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How Should the South African Constitutional Court Approach Tensions Between Women's Rights and Religious Rights?

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How Should the South African Constitutional Court Approach Tensions Between Women's Rights and Religious Rights?

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I. INTRODUCTION

Women's rights and religious rights appear to be in tension in countries around the world. For example, the Catholic Church does not permit women to become priests.¹ Certain tenets of Islam allow polygyny but do not allow polyandry (therefore, men are permitted to marry more than one woman—a practice which in itself gives rise to violations of women's human rights—but women are not permitted to marry more than one man).² Orthodox Jewish communities require women to obtain a *get* from their husbands in order to obtain a divorce (which the husband may refuse to grant), but do not impose the same obligation upon men.³ One could easily come up with many other examples.

This paper explores whether women's rights conflict with religious rights under the South African Constitution, and if so, how the South African Constitutional Court might attempt to resolve such conflicts. The Constitution includes a broad range of human rights pertaining to women, such as women's equality with men, non-discrimination on the basis of gender, and the rights of women to full enjoyment of other specific human rights, such as the right to freedom of assembly, the right to freedom of occupation and profession, the right to human dignity, the right to freedom of expression, and the right to freedom of religion, belief, and opinion.⁴ The Constitution also includes a broad range of religious rights that pertain to all individuals—including women—regardless of their religion and religious (or non-religious) beliefs.⁵ Additionally, religious rights encompass the rights of individuals belonging to a religious community, along with other members of that community, to practice their religion and to form, join, and maintain religious associations and other organs of civil society, as long as those rights are not exercised in a manner inconsistent with any provision of the Bill of Rights.⁶

Specifically, this paper explores the interrelationships between women's rights and religious rights under the Constitution and suggests that they are not necessarily

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1. See 1917 CODE c.1024; see also ROMAN CATH. WOMENPRIESTS, <http://www.romancatholicwomenpriests.org> (last visited Apr. 9, 2016) (“[W]e have challenged and broken the Church’s Canon Law 1024, an unjust law that discriminates against women.”).
 2. See Martha Bailey & Amy Kaufman, *Should Civil Marriage Be Opened Up to Multiple Parties?*, 64 EMORY L.J. 1747, 1765 (2015) (“Islam, a major world religion that permits polygamy, allows only polygyny, not polyandry.”). Customary law in South Africa and other countries also permits polygyny. See, e.g., *Hassam v. Jacobs* 2009 (5) SA 572 (CC) at paras. 1, 17.
 3. Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1884 (2014) (“The Jewish divorce cases center on the husband’s refusal to grant a *get*, a Jewish divorce, thereby denying his wife the option of remarrying and having children within the parameters of her faith.”); see also Alexandra Leichter, *The Effect of Jewish Divorce Law on Family Law Litigation*, 2 J. INT’L ACAD. MATRIM. LAW., 2009, http://www.iaml.org/cms_media/files/jewish_divorce_law.pdf?static1. In contrast, South Africa has enacted a statute requiring that a spouse seeking a divorce must remove all impediments to the other spouse’s ability to remarry. Divorce Amendment Act 95 of 1996 § 5A.
 4. See S. AFR. CONST., 1996, §§ 9–22.
 5. See *id.*
 6. See *id.* § 15.

as far apart as one might first imagine. It asserts that they should be read in conjunction with each other to provide a high level of protection for both women's rights and religious rights of individuals. Part II of the paper briefly recounts the context in South Africa regarding religious demographics and the status of women and uses the exclusion of women from the Roman Catholic priesthood as a case study to explore how the Constitutional Court might approach the apparent tension between women's rights and religious rights. Part III examines women's rights and religious rights as set forth in various articles of the Constitution and explores how they have been applied by the Constitutional Court. Finally, Part IV concludes that the Constitutional Court could adopt an approach that integrates women's rights and religious rights in a manner that fully respects and protects both categories of rights by focusing on the rights specifically as they pertain to individuals.

II. RELIGION AND WOMEN IN SOUTH AFRICA

This section briefly discusses the religious demographics in South Africa along with a few examples of discrimination and subordination that South African women have faced in the present and historically. It then explores the ban on women's ordination in the Catholic Church as a case study through which the intersection of women's rights and religious rights under the Constitution will be examined throughout the rest of the paper.⁷

According to the South African government's website, the country's population of over fifty million people consists of about 79.2% black South Africans, about 9% "coloured" (the term used in South Africa for people of mixed races), about 9% white, and about 2.5% Indian/Asian.⁸ The latest census figures that collected information about religion were in 2001.⁹ According to those figures, South Africa's religious composition at that time was predominantly Christian (80%), with other religions (including Muslim, Jewish, Hindu, Buddhist, and traditional African indigenous beliefs) comprising about 5% of the population, and around 15% not expressly affiliating with any specific religion.¹⁰ A more current survey cited on the South

7. See generally Patricia Fresen, Address to the Southeast Pennsylvania Women's Ordination Conference (Mar. 12, 2005), <http://www.romancatholicwomenpriests.org/history1.htm> ("Today, in this post-apartheid time, what we have is a transformed South Africa, a rainbow nation, and there is no comparison with the divided apartheid society in which I grew up. . . . Now we in the Church are on another 'long walk to freedom', this time freedom from sexism, from unjust discrimination against women in the church, freedom from oppression by the privileged clerical caste in the church. Once again, we need to stand together in protest, to break the unjust laws because we cannot wait forever, and we need, at least at the beginning, to move into the structures that exist and change them. . . . Just as the Black people of SA needed to move into the structures set up by the Whites so as to claim their equal rights as citizens of the country, so we women need to move into the structures in the church so as to claim our right to be there. In both cases, the structures are being changed by the presence of the formerly excluded group.").

8. *South Africa's People*, SOUTH AFR. GOV'T, <http://www.gov.za/about-SA/south-africas-people> (last visited Apr. 9, 2016) [hereinafter *South Africa's People*].

9. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2013: SOUTH AFRICA, <http://www.state.gov/documents/organization/222309.pdf>.

