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The Religious Question and the South African Constitutional Court: Justice Ngcobo in *Prince* and *De Lange*

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ABSTRACT

Justice Ngcobo, an active member of the Constitutional Court early in the post-apartheid years, engaged with the merits of religious freedom and considered the determinations of the faithful and of religious organisations as part of appropriate adjudicatory factors. Roughly two decades after the end of apartheid, in *Ecclesia De Lange v Presiding Bishop of the Methodist Church for the Time Being & Another*, a strong suggestion is discernible that this position could be abandoned. If this trend were to be embraced, it would regard the determinations of the faithful and of religious associations as final and dispositive. Consequently, features of religious belief and practice would be rendered immune to constitutional scrutiny. What makes this trend worthy of evaluation are the decision of the Supreme Court of Appeal leading up to *De Lange*; the force of the trend evident in *De Lange*, and the persistence and subtle recognition of the religious question in South Africa's lower courts in the post-apartheid era despite the stance of the Constitutional Court post-1994 to engage fully with petitions about the right to religious freedom. This article draws attention to the challenges of the resurgence of the religious question in South African law by engaging in a review of the opinion of Justice Ngcobo in *Prince v President of the Law Society of the Cape of Good Hope & Others* as well as in similar cases, such as *De Lange*, where the religious question has arisen.

Keywords: right to religious freedom; *Prince*; *De Lange*; religious question; constitution-free space; religion and law; doctrine of entanglement

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 32 | Number 1 and 2 | 2017 | pp.1–17

https://doi.org/10.25159/2522-6800/3577
ISSN 2522-6800 (Online) | ISSN 2219-6412 (Print)

Introduction

This article discusses the nature of and the extent to which courts can review questions arising in the course of the interpretation of the right to freedom of religion.[1] It is because religion is a world of power[2] that requires a certain measure of respect and deference that the nature of its relationship with the law is often a matter of controversy and it is in constant flux. All modern liberal democracies are struggling to determine the extent to which a court of law, faced with petitions of a breach of religious freedom, should accept determinations of the faithful and of religious associations regarded in this article as the 'religious question'.[3] Should a court of law accept such determinations as total, substantial or simple? If it is a matter of total, a court of law would refuse to engage in the merits of a petition. If it is substantial, a court of law would depart from such determinations in rare cases. If it is simple, a court of law would regard such determinations as part of the factors to be considered in its adjudication.

At another level, it could be argued that in a rights-based constitutional democracy such as South Africa the courts have no room for such determinations. It could be asked how a court would evaluate a petition of a breach of religious freedom if it is incapable of engaging in or unwilling to engage with the merits of a belief or practice, no matter how difficult or insensitive doing so would appear to be. Many unsettling issues arise where incapacity or reluctance to engage in a review exists despite a constitutional obligation to act otherwise. Did the Interim Constitution and the Constitution, 1996 require a change of the apartheid-era jurisprudence that recognised the finality of the determinations of the faithful and of religious associations in religious freedom litigation? Under what circumstances should this change be reversed, if at all?

In this article, it is argued that Justice Ngcobo, an active member of the Constitutional Court early in the post-apartheid years, engaged with the merits of religious freedom and considered the determinations of the faithful and of religious organisations as part of appropriate adjudicatory factors. Roughly two decades after the end of apartheid, in *Ecclesia De Lange v Presiding Bishop of the Methodist Church for the Time Being*

1 See s 15 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

2 See, generally, Stephen Ellis and Gerrie ter Haar, *Worlds of Power: Religious Thought and Political Practice in Africa* (Hurst and Company 2003).

3 See Sachs J in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) ('*Christian Education*') para 35, who conceptualised the dilemma that faces modern liberal States thus: 'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'

& Another,[4] there is strong suggestion discernible from *De Lange* that this position could be abandoned. In sum, it is my opinion that this trend, if embraced, would regard the determinations of the faithful and of religious associations as final and dispositive. Consequently, features of religious belief and practice would be rendered immune to constitutional scrutiny. What makes this trend worthy of evaluation are the decision of the Supreme Court of Appeal[5] leading up to *De Lange*; the force of the trend evident in *De Lange*, and the persistence and subtle recognition of the religious question in South Africa's lower courts in the post-apartheid era despite the stance adopted by the Constitutional Court post-1994 to engage fully with petitions about the right to religious freedom.

