within a private sphere’. The refusal of A and B to live with a sexually active homosexual represents bigotry, but that is irrelevant. People should be free to live with whomever they choose. A and B’s discrimination will not have an appreciable effect on the rental market, nor is it important for equality of opportunity. A and B should have a right to discriminate, and should be granted an exemption from the Rental Housing Act if necessary to give effect to this right. By analogy, religious associations should be allowed to discriminate in respect of positions that involve the carrying out of distinctively religious functions.

Bilchitz asks, ‘why is religion so special that it is able to command an exemption from non-discrimination laws that are of such import for society?’ He avers that if religious believers are entitled to an exemption from anti-discrimination laws ‘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 or worldviews’. He states that I ‘owe … some account of how [my] justification for exemptions can be limited to the domain of religion’. Let me say straight away that I have never claimed, nor do I believe, that exemptions from laws of general application, including anti-discrimination legislation, should be restricted to religious associations. I think that the autonomy, privacy and associational interests of individuals will sometimes justify exempting those who wish to discriminate for secular moral reasons. In the case of A, B and C above, I think A and B should be permitted to discriminate even if their objection to living with a sexually active homosexual is based on secular moral beliefs (albeit beliefs that are false). To take another case, suppose an association for gay men is formed with the purposes of identifying and legitimising the specific experiences of gay men in South Africa, repairing the injury done to gay men’s sense of their

54 Ibid.
55 Bilchitz (note 1 above) 312.
own self-worth as a result of their being the victims of unfair discrimination and, in general, determining and furthering gay men’s interests. In my view, such an association should be permitted to restrict its hiring of a leader to gay men, even if this means discriminating against women, including lesbians, for reasons that are not religious. Bilchitz thinks that the granting of exemptions not only to religious associations but also to other kinds of associations will ‘fundamentally undermine the purpose of anti-discrimination legislation’. 

By contrast, I believe that the experience in the US and Canada reveals that the public interest in combating unfair discrimination will not be seriously set back.

Bilchitz purports to discern an inconsistency between my support for permitting religious associations to discriminate in respect of leadership positions and the ruling of the Constitutional Court in Bhe v Khayelitsha Magistrate. This case concerned the constitutional validity of s 23 of the Black Administration Act 38 of 1927, which contained the rules regulating intestate succession under African customary law, including the rule of male primogeniture, in accordance with which only males related to the deceased qualify as intestate heirs. The Court decided that the primogeniture rule was unconstitutional since it violated women’s right to equality and discriminated unfairly against extra-marital children by denying them the right to inherit from their deceased parents. Bilchitz states that since the Court was prepared in Bhe ‘to intervene in a stringent manner to protect equality … Lenta owes us a strong justification why a similar approach should not be taken to religious practices that unfairly discriminate in employment’. 

The discrimination that was the focus of the Court’s concern in Bhe is distinct from the discrimination by religious associations that I think should be legally permitted in ways that make all the difference. The discrimination in Bhe concerned discrimination by the state, in the form of legislation. Section 23 of the Act represents discrimination in the public, political sphere: this section and its regulations ‘impose a system on all Africans irrespective of their circumstances and inclinations’. By contrast, the discrimination I deem acceptable is discrimination by private associations. In the view that I defend, all unfairly discriminatory acts by the state should be illegal, whereas certain discriminatory practices by private religious associations should remain legally acceptable. Furthermore, I support the toleration of some discrimination by religious associations on grounds that include the good of pluralism – that in a liberal society, the existence of diverse associations has value. By contrast, engendering pluralism is, as the Court in Bhe recognises, ‘not [the] dominant purpose or effect’ of s 23 of the Act. ‘Section 23 was enacted as part of a racist program intent on entrenching division and subordination.’

