Religious associational rights and sexual conduct: the accommodation of diversity of persuasion

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Prof. Johan van der Vyfer from Emory Law School recently commented that:

> It is perhaps unfortunate that the self-determination of religious institutions within their internal household has been placed under stress. Religious perceptions and practices that have lost touch with the times can best be remedied through deliberation and persuasion; legal coercion in matters of faith is bound to be counterproductive.[1]

This Van der Vyfer states in the context of current approaches in German jurisprudence where the labour courts are only required to take account of the effect of the dismissal of an employee on his or her personal and family life 'and to ask whether the consequences of the employee's conduct with regard to the spiritual calling of the church was of such a nature as to justify the negative effects his or her dismissal would have on his or her personal and family life.'[2] Van der Vyfer's reference to 'deliberation and persuasion' as trumping 'legal coercion' poses challenges towards qualifying the parameters of appointments by, and membership to, religious associations. How would such 'deliberation' and 'persuasion' look like, and will 'persuasion' always be possible?

This paper argues for an extreme accommodative approach in favour of the relevant association to be taken by the courts and the authorities regarding the parameters of membership to, and appointments by, religious associations when specifically confronted with issues related to sexual conduct and the prohibition thereof by the core tenets of such associations. The focus here is on the nature of reason and the many faces of persuasion in a pluralist society. It is through the lens of associational rights understood as having a claim independently of its members that leads to a more nuanced and

[1] Johan D. van der Vyfer, "State Interference in the Internal Affairs of Religious Institutions", *Emory International Law Review*, Vol. 26, (2012), 9. 1-9
[2] Van der Vyfer, "State interference in the internal affairs of religious institutions', 9.

accommodative approach regarding the different forms of reasoning in society, which in turn furthers the flourishing of difference in pluralist and democratic forms of civil society. Individuals sharing the same interests (and consequent practices) are not primarily to be allowed to enjoy the free exercise of such interests due to such interests being able to qualify as reasoning that enjoys general persuasion.

The refusal of membership to, and appointments by, religious associations due to certain types of sexual conduct remains a concern in many democratic dispensations. In South Africa, this matter is currently enjoying substantial attention, also within legal circles. The applicant in *Johan Daniel Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (Equality Court of South Africa) was appointed as an independent contractor by the respondent (a church) to teach music to its students. The respondent terminated the services of the applicant when it was discovered that he was involved in a same-sex relationship. The finding of the Court (in 2009) was that the respondent unfairly discriminated, due to sexual orientation, against the applicant. Scholarship resulting from the *Strydom* -case is comprised of three main streams of thought.

Firstly, there is the view that a religious association should, irrespective of its core tenets, accommodate those who practice same-sex sexual conduct due to an understanding of equality as necessitating non-discrimination based on sexual orientation. No matter what the nature is of the functions to be exercised by an appointment, a religious association may not refuse to appoint a person who practises same-sex sexual conduct (and the same applies to membership). Secondly, there is the view that a religious association may not be forced to appoint persons practising same-sex sexual conduct, where such persons are expected to perform a 'core function' (such as spiritual leadership) within such an association. When, for example, a church wants to appoint someone, and such an appointment is not aligned with a central function in the church (such as a secretarial position for example), then a person who practises same-sex sexual conduct should be accommodated, even though such conduct is in opposition to the core tenets of such a church. Thirdly, there is the view that a religious association specifically represents a unique and important associational dynamic (especially and foremost to its members),

and that membership (and appointments) to it requires one to adhere to the core tenets of such an association irrespective of the functions to be performed by a member or an employee. Therefore, a religious association may require that even an administrative appointment necessitates a person to be loyal to all the core tenets of such an association. As an extension of this third position, this paper argues for the accommodation of the differing rational (and moral) arguments so as to allow a religious association to refuse appointments or membership to those persons who partake in sexual conduct that is in opposition to the core beliefs of that religious association.