This article draws attention to the challenges presented by the resurgence of the religious question in South African law by engaging in a review of the opinion of Justice Ngcobo in *Prince v President of the Law Society of the Cape of Good Hope and Others*[6] as well as in similar cases, such as *De Lange*, where the religious question has arisen. The next section provides an overview of the religious question; after that, the religious question between *Prince I* and *De Lange* is raised; the next section considers the concept of a constitutionally permitted free space for religions. Concluding remarks follow in the last section.

The Religious Question

This article proceeds from the fact that a religious question reflects the beliefs and practices of a religion or faith on which a court should decline to adjudicate. The contours of the religious question vary between different countries, and even between different courts in one country; this reflects the fact that the doctrinal approach to the religious question is also known variously as 'ecclesiastical abstention';[7] 'religious autonomy';[8] a 'hands-off approach';[9] a 'ministerial exception';[10] 'freedom of the Church';[11] 'non-

4 2016 (2) SA 1 (CC) ('*De Lange*').

5 See *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being & Another* 2015 (1) SA 106 (SCA) ('*De Lange SCA*').

6 2001 (2) SA 388 (CC) ('*Prince I*').

7 See, for example, Dan Knusden, 'Wrestling with the Ecclesiastical Abstention Doctrine: How *Puskar v Krco* Further Complicated the Heavily Litigated History of the Serbian Orthodox Church in America' (2015–2016) 36 Northern Illinois University LR 139.

8 See, for example, Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1 Oxford Journal of Law and Religion 81.

9 See Richard Garnet, 'A Hands-off Approach to Religious Doctrine: What Are We Talking About?' (2009) 84(2) Notre Dame LR 837.

10 See, for example, *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 132 SCt 694 (2012).

11 See Paul Horwitz, 'Act III of the Ministerial Exception' (2012) 106 Northwestern University LR 973.

justiciability',[12] and the 'doctrine of entanglement'.[13] As stated above, the nature of the religious question is such that a court may refuse to adjudicate on it or, alternatively, a court may adopt the decisions of a religious body to resolve a dispute, in this way effectively side-stepping adjudication. Typically, the religious question doctrine involves a range of issues, from the threshold enquiry into whether a belief and/or a practice qualifies as a religion in terms of the protection of the right to freedom of religion;[14] the sincerity of a religious belief or practice asserted by a faith, also for the purposes of triggering the right to freedom of religion; an evaluation of the plausibility or truth of a religious claim;[15] the accuracy of a religious claim where there are different doctrinal interpretations, and a subjective burden that is important for evaluating different factors in the limitation clause.[16] The religious question could be relevant to the disposition of either an entire case or only to parts of a case. For example, a threshold inquiry as to the truth and/or sincerity of a religious belief may not be dispositive of a case. In other words, a court could refuse to engage in a determination of the sincerity of a belief and yet subsequently engage in evaluating how that belief or the practices anchored on that belief fare with respect to the laws of the land. The subsequent enquiry would be a negation of the religious question because it could entail a court evaluating beliefs and practices.

There are a number of reasons why the religious question continues to resonate with the courts. The first would be the difficulty of evaluating beliefs as they are largely subjective. Allied to this point is the expertise required of courts in evaluating claims of religious freedom. It is also plausible that a legal system would consider certain rights of such crucial importance that it is willing to render them immune from government interference, including judicial deference. On the other hand, a legal system, which conceives that rights are not absolute and that compelling public interests require a limitation of rights, could not embrace the religious question wholeheartedly. For example, the South African human rights jurisprudence regards it as trite that courts evaluate petitions for a breach of human rights in a two-stage process.[17] In such instances,

12 See Russell Sandberg, '*Khaira and Others v Shergill and Others*: Religious Doctrine-non-justiciability' (2013) 15(1) Ecclesiastical LJ 122.