10. *Id.*

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

African government's website indicates that adherence to religion has dropped significantly in recent years.¹¹

Considering the historical development of religion in South Africa under apartheid, one source examining that era indicated: "The government . . . actively encouraged specific Christian beliefs during much of the twentieth century, but South Africa has never had an official state religion nor any significant government prohibition regarding religious beliefs."¹² It continued:

In the twentieth century, however, several Christian churches actively promoted racial divisions through the political philosophy of apartheid. The largest of these denominations was the Dutch Reformed Church . . . which came to be known as the "official religion" of the National Party during the apartheid era. Its four main branches had more than 3 million members in 1,263 congregations in the 1990s.¹³

On the other hand, "senior officials within the Roman Catholic Church in South Africa opposed apartheid," as did officials of other denominations, such as the Anglican Church, the Methodist Church, and the South African Council of Churches, which was an umbrella coalition of anti-apartheid churches.¹⁴

In the present day, women in all regions of the world, including South Africa, continue to be discriminated against and treated as subordinate to men. In recent years, South Africa has made significant progress regarding women's rights in certain areas, such as women's participation in the national government,¹⁵ but pervasive women's human rights violations remain entrenched throughout society. According to the 2014 U.S. State Department Human Rights Country Report on South Africa, violence against women and societal discrimination against women remain significant human rights problems facing the country.¹⁶ For example, rape and sexual violence

11. *South Africa's People*, *supra* note 8 ("According to August 2012 polls released by the Win-Gallup International Religiosity and Atheism Index, which measures global self-perceptions on belief, religious South Africans dropped from 83% of the population in 2005 to 64% in 2012. According to the survey, 28% of South Africans do not consider themselves religious and 4% said they were atheists."); *see also* GOV'T COMM'NS, SOUTH AFRICA YEARBOOK 2013/2014, at 3, http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2013-4Land_and_People.pdf.

12. U.S. Library of Cong. Fed. Research Div., *Religion, in SOUTH AFRICA: A COUNTRY STUDY* (Rita Byrnes ed., Country Studies/Area Handbook Ser. South Africa, 1996), <http://countrystudies.us/south-africa/52.htm> [hereinafter *A COUNTRY STUDY*].

13. U.S. Library of Cong. Fed. Research Div., *Religion and Apartheid, in A COUNTRY STUDY*, *supra* note 12, <http://countrystudies.us/south-africa/53.htm>.

14. *Id.*

15. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, SOUTH AFRICA 2014 HUMAN RIGHTS REPORT 25 (2014), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236406> [hereinafter 2014 HUMAN RIGHTS REPORT] ("Women held 14 of 35 ministerial positions, including foreign affairs and defense, and 17 of 38 deputy ministerial positions. There were 164 women [out of 400 seats] in the National Assembly and 20 women among the 54 members of the NCOP. Women occupied two of four parliamentary presiding officer positions, including the speaker of the National Assembly and chairperson of the NCOP.").

16. *See id.* at 1.

against women are rampant,¹⁷ as is domestic violence.¹⁸ Elderly women are accused of practicing witchcraft and are subjected to various forms of abuse.¹⁹ Women also face multiple forms of economic discrimination.²⁰ Marriage can be oppressive as a result of religious or cultural practices.²¹ Moreover, women are still relegated to being the primary caregivers to children and responsible for maintaining the home,²² which is a problem that the Constitutional Court has recognized in prior decades, albeit in

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17. *Id.* at 28–29 (“Rape, including spousal rape, is illegal but remained a serious and pervasive problem. . . . According to the 2012–13 SAPS annual report, 197,877 reported crimes were committed against women A 2009 Medical Research Council (MRC) report stated that more than 25 percent of men interviewed in KwaZulu-Natal and Eastern Cape provinces admitted committing at least one rape, and more than half of those persons admitted raping more than one person. In a 2011 study conducted in Gauteng Province by the MRC and Gender Links, 37.4 percent of men admitted to having committed one or more rapes, and 25 percent of women admitted being a victim of sexual violence in their lifetime.”); *see also, e.g., K v. Minister of Safety and Sec.* 2005 (6) SA 419 (CC) at para. 1; *Carmichele v. Minister of Pub. Safety and Sec.* 2001 (4) SA 938 (CC) at paras. 1–2, 9–12.
 18. 2014 HUMAN RIGHTS REPORT, *supra* note 15, at 30 (“Domestic violence was pervasive and included physical, sexual, emotional, and verbal abuse, as well as harassment and stalking. . . . According to NGOs an estimated 25 percent of women were in abusive relationships, but few reported it. A 2009 MRC report stated more than two-fifths of men interviewed in KwaZulu-Natal and Eastern Cape provinces had been physically violent toward an intimate partner. According to the 2011 report conducted by the MRC in Gauteng Province, 51 percent of women experienced some form of violence (economic, physical, sexual, or emotional) in their lifetime, and 78 percent of men admitted to perpetrating some form of violence against women. TCC counselors also alleged that doctors, police officers, and judges often treated abused women poorly.”).
 19. *See id.* at 42–43 (“There were reports that persons accused of witchcraft were attacked, driven from their villages, and in some cases killed, particularly in Limpopo, Mpumalanga, KwaZulu-Natal, and Eastern Cape provinces. Victims were often elderly women. . . . For example, on February 11, community members attacked Mamayila Nkuna, a pensioner in Limpopo Province, and burned her alive. They accused her of witchcraft after three boys who lived near her committed suicide.”).
 20. *Id.* at 31–32 (“Discrimination against women remained a serious problem despite legal equality in inheritance, divorce, and child custody matters. Women experienced economic discrimination in wages . . . extension of credit, and ownership of land. Traditional patrilineal authorities, such as a chief or a council of elders, administered many rural areas. Some traditional authorities refused to grant land tenure to women, a precondition for access to housing subsidies. . . . Women, particularly black women, typically had lower incomes and less job security than men. Many women were engaged in poorly paid domestic labor and microenterprises, which did not provide job security or benefits.”). However, the Constitutional Court has established legal equality in inheritance laws relatively recently. *See Hassam v. Jacobs* 2009 (5) SA 572 (CC) (invalidating provisions of the Intestate Succession Act that excluded widows of polygynous marriages from inheritance); *see also Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) (striking down as unconstitutional a statute that had ensconced and ossified the customary law concept of male primogeniture into statutory law).
 21. Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa, GN 756 of GG 34657, 31–32 (3 Oct. 2011) [hereinafter Promoting Family Life].
 22. *Id.* at 40 (“Furthermore, the gender division of labour continues to influence how families function. Women typically assume more household responsibilities and spend a larger portion of their time on unpaid care work than men and form a greater proportion of discouraged work seekers. This situation is further exacerbated by the inadequate provision of childcare facilities, causing the amount of time women spend on wage work to be reduced. Consequently, their vulnerability to poverty increases.”).