56 Ibid 312.
57 Ibid 313. See Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC).
58 Bilchitz (note 1 above) 313.
59 Bhe (note 57 above) para 66.
60 Ibid para 72.
In addition, whereas discrimination on the part of religious associations gives rise to a genuine clash between the rights to freedom of religion and associational liberty on the one hand and the right to equality on the other, the Court in *Bhe* avoids characterising the dispute in that case as involving a collision between rights protecting cultural diversity (ss 30 and 31 of the Constitution) and the right to equality. As the Court sees it, the central problem in *Bhe* is that the state has failed to amend the formal customary law rules of succession as set out in s 23 to enable these rules to ‘adapt and keep pace with changing social conditions and values’,61 with the result that ‘official customary law as it exists … in the Act is generally a poor reflection, if not a distortion of the true customary law’.62 True customary law, the Court states, is customary law that ‘respond[s] creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender and society’.63 So the central tension in *Bhe*, as the Court views matters, is not between equality and culture, but instead between discriminatory formal rules of African customary law concerning succession as expressed in legislation and ‘true customary law’.

A final difference between the discrimination in *Bhe* and that by religious associations in respect of positions close to their doctrinal core is that relatively few individuals (exclusively adults) will be discriminated against in the case of employment discrimination by religious groups, since it relates to relatively few jobs. Section 23 of the Act discriminates against far more people, including extra-marital children.

These differences between discrimination by religious groups in respect of positions proximate to the doctrinal core of the religion concerned and discrimination mandated by s 23 together provide conclusive reasons to think that the former should be permitted, while the latter should be illegal.

### III Reply to Professor De Freitas

Whereas Bilchitz reproaches me for permitting too much employment discrimination by religious associations, De Freitas worries that the scope for employment discrimination I allow to religious groups may be excessively narrow. In my view, religious associations should only be permitted to discriminate in respect of positions that have a sufficiently close connection to the settled religious convictions of a religious group – the job must have a religious basis. In the article to which De Freitas replies, I argued that the position of teachers in a church-run school has a close enough connection to religious beliefs of the church to permit it to discriminate in respect of this position, but that religious groups may not discriminate in respect of positions such as a typist or janitor, who perform substantially non-religious functions.

61 Ibid para 82.
62 Ibid para 86.
63 Ibid para 90.
De Freitas replies that the position of typists may be closer than I realise to the core of a church’s religious doctrine. For one thing, the doctrine of a church may include typists employed by it as ‘part of the community of believers in covenant with God’. For another, the job of a typist may include religious duties. He asserts that typists may ‘sometimes participate in messages of bereavement where there is a death of illness in the congregation’, which may require them to engage in ‘activities such as prayer and other forms of spiritual upliftment’. They may also be required to ‘provide religious inputs at church meetings’. All of this shows, in his view, that ‘spirituality and administration are not always clearly separated from one another’.

As I understand De Freitas’s criticism of my position, the views of religious groups concerning which jobs are religiously based and which are not should be taken more seriously than I allow. Referring with apparent approval to the US Supreme Court’s finding in *Corporation of the Presiding Bishop v Amos*, he urges that ‘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’ and that ‘where the core of 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’.

Let me immediately concede in favour of De Freitas that I may have been too rigid in claiming that religious associations should never be permitted to discriminate in respect of the position of a typist. Whether a church should be allowed to discriminate in respect of such a position depends on the duties attached to it. It may be, as De Freitas says, that in some churches typists’ duties extend beyond typing to include religious duties such as participating in prayer and contributing to religious discussions (though I suspect that most typists employed by religious associations are not required to perform such duties). Importantly, however, certain other employees may perform no religious functions at all. This may be true of many gardeners and cleaners employed by churches, for example. What is crucial is that religious associations be required to demonstrate the religious nature of the duties attached to any position in respect of which they wish to be exempt from anti-discrimination law. For as I have argued previously:

> religious associations are significant employers, so that if immunity from anti-discrimination laws were extended to all jobs, this would reduce to an unacceptable extent the employment opportunities of members of those groups against whom they are discriminating. The government’s legitimate goal of protecting the right to equality would be impeded unacceptably if claims for religious autonomy were extended to all jobs. The state’s duty to prevent discrimination, and legally to sanction it where it occurs, will only be outweighed by its duty to protect the rights to religious and associational freedom where