13 See Jared Goldstein, 'Is there a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs' (2005) 54 Catholic University LR 497.

14 See, for example, Christa Rautenbach, '*Umkhosi Ukweshwama*: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage' in Tom Bennett (ed), *Traditional African Religions in South African Law* (UCT Press 2011) 63.

15 In *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) ('*Prince II*') para 42, where Ngcobo J stated that '[A]s a general matter, the Court should not be concerned with questions whether as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief … The believers should not be put to the proof of their beliefs or faith.'

16 For example, the relevant factor of 'the nature and extent of the limitation' as part of s 36 of the Constitution possibly turns on the burden that a law has on the faithful's beliefs or practices.

17 See Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6 edn, Juta 2013) 153.

the courts would first determine whether a religious freedom has been breached; an enquiry would then follow to determine whether there is a justifiable limitation in terms of section 36 of the Constitution.[18] In many legal systems, these two extremes have been both prominent and recognised. The result is that states oscillate between periods when the religious question is recognised and other periods of judicial engagement.

As stated above, a court's deference because of a religious question could be either simple, substantial or total. Simple deference would be a normal adjudicatory technique that in a normal review considers the faithful and the religious associations as ordinary bearers of rights and participants. Substantial deference to a religious question would consist of a judicial preference or sympathy towards the determination of the faithful or religious association, but a position arrived at through engagement with ascertaining whether legislation has been breached and determining justification or otherwise. Substantial and simple deference allow the courts, in appropriate circumstances, to engage with issues of religious freedom. For compelling public-interest reasons, a religious belief or practice could be struck down or be held to have breached legislation. It should be pointed out that simple and substantial deference are largely similar but are antithetical to the religious question. This is because judicial review occurs even if, in the end as, in the case of substantial deference, a court leans towards and/or prefers the determination of the faith or religious association.

An exclusive or total deference, on the other hand, is really immunity from judicial scrutiny because in such cases judicial review is disabled. The courts would not even engage in a rights-based enquiry so that the faith or religious association is in most cases left to their own devices and determination. It is the difference between simple and substantial deference, on the one hand, and total and complete immunity to claims, on the other hand, that is the focus of this article.

The Religious Question in South Africa

As stated earlier, the post-apartheid constitutional dispensation presented an opportunity for South African courts to determine whether the structure of the South African Bill of Rights contemplated a religious question. A number of early post-apartheid decisions of South African courts did in fact recognise it. In *Mankatshu v Old Apostolic Church of*

18 Section 36 of the Constitution provides that '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

Africa & Others[19] and *Ryland v Edros,*[20] South African courts recognised the religious question and held that it was inappropriate to adjudicate on doctrinal issues.[21] In *Edros*, for example, Farlam J declared that section 14 of the Interim Constitution has changed the limited application of the religious question[22] and that the doctrine of entanglement was part of South African law.[23] Farlam J went as far as stating that had the parties in *Edros* not decided that were there no issues of doctrinal entanglement, section 14 and the doctrine of entanglement would have prevented the court from adjudicating the rights and duties of the Muslim marriages in issue in *Edros*. It was plausible to argue that because of *Edros and Mankatsu* the religious question had become part of South African law. It would appear, however, that the Constitutional Court had other ideas on this matter. Signs of a change of tack first appeared in general in *S v Lawrence; S v Segal; S v Solberg.*[24] All the opinions in *Lawrence* adopted what has now become orthodoxy in Bill of Rights claims. As stated above, it is first a right and if its breach is established, after which the limitation is assessed in terms of section 36 of the Constitution.[25] While this may appear trite to any human rights lawyer in South Africa, its significance lies in the fact that the courts do enquire into matters that are ordinarily inherently religious and a fit for the religious question. Sachs J's specific opinions in *Lawrence* reveal that the Court would engage with doctrinal matters.