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

dissenting opinions.²³ Polygamy remains common in certain parts of South Africa.²⁴ Girls in some communities are still subject to female genital mutilation.²⁵ Women face pervasive sexual harassment in the workplace.²⁶ In certain regions, forced marriages and child marriages continue to occur.²⁷ Another example of an issue concerning women's rights in South Africa is *lobolo*—otherwise known as bride price—where a man pays a certain amount (traditionally in cattle, now more commonly cash) to the father of the bride in exchange for her hand in marriage.²⁸

Historically, some laws inspired by religion have had a negative impact upon women, for example in the area of family law.²⁹ Writing shortly after the adoption of

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23. See *Harksen v. Lane* 1998 (1) SA 300 (CC) at para. 94 (O'Regan, J., dissenting) (“These rules therefore both reflected and entrenched deep inequalities between men and women. Not infrequently women’s experience of marriage therefore was (and sometimes still is) one of subordination, both in relation to the rules regulating matrimonial property (whether customary or common law) and in relation to the division of labour within the household. A strong social expectation that married women would not work outside the household also translated into patterns of discrimination against married women outside of the marriage relationship, particularly in the labour market.”); see also *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 80 (Kriegler, J., dissenting) (“[T]he notion . . . that women are to be regarded as the primary care givers of young children, is a root cause of women’s inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind.”).
 24. Promoting Family Life, *supra* note 21, at 29 (“Polygamous families are also quite prevalent in certain parts of South Africa.”).
 25. 2014 HUMAN RIGHTS REPORT, *supra* note 15, at 31.
 26. See *id.*
 27. *Id.* at 34; see also DEP’T OF WOMEN, REPUBLIC OF S. AFR., SOUTH AFRICA’S BEIJING +20 REPORT, PROGRESS MADE ON THE IMPLEMENTATION OF THE BEIJING DECLARATION AND PLATFORM FOR ACTION AND THE OUTCOMES DOCUMENT OF THE 23RD SPECIAL SESSION OF THE GENERAL ASSEMBLY IN 2000, at 71 (2015), [http://www.women.gov.za/attachments/article/52/Final%20Draft%20\(2\)%20National%20Beijing%20+20%20Report%20%2026022015%20\(3\).pdf](http://www.women.gov.za/attachments/article/52/Final%20Draft%20(2)%20National%20Beijing%20+20%20Report%20%2026022015%20(3).pdf) [hereinafter SOUTH AFRICA’S BEIJING +20 REPORT] (“Ukuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations. Ukuthwala was traditionally intended for people of the same age group who, in the normal course of events, would have been expected to marry each other and never intended to apply to minor children, however, forced marriage of girls as young as 12 to adult men, is still practiced in some remote villages in the country.”).
 28. Lindsay Carniak McLaughlin, *The Price of Failure of Informed Consent Law: Coercive Sterilizations of HIV-Positive Women in South Africa*, 32 LAW & INEQ. 69, 76 n.47 (2014) (citing SETHEMBISO MTHEMBU ET AL., ‘I FEEL LIKE HALF A WOMAN ALL THE TIME’: A QUALITATIVE REPORT OF HIV-POSITIVE WOMEN’S EXPERIENCES OF COERCED AND FORCED STERILISATIONS IN SOUTH AFRICA 27 (2011), <http://www.africawln.org/download/5/>) (“Although lobola was traditionally paid for in cattle, it is currently paid in cash for a bride, meaning that the husband and his family bought the wife and any future children.”).
 29. See Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 135, 137 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter WOMEN’S RIGHTS, HUMAN RIGHTS] (“However constructed throughout the world, family laws and practices tend to perpetuate a patriarchal structure in which women are subordinated to men and in which male economic and decision-making powers are enhanced.”).

the Interim Constitution, a women's rights advocate noted that "[a]s in most countries, South African society is patriarchal. Religious and traditional norms relegate women to an inferior position in both society and family."³⁰ Conservative interpretations of Catholicism, Islam, and other religions have regarded women as inferior because women's traditionally prescribed functions of motherhood, domesticity, and nurturing supposedly render them "weak, unable to reason, inadequate to engage in public or political activities."³¹ Women's roles, as framed within religious precepts, have been shaped significantly by the historical, social, and cultural context of the times, yet they have changed dramatically across many regions of the globe in recent decades. In fact, just over fifty years ago, most Protestant denominations in Europe and the United States began to ordain women.³²

Although numerous examples could be explored, this paper questions the practice of excluding women from the priesthood in the Roman Catholic Church as a case study to examine the tension between women's rights and religious rights under the South African Constitution. A South African Roman Catholic theologian, Dr. Patricia Fresen, has tested and expounded upon these tensions.³³ Back in 1978, she resigned from the seminary. She later learned about the "Danube Seven"—the first group of women in modern times to be ordained publically into the Roman Catholic priesthood by Bishop Romulo Braschi in 2002.³⁴ Fresen was ordained as a priest in 2003, and subsequently was ordained as a bishop along with two other women, by progressive male Catholic bishops who support the cause of women's ordination and wanted to ensure that women's ordination into the priesthood could continue.³⁵

30. Brigitte Mabandla, *Women in South Africa and the Constitution-Making Process*, in *WOMEN'S RIGHTS, HUMAN RIGHTS*, *supra* note 29, at 67, 67.

31. Nayereh Tohidi & Jane H. Bayes, *Women Redefining Modernity and Religion in the Globalized Context*, in *GLOBALIZATION, GENDER, AND RELIGION: THE POLITICS OF WOMEN'S RIGHTS IN CATHOLIC AND MUSLIM CONTEXTS* 17, 18 (Jane H. Bayes & Nayereh Tohidi eds., 2001). This attitude is likely based on the teachings of Saint Paul. See Sister Sara Butler, M.S.B.T., *Catholic Women and Equality: Women in the Code of Canon Law*, in *FEMINISM, LAW, AND RELIGION* 345, 362 (Marie A. Failinger et al. eds., 2013); see also *1 Corinthians* 14:34–35 (New International Version) ("[W]omen should remain silent in the churches. They are not allowed to speak, but must be in submission, as the law says. If they want to inquire about something, they should ask their own husbands at home; for it is disgraceful for a woman to speak in the church."). But see *1 Corinthians* 14:34–35 n.14:34, 35 (Life Application Study Bible, New International Version 2005) ("The purpose of Paul's words was to promote unity, not to teach about women's roles in the church.").

32. See Susan J. Stabile, *The Catholic Church and Women: The Divergence Between What is Said and What is Heard*, in *FEMINISM, LAW, AND RELIGION*, *supra* note 31, at 63, 71.

33. See Fresen, *supra* note 7 ("There are many parallels between racism and sexism. Both racism and sexism attempt to give all the power and privilege to one group of people to the exclusion of the other group. Both racism and sexism are horrendous systems of injustice. . . . Today, in this post-apartheid time, what we have is a transformed South Africa, a rainbow nation, and there is no comparison with the divided apartheid society in which I grew up. It is not perfect . . . there are still many problems, but the transformation has truly begun and we live and work together in a way that most South Africans would never have believed possible. . . .").