Liberalism's privatisation of religion together with the strict separation between the private and the public go hand-in-hand with an understanding of *reason* (and consequently persuasion) as solely restricted to the public or to common consensus. This negates the credibility of forms of explanation emanating from groups of individuals sharing the same core religious beliefs and interests. Faith permeates all of reality, whether in education, scientific experimentations or in the observations by astronomers. Faith is exercised not only by the religious but also by the non-religious. This has implications for how we understand reason and the viability thereof. If faith permeates all of society (including the public) and if 'fact' has a faith dimension to it and also permeates all of society, then reason is open to variation, depending on the specific religious and faith basis relevant to a given situation.

When dealing with religious associations, for example, as part of civil society, it is important to note that religion viewed as that which should be relegated to the private sphere also has implications for how we understand religious associational rights, which in turn influences views on what is rational and what is not. Iain Benson[3] comments that if we are looking to discuss the relationship between religion and other aspects of society we must be careful to avoid setting up false dichotomies. Religion discussed *in relation to the state* or *within* society is a far cry, says Benson, from the frequently used 'religion and the state.' Benson explains that when we use the 'state' to mean the order of

[3] IT Benson 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' (2007) 21 *Emory Int LR* 111, 155.

government and the law, and 'society' to mean citizens at large, including both religious and non-religious citizens, we must remember that religion, in some sense, is within both, since religious and non-religious citizens make up both the state and society. It is in this regard that caution is required regarding a too general and frequent usage of 'public' versus 'private' when it comes to religious rights. In many instances, the 'private-religious' extends itself into the 'public-belief' domain becoming a participant and representative of a specific belief in the various areas of reality which may include other participants and representatives of other beliefs.

This implies therefore that religious associations (and consequently civil society) also are to be viewed as part and parcel of the public sphere which in turn implies an acceptable level of freedom for the manifestation of religion in the public sphere and for the manifestation of reasoned justifications for certain religious practises.

There is currently, in what is referred to as a 'post-secular' society, a growing realisation that religion deserves its rightful place in public debate without having to sacrifice its own 'language'. This is of relevance to the freedom that religious associations should have in qualifying their ways of functioning. Certain sectors in liberalism are coming to realise the subjectivity of discussions and persuasions clothed in so-called 'neutral' (non-religious) language.

The protection of religious associations and their 'domains of rationality' form an important facet of the upkeep of a vibrant and diverse civil society. Arguments in support of diversity and consequently of associational rights, require clarity on the parameters of persuasive modes of explanation and the accommodation thereof for a pluralist society. Human rights protection includes the necessity to agree upon certain fundamentals. This however should not negate circumstances that allow for a more sensitive and accommodative approach regarding a diversity of supportive arguments pertaining to contentious and highly contestable moral matters. An example of this would be same-sex sexual conduct in the context of the right of a religious association to appoint whom it wishes to and to grant membership to whom it wishes to. In this regard,

how we perceive concepts such as ‘discrimination’, ‘equality’ ‘human dignity’ and ‘freedom’ may differ from believer to believer and from groups of believers to other groups of believers. Differing views on such central concepts require accommodation. Needless to say, this should only be permitted as far as the public peace and order, as well as the basic tenets for the protection of human dignity, will allow.

Civil society represents a plethora of morally-driven interests and exchanges. Civil society also includes different forms of persuasion in justification of certain actions taken by the constituent parts of civil society, and this is especially witnessed in religious associations. The protection of the autonomy of the entities making- up civil society also, as stated earlier, implies sensitivity to the rationale used by such entities in justifying certain modes of conduct. Many religious and non-religious believers, cultures and religious associations in South Africa (and elsewhere) have as part of their core belief (and consequent sense of rationality and morality) obligations pertaining to sexual conduct which are inextricably connected to foundational (and traditional) views on marriage, family, child-rearing and purpose in life. These core beliefs should not be assumed to be less rational (and less foundational) than opposing beliefs.