By the time the unanimous decision of the Constitutional Court in *Christian Education* (in which Ngcobo J sat) was handed down, it was clear that the religious question had fallen out of favour: South African courts would engage with any religious claim pertaining to belief and/or practice, whether entangled or otherwise. Reviewing the nature of the freedom of religion recognised by the South African Constitution, Gerhard van der Schyff[26] concluded that

> [t]he South African constitution guarantees everyone access to courts for the resolution of disputes to which the law may be applied. Furthermore, it guarantees wide *locus standi* in the hearing of matters regarding the infringement of the bill of rights. The courts, therefore, may not be heard to say that ecclesiastical matters do not concern them in the least and that they merely pay deference to ecclesiastical tribunals without inspecting the facts.[27]

19 1994 (2) SA 458(TkA) ('*Mankatsu*').
20 1997 (2) SA 690 (C) ('*Edros*').
21 See also *Allen and Others NNO v Gibbs and Others* 1977 (3) SA 212 (SE).
22 In *Allen* (n 21) the Court pointed out that the religious question could be displaced if there were proprietary or other legally recognised rights in issue.
23 See *Edros* (n 20) para 703. See also Paul Farlam, 'Freedom of Religion, Belief and Opinion' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2edn, Original Service 12-03, Juta 2013) 41.1.
24 1997 (4) SA 1176 (CC) ('*Lawrence*').
25 See, for example, paras 129–130 (O'Regan J) and paras 164–177 (Sachs J) in *Lawrence* (n 24).
26 Gerhard van der Schyff, 'Freedom of Religious Autonomy as an Element of the Right to Freedom of Religion' (2003) 3 Tydskrif vir Suid-Afrikaanse Reg 512.
27 Van der Schyff (n 26) 529 [footnotes omitted].

Justice Ngcobo's decision in *Prince II* is part of the commendable early post-apartheid case law of the Constitutional Court that engaged in the review of religious claims within the architecture of the Bill of Rights. Among others, Justice Ngcobo recognised that the domain of religion should exist within the law and the Constitution – to assert otherwise would be to reify religion above the law. Furthermore, to require deference without evaluation would be tantamount to a shirking of responsibilities towards rights and the Bill of Rights. It is important to note that *Prince I* and *Prince II* were potentially classic doctrinal entanglement cases that would have admitted of the religious question. Ngcobo J's minority opinion in *Prince II* highlighted aspects of the religious question by recognising that the religious question could rightly be a threshold enquiry into the sincerity and/or truth of a belief and practice. Reacting to the challenge of the centrality of the practice of using cannabis by adherents of the Rastafari religion, he said (in an oft-quoted statement):

> [A]s a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, [that] their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is genuine dispute as to the centrality of the practice.[28]

It is evident that Ngcobo J recognised the plausibility of an engagement with the truth and sincerity of a religious belief or practice. Subsequent cases, such as *MEC for Education: KwaZulu-Natal v Pillay*,[29] have required the Court's engagement in an evaluation of the sincerity of a religious belief. Even though Langa CJ and O'Regan J disagreed in *Pillay* on how to evaluate a sincerely held personal belief, the crucial point is that the Constitutional Court did not invoke the religious question to decline appropriate engagement with the facts. It seemed that the religious question doctrine had fallen out of favour.

But that was not to be. A decision of a South African lower court raised the spectre of the religious question in the time between *Prince II* (2002) and *Pillay* (2008). In *Taylor v Kurstag*[30] Malan J reflected on the doggedness of the doctrine of entanglement when he said:

28 *Prince II* (n 15) para 42.
29 2008 (1) SA 474 (CC) ('*Pillay*').
30 2005 (1) SA 362 (W) ('*Kurstag*').

> although the decisions of the Beth Din are subject to judicial scrutiny, the values embodied in the doctrines of entanglement and the *reluctance*[31] to interfere in matters of faith, whether it be procedural or otherwise cannot be discarded.[32]

Even though it appears plausible to read *Kurstag* as a judgment of substantial deference to the decisions of the Beth Din or the Jewish Ecclesiastical Court, consistent with the use of 'reluctance' in the quoted phrase, Malan J extensively reviewed the facts of the case and then evaluated the rights of the parties to the case in a manner that would suggest otherwise. The influence of *Kurstag*, it would appear, was far-reaching and years later seemed to have influenced the Supreme Court of Appeal in *De Lange SCA*, where the Court declared that:

> As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.[33]

The Court had, in paragraph 33 of the judgment, recognised *Edros* and *Kurstag* as well as comparative jurisprudence from the United States, Australia and Canada as a prelude to and support for the conclusion it reached above. In sum, the religious question had returned. An academic inspiration for the court's position was found inter alia in Woolman and Zeffert's piece entitled 'Judging Jews: Court Interrogation of Rule-making and Decision-taking by Jewish Ecclesiastical Bodies'.[34] The Court approvingly noted the opinion of the authors:

> [I]n a radically heterogeneous society governed by a Constitution committed to pluralism and private ordering, a polity in which both the state and members of a variety of religious communities must constantly negotiate between the sacred and the profane, courts ought to avoid enmeshment in internecine quarrels within communities regarding the content or the truth of particular beliefs.[35]

There is no doubt about academic endorsement of the religious question in South Africa. For example, Woolman and Zeffert have also stated that '[t]he doctrine of "doctrinal entanglement" has been endorsed by a number of South African Courts'[36] and cited

31 [Emphasis added].
32 *Kurstag* (n 30) para 61; here, *Edros* and *Mankatshu* were cited with approval.
33 *De Lange* (n 5) para 39.
34 Stu Woolman and David Zeffert, 'Judging Jews: Court Interrogation of Rule-making and Decision-taking by Jewish Ecclesiastical Bodies' (2012) 28 SA Journal on Human Rights 196.
35 ibid 205.
36 ibid 205–206.

Edros, *Worcester Muslim Jamaa v Valley*[37] and *Mankatsu* in support. While it is true that the doctrine of entanglement is recognised by some South African courts, the nature of the engagement with religious claims by the Constitutional Court as demonstrated above cast serious doubt on whether the religious question or the doctrine of entanglement is still part of South African law. For this and many other reasons, *De Lange* was eagerly expected and it is to the opinion in that decision, relevant to our discussion in this article, that we now turn to.

De Lange—A Constitutional Free Space for Religions

The suggestion in *De Lange* of full-blown deference on the part of South African courts to the determination of religious associations raises grave issues. In this matter, the Constitutional Court in *De Lange* refused leave to appeal from a judgment of the Supreme Court of Appeal by a Methodist Minister against an order of suspension and discontinuation as a minister of the Methodist Church of Southern Africa. The applicant had been suspended and discontinued in her roles as an ordained minister after she had publicly announced her intention to marry her same-sex partner. A unanimous Constitutional Court refused leave to appeal, on a number of grounds, in the interests of justice.

What is important for our discussion is the *obiter* concurrent judgment of Van der Westhuizen J, who wondered whether the Constitution of the Republic of South Africa 'permitted free space', which would be a space where the Constitution would ordinarily apply but should not because the Constitution 'guarantees space to exercise our diverse cultures and religions and express freely our likes, dislikes and choices, as equals with human dignity'.[38] It is not exactly clear whether the constitutionally permitted space is a matter of constitutional principle or a discretionary judicial technique that a court could resort to in appropriate cases. Van der Westhuizen posed a question crucial to the religious question by asking whether there is 'somewhere in our churches, temples, mosques and synagogues – or for that matter our kitchens and bedrooms – a "constitution-free" zone?'[39]

In the opinion of Van der Westhuizen, as argued above, the core of the private inner sanctum of citizens is one area where courts should not engage in the balancing of competing rights. Accordingly, it could be asserted that the core inner sanctum of a religious association should be free from judicial intervention. But it would not be enough that a matter is a religious one to trigger substantive judicial abdication, since the Constitution does reach into private religious spheres.[40] It would have to be a principle representing the core doctrinal beliefs of a religious association. Even though Van der

37 2002 (6) BCLR 591 (C).
38 *De Lange* (n 4) para 83.
39 *De Lange* (n 4) para 70.
40 ibid para 81.