34. See Bishop Patricia Fresen *Midwest Speaking Tour*, *WOMEN'S ORDINATION CONFERENCE*, http://www.womensordination.org/archive/pages/fresen_pages/Fresen06.htm (last visited Apr. 9, 2016).

35. See *id.*

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

Indeed, Fr. Roy Bourgeois called for the ordination of women, stating that “[w]e need women priests, we need women bishops, to take leadership positions in every Church office.”³⁶ Fresen had hoped that her denomination, which had been strongly and actively opposed to racial apartheid in South Africa, would also support the steps she had taken toward ending gender apartheid in the Catholic Church hierarchy.³⁷ Instead, they bowed to the pressures brought upon them by the Vatican, and she was ousted from her denomination.³⁸ She later worked with an international organization called Roman Catholic Womenpriests, an international initiative within the Roman Catholic Church that began with the ordination of the seven women in 2002, through which women deacons, priests, and bishops provide ministry in the Roman Catholic Church and “[w]omenbishops ordained in Apostolic Succession continue to carry out the work of ordaining women in the Roman Catholic Church.”³⁹ Notably, in 2007, the Congregation for the Doctrine of the Faith later issued a general decree, stating that any attempts to ordain women or attempts by women to be ordained would result in automatic excommunication.⁴⁰

As exemplified by the account of Fresen’s ordeal in South Africa, women have been largely proscribed or have been altogether prohibited from participating in leadership positions within many of the religions that are practiced in Africa, and indeed around the world.⁴¹ Until recently, few women have played a central role in the development and interpretation of such religions, and some entities, such as the Catholic Church, still forbid women from doing so. Women’s human rights are violated by the discrimination against women in all major world religions that have historically prohibited them from becoming religious leaders.⁴² Such discrimination has largely inhibited women from participating in the evolution of religious tenets, practices, and principles. The rest of the paper will explore how these issues might be addressed by the Constitutional Court of South Africa.

36. Stabile, *supra* note 32, at 70.

37. See Marjorie Reiley Maguire, *The Lady is a Bishop*, ROMAN CATH. WOMENPRIESTS (June 2006), http://romancatholicwomenpriests.org/WomenPriest_History_June_2006/THE%20LADY%20IS%20A%20BISHOP.pdf.

38. Judith Johnson, *Ordinations on the St. Lawrence*, 27 WOMEN’S ORDINATION CONF., <http://www.womensordination.org/content/view/223/> (last visited Apr. 9, 2016).

39. *History of Roman Catholic Womenpriests Movement*, ROMAN CATH. WOMENPRIESTS, <http://www.romancatholicwomenpriests.org/NEWhistory.htm> (last visited Apr. 9, 2016).

40. Butler, *supra* note 31, at 362.

41. See generally BART D. EHRMAN, *MISQUOTING JESUS: THE STORY BEHIND WHO CHANGED THE BIBLE AND WHY* (2008) (discussing the exclusion of women from teaching and leadership positions within Christianity); ELIZABETH A. JOHNSON, *SHE WHO IS: THE MYSTERY OF GOD IN FEMINIST THEOLOGICAL DISCOURSE* (1993) (discussing the exclusion of women from leadership positions in the Catholic Church and theology); IRSHAD MANJI, *THE TROUBLE WITH ISLAM TODAY: A MUSLIM’S CALL FOR REFORM IN HER FAITH* (2003) (discussing the exclusion of women from leadership positions in Islam).

42. As another example of demoting women from leadership roles, although women have played key roles in the Bible, the Lectionary (the book from which Mass readings are taken) often omits key female figures. See Stabile, *supra* note 32, at 67–68 (discussing the downsizing of major female figures such as Deborah, Naomi, Ruth, Esther, and Mary Magdalene).

III. WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN THE SOUTH AFRICAN CONSTITUTION AND CASES

In light of the cases touching upon women's rights and religious rights that have already been decided under the Constitution by the Constitutional Court, how might the Court approach a case if one were brought challenging the ban on women in the priesthood by the Catholic Church?⁴³ How would the Court react if a woman brought a complaint against the Southern African Catholic Bishops Conference for not allowing her to become a member on the basis of her gender?⁴⁴ Of course, the same question could be asked of other religions whose governing hierarchies ban women from leadership positions.⁴⁵

Article 15 of the Constitution provides significant protections guaranteeing the right to freedom of conscience, religion, thought, belief, and opinion.⁴⁶ In interpreting this provision in *S v. Lawrence*, Justice Arthur Chaskalson quoted Chief Justice Brian Dickson of Canada as writing:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.⁴⁷

Justice Albert ("Albie") Sachs expounded upon these sentiments in *Christian Education South Africa v. Minister of Education*, adding:

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43. Note that the standing provision in the South African Constitution is very broad, so this case could be brought not only by women who themselves would like to become ordained, but also by congregants who would like to have female priests and bishops, progressive male priests and bishops who would like to have female colleagues (which could take some of the strain off of them due to the current shortage of Catholic priests and bishops), and other entities such as non-governmental organizations that are acting in the public interest. See *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (4) SA 125 (CC) at para. 17.
44. Though outside this article's scope, such a complaint could also be brought under statutory law, such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which "provides the framework for implementing section 9 of the Constitution. It seeks to promote achievement of equality and prevent and prohibit unfair discrimination on the grounds of, inter alia, gender, sex, and pregnancy." SOUTH AFRICA'S BEIJING +20 REPORT, *supra* note 27, at 12 (citing the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000). Section 8(d) of the Equality Act "stipulates that unfair discrimination on the ground of gender includes 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.'" *Id.* at 58.
45. See, e.g., Jacob Lewin, Note, *Orthodox Jewish Women and Eligibility for the Parsonage Exemption*, 17 CARDOZO J.L. & GENDER 139 (2010) ("By principle, Orthodox Jewish communities do not ordain women; thus women cannot serve in the rabbinate."). On a positive note, the Constitutional Court has upheld the right of a woman to become a tribal leader under customary law and dismissed a challenge brought against her and her community by a male relative who wanted the position for himself. See *Shilubana v. Nwamitwa* 2009 (2) SA 66 (CC) at para. 86; see also Karin Brulliard, *South African Court Rules for Female Chief in Tribal Succession Case*, WASH. POST (June 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053102237.html>.
46. S. AFR. CONST., 1996, § 15.
47. 1997 (4) SA 1176 (CC) at para. 92 (quoting *R. v. Big M. Drug Mart, Ltd.*, [1985] 1 S.C.R. 295, 336 (Can.)).