This is also of relevance to the courts when determining whether a religious association may discriminate in matters of membership and appointments where specific forms of sexual conduct are at issue. Any balancing exercise regarding the rights of a religious association and those of the complainant is inextricably connected to an element of interpretation that competes for priority with other elements of interpretation. The European Court of Human Rights (ECtHR) and the German labour courts for example, have applied factors such as ‘limited possibility of finding new employment’, and the ‘impossibility in finding new employment’, as reasons to uphold the continuation of employment in a religious association, irrespective of the types of sexual conduct prohibited by a religious institution, such as extra-marital sexual conduct. This reasoning is viewed as universally persuasive and overrides the religious association’s opposition to extramarital sexual conduct by its members or employees.

The question here is whether such reasons presented by the courts should trump the reasoning of the religious association, which is in this case 'the entering into a marriage within the understanding of the Church'. The same can be said of the use of 'equality' to further popular non-religious sentiment in criticism of limitations set by religious associations regarding membership and appointments (where the type of sexual conduct is a factor). Placing equality and non-discrimination over against religion, or viewing some forms of non-discrimination (for example, same-sex-sexual conduct) as more important than the religious person's freedom to disagree with the associational acceptance of same-sex sexual conduct, is questionable. See what Justice Basson states in the *Strydom*- case, namely:

> The question remains whether the right to religious freedom outweighs the Constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation? The Constitutional right to equality is foundational to the open and democratic society envisaged by the Constitution. As a general principle therefore, the Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation.[4]

Also, Justice Basson views 'equality' as a core value,[5] and bearing in mind the equating of 'equality' with that of prohibiting discrimination based on 'same-sex sexual orientation' (as inferred from the above),[6] Basson is in fact proclaiming that 'same-sex sexual orientation' is therefore also a core value which may trump the right to freedom of association. There is however a risk in this generalised view when focusing on the parameters of membership of (and appointments to) a religious association. This risk lies in having same-sex sexual conduct as an equality norm forced onto religious associations as a universal moral right that permeates all sectors of society, including the private.

In conclusion therefore the following: What this paper dealt with is the prioritisation of the status of associational rights with specific reference to religious groups, which in turn leads to an understanding of a specific form of reasoning emanating from a religious

[4] *Strydom* par. 14.
[5] Ibid para 10.
[6] As well as Basson's view that it was discriminatory (due to a violation of equality) for the church not to treat those with a same-sex sexual orientation the same as it treats heterosexuals. In this regard, see, for example, para 25.

association as just as important as reasons emanating from other sources. It is in this regard that persuasive considerations attains a localised, rather than a universal aspect.

But how do we get to the prioritising of associational rights as a moral norm on equal footing with individual rights? Do we simply equate the rights of an association with that of the individual, or view associational rights as an extension of individual rights? Why not view a religious association as an ultimate subject of moral value, just as liberalism supports the view that the individual is the ultimate subject of moral value? The emphasis here is to move beyond normal acceptances of associational rights which usually strictly scrutinises associational rights in balancing of rights exercises where, in many instances, the individual's right is called for as being superior.

Viewing the religious association as a form of ultimate moral value will, where there is a clash of associational rights and individual rights, allows for an initial phase allowing for substantial efforts at persuasion from both the side of the specific association and the complainant to defend its and his (or her or their) position to such an extent that a persuasive dead-end is established, and once this happens the moral autonomy of the association kicks-in as final persuasion for the protection of the rights of such an association. The religious association will however need to provide a strong argument for the stand-point taken by itself, and in the context of the *Strydom*-case and matters related to the acceptability of certain types of sexual conduct, this is possible.

This does not exclude ideas on sphere sovereignty, communitarianism, and subsidiarity as aids in contributing towards such an outcome. In addition to this, how we understand the public versus the private, and criticisms against the use of the phrase 'the secular' also prove helpful in this regard. However, the view here is that scholarship in this regard requires further development also against the background of specific problematic issues such as membership of, and appointments to religious associations of persons practising same-sex sexual conduct where such conduct is opposed by the core tenets of a church. Jurisprudence in also South Africa, is currently of dire need of contributions in this regard.