Westhuizen J contrasted a 'constitution-free' zone from a 'constitutionally permitted free space',[41] the two concepts appear to be the same in the outcomes they lead to. The concept of a constitutionally permitted free space reflects a full-blown religious question because in this free space no judicial review would occur and would accordingly provide immunity to the 'core inner sanctum of a religious association' from judicial review. In fact, it may well be argued that the structure of the South African Bill of Rights challenges the notion of a constitutionally permitted free space without more. It would appear preferable that a court determines that such a space exists in a particular case out of the abundance of reasoned analysis rather than a jurisdictional abdication. The fact that there are places where a constitution should not go should not be anteriorly determined.

The concept of a constitutionally permitted free space and/or a constitution-free zone as another phrase for the religious question is at odds with the carefully constructed jurisprudence evident in previous Constitutional Court judgments, including *Prince II*, that petitions about the right to religious freedom will be substantively engaged with. I shall put forward certain propositions to illustrate this point. First, were the religious question in operation, the Constitutional Court would have yielded to the assertions of the parents in *Christian Higher Education*; the Rastafari Movement in *Prince II*, and the priest in a same-sex relationship in *De Lange*. Indeed, *Christian Higher Education* illustrates some difficulties faced by the religious question. Should the Court have deferred to the assertions of the parents or those of the children because the proscription of corporal punishment defines the religious rights of South African children? The same considerations seem to apply in *De Lange*, where the Methodist Church effectively sought exemptions from the right to equality, on the one hand, and, on the other, the priest in a same-sex relationship affirmed her equal status in church ministerial positions which, if upheld, would have trumped internal rules that defined her religious affiliation and thus her right to freedom of religion. A court faced with different assertions of the right to religious freedom would have to balance these rights. The religious question appears incapable of resolving this dispute because when different religious freedom claims clash, careful balancing appears more appropriate.

Secondly, there are many instances where the right to freedom of religion clashes with other rights. An example is where the internal organs of a religious association breach procedural rights in the process of reaching determinations for which immunity is claimed. A court would engage in a review process not as an appellate body but to ascertain whether the internal organ had acted within the remit of its constitutive powers, and had been procedurally fair, reasonable, rational and had proceeded without bias. A court confronted with such a fact would have to examine the truth or otherwise of such an allegation. *Kurstag* is an example of a review enquiry by a court of the proceedings of a Jewish Ecclesiastical Court (Beth Din). Even if a court determines that the breach

41 ibid para 83.

of such procedural rights is immaterial, it will be as a result of a process of engagement with the proceedings. Along these lines, Van der Vyver states that

> [u]pholding the basic principles of justice and other constitutional rights of members of a religious institution has become critical in South Africa due to, and to the extent of, applying the Bill of Rights obligations to juristic persons.[42]

With respect to the *De Lange* litigation, Van der Vyver goes on to state that

> if the Church were to terminate the reverend De Lange's appointment as a minister, provided the proper procedures are applied by the Church, a Court of Law will not overrule that decision.[43]

Other plausible rights which would need careful examination of how they relate to the right to the freedom of religion include the right to fair labour practices protected by section 23 of the Constitution read together with the Labour Relations Act. In accordance with the religious question, as discussed above, it would be appropriate for a court to defer completely to a religious institution's characterisation of the status of its ministers rather than to engage in an enquiry to determine whether such characterisation is statutorily valid. In *The Church of the Province of Southern Africa Diocese of Cape Town v CCMA*[44] it would appear that the Labour Court was influenced by the Church's characterisation of the relationship between an ordained minister and God. Such a relationship is characterised by the absence of an intention to enter into the legal relationship considered important to grounding an alleged employment relationship between a Church and its ministers. Even though the recent case of *The Universal Church of God v Myeni*[45] suggests that section 200A of the Labour Relations Act 66 of 1995 raises a presumption which, if not sufficiently rebutted, would lead to the conclusion that an employment contract exists between a Church and its ministers, it is important to note that in *Universal*, the Labour Appeal Court engaged with the facts of the case to conclude that a contract must exist before the presumptions in section 200A are available and that there appeared to be no evidence of an intention to create a legal relationship between the Church and its ministers. These cases, including *Universal*, strongly suggest that the courts do not automatically defer to the characterisations of a religious institution. Instead, there is evidence of substantial deference to the religious institution in the decision of the court. To this effect, Ndlovu JA said:

42 See Johan van der Vyver, 'Equality and Sovereignty of Religious Institutions: A South African Perspective' (2012) 10 Santa Clara Journal of International Law 162.