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

This broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs. Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial.⁴⁸

The right to freedom of conscience, religion, thought, belief, and opinion is guaranteed *to everyone*, that is to say, to human beings, not to corporate entities such as religious organizations; it is a personal right adhering specifically to individuals.⁴⁹ Since religious bodies are made up of individuals, many of whom will have differing beliefs about particular religious tenets, the right provided in the South African Constitution must inherently guarantee the right of those individuals to maintain their different religious beliefs.

Religious tenets are continually questioned and challenged. Religious beliefs that were once considered heresies may even evolve into orthodoxies over time. Religions change in response to the constant changes in society and the world, and in response to growing knowledge and increased access to information.⁵⁰ Religion and culture are frequently intertwined, as Justice Pius Langa emphasized in the *MEC for Education: KwaZulu-Natal v. Pillay* case, and he discussed the fact that such

48. 2000 (4) SA 757 (CC) at para. 19.

49. S. AFR. CONST., 1996, § 15; *see also Christian Educ. S. Afr.*, 2000 (4) SA 757 at para. 23 (“[P]rotection of [religious] diversity is not effected through giving legal personality to groups as such.”). *But see* Johan D. van der Vyver, *Equality and Sovereignty of Religious Institutions: A South African Perspective*, 10 SANTA CLARA J. INT’L L. 147, 158 (2012) (“Many mainline churches still uphold age-old practices that amount to gender discrimination against women, and does one really want to entrust the state with the power and obligation to compel the Roman Catholic Church, the Greek Orthodox Church, Jewish religious institutions, and the *Gereformeerde Kerk* (related to a Church in the Netherlands with the same name and the Christian Reformed Church in the United States) to ordain women as part of their clergy? Surely, that would amount to political totalitarianism, which ‘becomes evident when State authority extends into the private enclave of non-State societal circles, such as family life, academic institutions and the sovereign sphere of the churches.’” (quoting Johan D. van der Vyver, *The Function of Legislation as an Instrument of Social Reform*, 93 SALJ 56, 66 (1976))). Moreover, the U.S. Supreme Court adopted a different approach in *Burwell v. Hobby Lobby Stores, Inc.*, holding that for-profit corporations may exercise religion. 134 S. Ct. 2751, 2770–71 (2014).

50. For example, Pope Paul VI formed the Birth Control Commission that voted to allow birth control within a marriage committed to having children. The Commission determined that artificial birth control was not inherently evil and that married couples should make such decisions for themselves. Stabile, *supra* note 32, at 75. Furthermore, a study by Catholics for Choice revealed that, “[s]exually active Catholic women older than 18 are just as likely (99%) to have used some form of contraception banned by the Vatican as women in the general population (99%).” CATHOLICS FOR CHOICE, *THE FACTS TELL THE STORY: CATHOLICS AND CHOICE 2014-2015* (2014). Interestingly, Protestants have been accepting the use of artificial birth control since the Lambeth Conference in 1930. Stabile, *supra* note 32, at 75.

communities are multifaceted (since they are so intertwined, the term religion is substituted for culture in his discussion of culture below):

[W]hile [religions] are associative, they are not monolithic. The practices and beliefs that make up an individual's [religious] identity will differ from person to person within a [religion] . . . While people find their [religious] identity in different places, the importance of that identity to their being in the world remains the same. There is a danger of falling into an antiquated mode of understanding [religion] as a single unified entity that can be studied and defined from outside. . . .

[Religions] are living and contested formations. The protection of the Constitution extends to all those for whom [religion] gives meaning, not only those who happen to speak with the most powerful voice in the present [religious] conversation.⁵¹

The same, too, can be said about customary law. The Constitution carves out a place for customary law as an equally valid part of South African law, yet it, too, is subject to the Bill of Rights and must be developed by the courts to promote the object and purpose of the Bill of Rights.⁵² Although customary law had sometimes been codified, and therefore fossilized and subsequently marginalized, the Court in *Bhe v. Magistrate, Khayelitsha* indicated that:

It should however not be inferred from the above [codification] that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution. Adjustments and development to bring its provisions in line with the Constitution or to accord with the 'spirit, purport and objects of the Bill of Rights' are mandated.⁵³

Similarly, the ever-changing religious and cultural practices are also subject to the Bill of Rights. Moreover, although many Christians believe their religious manuscript, the Bible, to be divinely inspired, its words have been scribed, copied, translated, and changed—primarily by an elite group of men—countless times over the centuries.⁵⁴ Those holding power within religious hierarchies may understandably be reluctant to accept changes within the religious organization that may erode their claims to power.⁵⁵ They may, therefore, attempt to ossify church teachings that substantiate their power, and resist anyone questioning their authority to define and impose their version of religious beliefs upon other members of the religious community—particularly upon lay members who have little official power within the religious

51. See 2008 (1) SA 474 (CC) at paras. 53, 54.

52. See S. AFR. CONST., 1996, § 39.

53. 2005 (1) SA 580 (CC) at para. 44 (quoting S. AFR. CONST., 1996, § 39).

54. See generally EHRMAN, *supra* note 41.

55. See Stabile, *supra* note 32, at 69–70 (discussing the inherent societal biases in gendered language used in reference to God that lead to the conclusion that men are superior to women).

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

institution, such as women.⁵⁶ The Christian scripture contains many contradictory statements and injunctions about the role of women in society in general and religion in particular.⁵⁷ Men holding positions of authority within the Christian religious hierarchal structures have historically interpreted and redefined the religious scriptures and tenets to their benefit and to bolster their power, and have imposed that interpretation upon those holding less power within that community (such as women).⁵⁸ Although women are beginning to exercise a stronger voice in interpreting religion,⁵⁹ they are still largely excluded from religious institutions and hierarchies. Since religious leaders interpret and shape the religious tenets that are applied to the entire religious community, the ban on women's participation in religious leadership prevents them from helping to shape the evolutionary progress of their religion, which is yet another layer of discrimination against women.⁶⁰

Of course, diversity of opinion and interpretation within a religious community is to be protected and celebrated under the South African Constitution,⁶¹ just as diversity of opinion and religious belief is to be protected and celebrated as between

56. See Butler, *supra* note 31, at 362–63 (discussing the Church's restriction on women entering the priesthood as justified by Jesus' selection of twelve men as his apostles).

57. See, e.g., Tohidi & Bayes, *supra* note 31, at 20.

58. See *id.* at 19 (“A system of laws and rights emerges along with intellectual male elites (popes, bishops, clergy, priests, ulama, *muftis*, *ayatollahs*, and *mullahs*) who are the propagators and rulers of the new religious and moral order. The order is hierarchical, communal, and authoritarian.”); see also Butler, *supra* note 31, at 351–53 (discussing the inequality experienced by women in public worship).