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64 De Freitas (note 1 above) 269.
65 Ibid.
67 De Freitas (note 1 above) 270.
the position in respect of which the religious group wishes to discriminate is sufficiently proximate to its doctrinal core.\textsuperscript{68}

I agree with De Freitas that courts should be ‘sensitive ... to the church’s own account of the religious foundation of an employee’s activities’,\textsuperscript{69} provided that they do not simply defer to a religious group’s view of what counts as a job close to the doctrinal core of the religion. Courts’ exercise of independent judgment is vital since religious associations may invoke ‘the religious ethos of the workplace’ to justify discrimination in respect of positions whose functions have no connection to the religious activities of the church.

I persist in considering mistaken the US Supreme Court’s decision in \textit{Amos} to uphold an exemption from Title VII, the federal anti-discrimination law which allows religious groups to discriminate in favour of co-religionists in respect of all their employees, including those whose duties are unrelated to the religious functions of the church. In \textit{Amos}, a maintenance worker at a non-profit Mormon-run gymnasium was dismissed for failing to comply with the eligibility text at Mormon temples. The duties performed by the maintenance worker were not religious in nature. Nancy Rosenblum writes:

\begin{quote}
The district court failed to find a sufficiently close connection between the work performed and the tenets of faith to say that government regulation would burden religion. Nothing in \textsuperscript{70} [the maintenance worker’s] duties was ‘even tangentially related to any conceivable religious belief or ritual of the Mormon church or church administration’. Nothing in the purpose or operation of Deseret gym suggests that it was intended to spread the beliefs, doctrine or sacred ritual of the Mormon Church, either; the gym was indistinguishable from any other health club operated for profit. Nor did the church contend that religious tenets required it to discriminate in employment.\textsuperscript{71}
\end{quote}

It is possible (as I have acknowledged in favour of De Freitas above) that some maintenance workers employed by certain religious groups may have religious responsibilities. ‘Yet Title VII’s broad exemption applies without regard to such details. Churches are permitted to discriminate against workers without showing that their work has any religious significance or that it in any way affects the ability of believers to practice their religion.’\textsuperscript{71} The Mormons own several economic concerns, which means that they are in a position to discriminate in respect of a great many employees. Discrimination to this extent seriously attenuates the right to equality. It will also abrogate to a significant degree the right to religious freedom, since a great many employment opportunities will be open only to Mormons in good standing. Under these conditions, job seekers will feel pressure to profess the Mormon faith in order to be availed of an employment opportunity.

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\textsuperscript{68} Lenta (note 2 above) 239.
\textsuperscript{69} De Freitas (note 1 above) 270.
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IV Conclusion

I hope to have shown that Professor Bilchitz’s arguments in support of refusing to allow religious associations sometimes to engage in employment discrimination are unconvincing. His position is inconsistent with the tolerant and pluralistic liberalism to which the Constitution commits us. Bilchitz has in the past criticised me for applying a-contextually the views of US and Canadian philosophers and constitutional theorists, so I shall conclude by quoting a constitutional theorist intimately acquainted with the South African religious liberty jurisprudence, Johan van der Vyver:

Affording to the State a competence to compel church institutions to ordain women (or homosexuals) as priests or as part of their clergy could be construed as an unbecoming interference by political authorities in the sovereign sphere of religious institutions, and in violation of the right to self-determination of faith-based communities, potentially leading to a most unfortunate confrontation between Church and State. 72

Provided that the words ‘could be construed as’ are replaced with ‘represents’ or ‘constitutes’ in this sentence, it expresses a view consistent with mine. I would extend the right of religious associations to discriminate beyond priests and clergy to include positions such as teachers in church-run schools and potentially certain other jobs involving the carrying out of religious duties. But I would not allow as much discrimination as Professor De Freitas considers permissible, since I do not think that ‘religious associations should be allowed to define for themselves what falls within the scope of activity that is conceivably part of their self-definition’. 73 To defer to religious associations to this extent is to undercut to an unacceptable extent the public interest in non-discrimination.

73 Rosenblum (note 70 above) 189.