43 ibid 163.

44 (2001) 22 *ILJ* 2274 (LC).

45 [2015] ZALAC 31 ('*Universal*').

> I think it is time that the resolution of disputes of this nature, with religious spiritual connotations or arising from internal church doctrinal governance, be left to the leadership of the church concerned, unless there is compelling reason for the Court to be involved.[46]

While it may be argued that because of *Universal* a South African court could find the existence of a contract of employment between a Church and its ministers, it is important to remember that allegations of a breach of the right to fair labour practices could qualify as 'a compelling reason' not to defer.[47]

In the second section of this article a distinction was made between simple, substantial and total deference. While it appears trite that a religious question is tantamount to total deference, it is also plausible that it could mean substantial deference. This conclusion is supported by numerous judicial opinions that judicial intervention in religious matters should be rare. In his reaction to *De Lange SCA* De Freitas[48] argues that the opinion of Ponnan J imposes

> [a] very strict burden as to when the judiciary should intervene in the affairs of religious associations. Here Justice Ponnan clearly states that in a dispute of this kind, a court must only become involved when it is 'strictly necessar' to do so, and that the court should 'avoid doctrinal entanglement'.[49]

The preference for substantial deference is also supported by scholarly reflection in the wake of *Kurstag* and *Strydom v Dutch Reformed Congregation Moreleta Park*,[50] where the Court suggested that a Church would be within its rights to dismiss a minister in a same-sex relationship. These views reflect a strong consensus that the courts should defer to religious associations in their internal disciplinary determinations. Woolman,[51] De Freitas[52] and Lenta[53] argue essentially for substantial deference towards religious

46 *Universal* (n 45) para 53.

47 See, generally, Wilhelmina Germishuys, 'Religion Above the Law? *Universal Church of the Kingdom of God v Myeni and Others*' (2016) SA Merc LJ 360. See also Bongani Khumalo and Lux Kubjana, 'Servants of God or Employees of the Church – Reflections on *Universal Church of the Kingdom of God v CCMA and Others*' (2015) SA Merc LJ 338.

48 Shaun de Freitas, 'Doctrinal Sanction and the Protection of the Rights of Religious Associations: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 15' (2016) 19 Potchefstroom Electronic LJ 1.

49 ibid 13.

50 2009 (4) SA 510 (T).

51 Stu Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 SA J on Human Rights 280; Stu Woolman, 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz' (2012) 28 SA J on Human Rights 273.

52 Shaun de Freitas, 'Freedom of Association as a Foundational Right: Religious Associations and *Strydom v Nederduitse Gereformeerde Kerk, Moreleta Park*' (2012) SA J on Human Rights 258.

53 Patrick Lenta, 'Taking Diversity Seriously: Religious Associations and Work-related Discrimination' (2009) 126 SALJ 827; Patrick Lenta, 'The Right of Religious Associations to Discriminate' (2012) 28 SA J on Human Rights 231; Patrick Lenta, 'In Defence of the Right of Religious Associations to Discriminate: A Reply to Bilchitz and De Freitas' (2013) SA J on Human Rights 429.

associations and exemption for these institutions regarding compliance with the right to equality. When Bilchitz argues that equality norms should apply to ministers of religious associations,[54] it is an affirmation of the importance of judicial engagement with matters of religious freedom. It is submitted that South African courts should eschew total deference to the faithful and to religious associations and that they should rather oscillate between substantial and simple deference in matters involving religious adjudication. But it is important to interrogate further 'substantial deference' for religious associations so that it is not a cover for total deference. One dares to assert that within a rights-based liberal democracy such as South Africa substantial deference should not be equated to jurisdictional abdication. Moreover, the fact that a court would treat the assertions of a religious association, with respect, should not mean that all enquiries should cease at the behest of the faith or religious association.