59. See Tohidi & Bayes, *supra* note 31, at 42 (“It has taken western women two centuries of fierce struggle (which continues today) to avail themselves of the egalitarian themes of modernity. Initially, the egalitarian goals of modernity and its call for ‘liberty, equality, and fraternity’ were meant for men only.”); see also Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS, HUMAN RIGHTS*, *supra* note 29, at 167, 173 (“We must acknowledge change, complexity, and interpretive privilege in cultural formation to avoid reductionism, essentialism, and rhetorical rigidity. This enables us to locate and condemn the particular historical formulations of culture that oppress women (such as the emphasis placed by male religious leadership on those passages in a religious text that permit wife beating) as well as to understand and support women's ability to wrest freedom from amidst these oppressive conditions (such as women's emphasis on other passages that advocate nonviolent and respectful treatment of wives).”).

60. As Erika Friedl explains:

Theoretically these [religious] texts are beyond negotiation because they are claimed to emanate from divine or divinely inspired authority. Practically, however, Holy Writ has to be translated, taught, made understandable to the faithful . . . This means it has to be interpreted. Interpretation is a political process: the selection of texts from among a great many that potentially give widely divergent messages, and their exegesis are unavoidably influenced, if not outrightly motivated, by the political programs and interests of those who control the formulation and dissemination of ideologies.

Erika Friedl, *Ideal Womanhood in Postrevolutionary Iran*, in *MIXED BLESSINGS: GENDER AND RELIGIOUS FUNDAMENTALISM CROSS CULTURALLY* 143, 146 (Judy Brink & Joan Mencher eds., 1997).

61. See *Hassam v. Jacobs* 2009 (5) SA 572 (CC) at para. 33 (“It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation.”).

different religious faiths and nonreligious beliefs.⁶² Not only must minority religious communities—such as Muslims, Hindus, Jews, Baha’is, and Buddhists—be protected against discrimination and treated equally within South Africa, but minorities *within* each religious community must also be protected.⁶³ Therefore, attempts by some members of a religious community to impose their particular interpretations of religion upon other members of the religious community goes against the right to freedom of conscience, religion, thought, belief, and opinion. This is especially true when an entire segment of the population—such as women—has been drastically subordinated, marginalized, and discriminated against by those in power, both within the religious community and within society as a whole.⁶⁴

In addition to protecting the rights of people who hold minority views within a religious community, the Constitution provides significant protections guaranteeing women’s rights. Indeed, South Africa’s 2015 Beijing +20 Report emphasized that “[w]omen’s empowerment and gender equality and the elimination of discrimination against women is a constitutional imperative in South Africa.”⁶⁵ The Constitution aims at transforming society in order to overcome past discrimination against women, to ensure the respect for women’s fundamental human rights, to guarantee that women are equally protected by law, and to free the potential of each woman.⁶⁶ Ending discrimination against women, along with ending racial discrimination, is

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62. See Lourens du Plessis, *Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in “the New South Africa”*, 2001 BYU L. REV. 439, 442 (2001) (“The explicit protection of the right to freedom of religion and the right to religious equality must be understood as part of this project of cultivating tolerance. Specific provision is made for the particular concerns created by a diversity of religious individuals and communities, so much so that it may well be said that the Constitution foresees a celebration of religious plurality in South Africa—in other words, a high degree of affirmative tolerance. Section 31 may well be understood as enjoining the ‘religious majority’—whoever they may be—to honor the ‘otherness’ of the other. As a result, an era of privileging *certain understandings* of the Christian faith has most certainly come to an end.”) (emphasis added).
63. See *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) at para. 24 (explaining that the Constitution, through various provisions taken together, affirms “the right of people to be who they are without being forced to subordinate themselves to the cultural or religious norms of others and highlight[s] the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’.”).
64. See, e.g., *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 77 (Kriegler, J., dissenting) (“True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute *or conduct* that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster.”) (emphasis added).
65. SOUTH AFRICA’S BEIJING +20 REPORT, *supra* note 27, at 58.
66. See S. AFR. CONST., 1996, at pmb1. (providing that “the people of South Africa . . . adopt this Constitution as the supreme law of the Republic so as to—*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*; Lay the foundations for a democratic and open society in which government is based on the will of the people and *every citizen is equally protected by law*; Improve the quality of life of all citizens and *free the potential of each person . . .*”) (emphasis added).

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

one of the most important principles enshrined in the Constitution.⁶⁷ Indeed, the first section of the Constitution indicates that non-sexism and non-racism are two of the founding values upon which the Republic of South Africa is based.⁶⁸ Women's equality is a fundamental component of the Constitution, as the Court explained in *Bhe*:

The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and nonsexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus section 9(3) of the Constitution prohibits unfair discrimination by the state "directly or indirectly against anyone" on grounds which include race, gender and sex.⁶⁹

Although this passage refers to state action (a statute codifying customary law), it could similarly apply to private action, as addressed further below.

The right to human dignity⁷⁰ also protects the rights of women and supports their claims to equality and non-discrimination in all matters, including in matters

67. For example, one Constitutional Court Justice has opined:

Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discriminating in s 8(2); in ss 119 and 120, especially 119(3), providing for the creation of a Commission on Gender Equality; and the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mind set and statutory drafting style . . . which used the masculine gender only.

The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution. . . . [I]n the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle.

Hugo, 1997 (4) SA 1 at paras. 73–74 (Kriegler, J., dissenting).

68. S. Afr. CONST., 1996, § 1(b).

69. 2005 (1) SA 580 (CC) at para. 50.

70. For a thoughtful discussion of human dignity in the context of HIV/AIDS, see *NM v. Smith* 2007 (5) SA 250 (CC) at paras. 48–54. See also *Dawood v. Minister of Home Affairs* 2000 (3) SA 936 (CC) at para. 35 ("The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. . . . This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. . . . Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as . . . the right to equality . . .").

concerning religion. Dignity is of central importance in the ban on ordination of females, which forbids women from entering into the leadership of the Catholic Church due to “the Greco-Roman and later the Augustinian view of women, regarding them as intrinsically inferior to men.”⁷¹ An institution cannot be said to feel an infringement upon its human dignity, since an institution is not itself a human being.⁷² A religious entity is certainly made up of individual human beings, but each individual may have different feelings from others about what constitutes an infringement upon that person’s human dignity. For example, some people within the Catholic Church would likely feel that their human dignity would be violated if they were to receive the sacraments from a female priest.⁷³ On the other hand, some people within the Catholic Church currently feel that their human dignity is violated by Catholic Canon 1024, which forbids women from becoming ordained. Whose human dignity, then, should the Constitution protect—those who want to perpetuate discrimination against women, or those who want women to be treated equally? Clearly, the right to human dignity must be read in conjunction with the other provisions of the Constitution, which unequivocally favor women’s equality and non-discrimination on the grounds of gender.