What about those religious associations that would qualify to enjoy a simple or substantial deference? A crucial issue in the nature of deference to be afforded religious associations is the question of what qualifies an association as a religious association. The difficulty of defining religion and the intuitive preference of a broad definition often precludes the important issue of what is religious or otherwise. On a continent of diverse beliefs and persuasions, this enquiry is crucial. Of interest is the fact that the jurisprudence of the religious question has arisen in respect of monotheistic faiths such as Christianity and Judaism. It should be obvious that such public and institutionalised religions would easily yield inner-core doctrinal beliefs that appear to be at the heart of substantial deference. But how do we recognise the inner-core beliefs of polytheistic faiths such as African Traditional Religions and other minority religions?

With respect to African Traditional Religions, Bennett and Amoah,[55] and a number of other scholars[56] have demonstrated the ease with which African culture often represents what is really religious. Accordingly, it could be asserted that much of what we know as African customary law is really of a religious nature. Would South African courts be prepared to do so, they could be asked to defer substantially to the faithful as well as to decisions of organisations of African Traditional Religion. Even if this is a question for another time, it is evident that substantial deference could immunise the faithful and their organisations from substantial parts of South African law if what is in issue before a court is of a religious nature were to be accepted by a court. But surely a religious belief or practice that is anchored, for instance, in cannibalism or child abuse would be

54 David Bilchitz, 'Should Religious Associations Be Allowed to Discriminate?' (2011) 27 SA J on Human Rights 219; David Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 SA J on Human Rights 296.

55 See Tom Bennett and Jewel Amoah, 'The Freedoms of Religion and Culture under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment' 2008 African Human Rights LJ 357.

56 See, for example, NM Nyaundi, 'African Traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience, and Pragmatism' in Tom Bennett (ed), *Traditional African Religions in South African Law* (UCT Press 2011) 1.

seriously investigated by a South African court? And would the same consideration not apply if it were urged that the defence to a crime is based on the religious belief and practice of the faithful or of a religious association?

The religious question is part of a larger conviction that religion as a world of power is beyond the law. In the very recent past, assertions of religious autonomy and attendant immunity from regulatory oversight were raised in opposition to the administrative enquiry established by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities[57] (CRL Commission) to study the commercialisation of religion.[58] If these claims of autonomy were to be upheld, the CRL Commission would have been unable to investigate grave allegations of

> [r]ecent controversial news reports and articles in the media about pastors instructing their congregants to eat grass and snakes, to allegedly drink petrol or to part with considerable sums of money in order to be guaranteed a miracle or blessing has left a large portion of society questioning whether religion has become a commercial institution or commodity to enrich a few.[59]

It is also plausible to imagine the religious question as a periodic response to a perceived decline in the protection of religious freedom. This would be the case where a legal system has such a record. For South Africa, it is plausible to conclude that the courts have substantially protected religious freedom through a careful consideration of the contours of the right to religious freedom and other human rights. Even though there is no hint at the Constitutional Court that the right to religious freedom, the faithful or religious associations are privileged, the need to display appropriate respect is evident from the Constitutional Court's deliberations.

Concluding Remarks

Ultimately, we return to the relationship between law and religion. It is my strong conviction that the jurisprudence articulated by the Constitutional Court, of which Justice Ngcobo was a leading figure, represents a credible and sustainable means of engaging with petitions for the protection of religious freedom. No state, except perhaps a theocracy, relinquishes its eminent domain to protect or restrict religious freedom in appropriate cases. Simple deference is to be preferred in this engagement, with the

57 Established by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 ('CRL Commission').

58 See the CRL Commission's *Report of the Hearings on Commercialisation of Religion and Abuse of People's Belief Systems* (2017) <http://www.crlcommission.org.za/docs/Report%20On%20Commecialization%20of%20Religion%20and%20Abuse%20of%20People's%20Believe%20Systems%20final.pdf> accessed 17 November 2017.

59 ibid 6.

possibility of substantial deference in rare cases. Perhaps this would be a better way of understanding the religious question.

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