The right to freedom of association in section 18 of the Constitution⁷⁴ could be viewed from both sides of the dispute on the ordination of women. On the one hand, men in the Catholic Church hierarchy and congregants who do not want female priests will claim their right to freedom of association within a religious institution that forbids female priests. On the other hand, women who want to be priests, as well as congregants and men in the Catholic Church hierarchy who want female priests, will claim their right to freedom of association within a religious institution that welcomes female priests. Justice Sachs has noted that:

[T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the

71. See Fresen, *supra* note 7; see also Elizabeth R. Schiltz, *A Contemporary Catholic Theory of Complementarity*, in *FEMINISM, LAW, AND RELIGION*, *supra* note 31, at 3, 6 (discussing the “polarity position” held by Aristotle and most common in our history, which views women as naturally inferior to men, although also noting that Plato held the “unisex view,” which viewed men and women as equals while rejecting significant differences between the sexes).

72. See generally *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at para. 28 (“[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.”).

73. See Butler, *supra* note 31, at 358–59, 361–63.

74. S. AFR. CONST., 1996, § 18.

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

“right to be different”. In each case, space has been found for members of communities to depart from a majoritarian norm.⁷⁵

The party opposing ordination of women could claim that their religious tenet banning female priests departs from the majoritarian norm of gender equality in South African society, affirms their right to self-expression, and comprises their right to be different, and therefore space must be made for such an association. Of course, the party favoring ordination of women could claim that their religious tenet allowing female priests departs from the majoritarian norm of gender discrimination within the Catholic Church hierarchy, affirms their right to self-expression, and comprises their right to be different, and therefore that space must be made for such an association. Again, the question then becomes a matter of whose right to freedom of association the Constitution should protect.⁷⁶

The right to freedom of religious communities in section 31⁷⁷ of the Constitution could also be viewed from both sides of the case examining the ban on the ordination of women. This section provides that “[p]ersons belonging to a . . . religious . . . community may not be denied the right, with other members of that community . . . to practise their religion . . . and to form, join and maintain . . . religious . . . associations” and that “[these rights] may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”⁷⁸ On the one hand, men in the Catholic Church hierarchy and congregants who do not want female priests will claim their right to practice their religion, including the religious tenet forbidding female priests, and to maintain their religious association within an institution that forbids female priests. On the other hand, women who want to be priests, as well as congregants and men in the Catholic Church hierarchy who want female priests, will claim their right to practice their religion, including their religious belief welcoming female priests, and to maintain their religious association within an institution that welcomes female priests. In addition to the analysis utilized in the previous paragraphs, the conclusion must take into account section 31(2), indicating that the rights in 31(1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.⁷⁹

75. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at para. 61.

76. This issue came to the forefront of public consciousness in the United States with the implementation of the Affordable Care Act (ACA). Indeed, the Catholic Church and its supporters have fiercely opposed the ACA's birth control mandate. Many in the United States view the ACA's birth control mandate as a violation of their religious freedoms. Conversely, others view the church's opposition to the mandate as an attempt by religious persons to force their worldview on others. See Stabile, *supra* note 32, at 76. In light of the U.S. Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*, the controversy will undoubtedly continue for years to come. See 134 S. Ct. 2751, at 2770–71 (2014).

77. The emphasis upon religious communities in section 31 may in part reflect the South African concept of *Ubuntu*, indicating that people only live through other people in community with each other and therefore must respect and affirm each other's humanity. See, e.g., *S v. Makwanyane* 1995 (3) SA 391 (CC) at paras. 225–27, 241–51, 263, 307–13; see also *Azanian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SA 672 (CC) at para. 19.

78. S. AFR. CONST., 1996, § 31.

79. See *id.* § 31(2).

The Catholic Church might argue that the limitation on the right to freedom of expression contained in section 16 of the Constitution should preclude any lawsuit challenging the ban on ordination of women, or for that matter, any advocacy for the rights of women to become priests.⁸⁰ The Church might claim that the lawsuit and other advocacy speaks negatively of its canon law, which could arguably be considered “advocacy of hatred that is based on . . . religion . . . that constitutes incitement to harm.”⁸¹ However, the counterargument by the women who want to become priests is that they are Catholic themselves, profess adherence to the Catholic religion, and are not attempting to incite harm against the Catholic Church. Indeed, contrary to any advocating hatred of religion in general or of the Catholic Church in particular, the very reason for their advocacy and lawsuit is their strong commitment to Catholicism, their deep Catholic faith, and their love of the Catholic Church. Moreover, similar to how Justice Sandile Ngcobo described the expectations for Rastafarian culture in *Prince v. President of the Law Society of the Cape of Good Hope*, we can likewise describe the expectations for religious groups:

[I]t is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform to the law. . . . [Religious groups] are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact on the practice of their religion.⁸²

The same could be said where religious groups must make suitable adaptations so that they do not violate the constitutionally protected rights of their members.

The right to occupation and profession⁸³ is also implicated by the Catholic Church’s prohibition on women entering the priesthood.⁸⁴ Currently the Roman Catholic Church supports about 393,000 priests around the world, which entails a significant number of positions that are closed to women.⁸⁵ In an act of civil disobedience to Roman Catholic canon law, between 2002 and 2006, 115 women,

80. *See id.* § 16.

81. *See id.* § 16(2).

82. 2002 (2) SA 794 (CC) at para. 76.

83. S. AFR. CONST., 1996, § 22.

84. *See* Judith Johnson, *Ordinations on the St. Lawrence, 27 WOMEN’S ORDINATION CONF.*, <http://www.womensordination.org/content/view/223/> (last visited Apr. 9, 2016) (“Through it all, the [Roman Catholic Womenpriests] have clung to their vision of their *vocational* calling: to proclaim, by their act of receiving the sacrament of orders, the validity of women as equal participants with men in the priestly ministry of Christ, as handed down through the original apostles. The Womenpriests call for preserving Roman Catholic heritage and traditions and, not to leave the Church, but to renew it and its priestly ministry.”) (emphasis added).

85. *See* Thomas Reese, *Global Catholic Population Up, Number of Priests Down Since 1980*, NAT’L CATH. REP. (May 31, 2015), <http://ncronline.org/blogs/ncr-today/global-catholic-population-number-priests-down-1980> (“In 2012, there were 1,228,612,000 Catholics in the world and 393,053 priests.”). The number of priests had dropped significantly from just a few years before. *See Pope to Close Year for Priests in Rome with Huge Meeting*, CATH. NEWS AGENCY (Aug. 14, 2009), http://www.catholicnewsagency.com/news/pope_to_close_year_for_priests_in_rome_with_huge_meeting/ (noting about 407,000 priests around the world as of 2009).

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

three married men, and two gay men have been ordained into the Roman Catholic priesthood in full apostolic succession (although they are still not recognized by the Vatican).⁸⁶ This small, but growing, number of (unrecognized, yet ordained) female priests within the Roman Catholic Church indicates the desire on the part of many women to enter the priesthood as their chosen profession.⁸⁷

Moreover, the ban on ordination of women also negatively affects men.⁸⁸ For example, it has placed a significant strain on male priests and bishops due to the current shortage of men going into the priesthood. Denying women the opportunity to enter the priesthood tremendously exacerbates the burdens that currently must only be borne by men who have been ordained.

Indeed, the Constitution contains provisions that expressly contravene certain religious tenets that are espoused by the male hierarchy within the Catholic Church (that some young Catholics are challenging)⁸⁹ in order to protect women's rights. For example, the Constitution provides that women have the right to make decisions concerning reproduction,⁹⁰ and to have access to reproductive health care⁹¹ that allows women to make decisions regarding and have access to modern methods of contraception and abortion,⁹² both of which are in contravention of the traditional teachings of the

86. See Maguire, *supra* note 37.

87. It would be interesting to explore whether the level of compensation provided by the Catholic Church to males employed as deacons, priests, and bishops is substantially higher than the level of compensation provided to women employed by the Catholic Church and whether there may be any legal significance under the Constitution or statutory law regarding any systemic distinctions in compensation levels. On a related note, in 2000 South Africa ratified the Equal Remuneration Convention. See Equal Remuneration Convention, *ratified* Mar. 30, 2000, ILO No. 100, 165 U.N.T.S. 303. In 1997, South Africa ratified the Discrimination (Employment and Occupation) Convention. See Discrimination (Employment and Occupation) Convention, *ratified* Mar. 5, 1997, ILO No. 111, 32 U.N.T.S. 31.

88. Similarly, stereotyping with regard to traditional female and male roles in parenting not only harms women, but also harms men. See *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 93 (Mokgoro, J., concurring) (“[O]ur Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman’s place is in the home, (and conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children.”).

89. See CATHOLICS FOR CHOICE, THE VIEWS OF CATHOLIC MILLENNIALS ON THE CATHOLIC CHURCH AND SOCIAL ISSUES 4 (2015), http://www.catholicsforchoice.org/topics/catholicsandchoice/documents/2015_BRS_Catholic_Millennials.pdf (reporting that “[a]mong Millennial Catholics, 24% believe abortion should be legal in almost all cases and 27% say legal in most cases . . .”).

90. S. AFR. CONST., 1996, § 12(2).

91. *Id.* § 27(1)(a).

92. See Choice on Termination of Pregnancy Act 92 of 1996.

Catholic Church in South Africa.⁹³ See, for example, the Constitutional Court's statement in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*:

There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds the view. Societal attitudes to contraception and marriages which are deliberately childless are also changing.⁹⁴

The Constitution's explicit stance safeguarding specific rights that are important to women even when those rights may contravene a teaching of a particular religious institution reinforces the proposition that the spirit of the Constitution is intended to protect the beliefs of religious adherents even when they differ from the orthodox beliefs of the religious institutional hierarchy. Moreover, the Constitutional Court has not hesitated to issue decisions that contravene other tenets of the Catholic Church, such as its decision in *Minister of Home Affairs v. Fourie* regarding nonreligious, same-sex marriage and other decisions supporting the gay and lesbian community.⁹⁵

It could also be argued that the Constitution places a greater emphasis upon the protection of women's rights to equality, non-discrimination on the basis of gender, and full participation in society than it does upon religious rights. For example, the Constitution expressly provides that consideration must be given to the racial and gender composition of the judiciary (but it makes no mention of the religious composition of the judiciary).⁹⁶ Moreover, the Constitution provides for the establishment of both a Commission for Gender Equality⁹⁷ and a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.⁹⁸ Notably, the section establishing the commission concerning religion contains a mandate that "The composition of the Commission must . . . be broadly representative of the main . . . religious . . . communities in South Africa; and . . . broadly reflect the gender composition of South Africa."⁹⁹ Thus the drafters of the Constitution felt it is crucial to have women participate meaningfully in overseeing the development, protection, and promotion of religious rights, presumably to ensure that the rights of women within religious communities are safeguarded.¹⁰⁰ On the

93. See Craig Timberg, *S. African Catholics Aren't Practicing What Pope Preached: Leaders Advocate Condoms To Curb Spread of AIDS Virus*, WASH. POST, April 9, 2005, at A16; see also *Johannesburg Catholics March for Life! Anti-abortion March Attracts Thousands*, HUM. LIFE INT'L (Mar. 18, 2010), <http://www.hli.co.za/newsarticles/johannesburg-catholics-march-for-life/>.

94. 1999 (1) SA 6 (CC) at para. 38 (quoting *S v. H* 1995 (1) SA 120 (C)).

95. 2006 (1) SA 524 (CC) at paras. 84–98.

96. S. AFR. CONST., 1996, § 174.

97. *Id.* § 187.

98. *Id.* § 185.

99. *Id.* § 186(2).

100. This comports with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which recognizes the right of women to participate in the political and decisionmaking process, including "the equal participation of women in the political life of their countries," and providing

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

other hand, no provision is contained in the section establishing the Commission for Gender Equality mandating that various religions must be represented on the commission. This omission could plausibly be because gender equality means the same equal rights for women across all religious (and non-religious) communities.¹⁰¹

Finally, in light of the “never again” principle, the Constitutional Court is likely to interpret the Bill of Rights in light of the oppression of the apartheid era.¹⁰² Therefore, in the case of a ban by a powerful institutional hierarchy on participation by women, who have historically been relegated to a subordinate position by such an entity, the Court may well interpret the Constitution to protect the rights of the oppressed and marginalized individual plaintiffs against the exclusivity and dominance of the institutional defendant.¹⁰³ In the words of Justice Ismail Mahomed concurring in the *Makwanyane* case:

that “States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.” See Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 9, *adopted* July 11, 2003, <http://www.achpr.org/instruments/women-protocol/>. Additionally, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that states parties must afford women the right “[t]o participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.” Convention on the Elimination of All Forms of Discrimination Against Women art. 7, Dec. 18, 1979, 1249 U.N.T.S. 13.

101. Despite this proposition, I would hope that a broad range of religions is represented on the Commission for Gender Equality to enhance its credibility and respect among all religious groups.
102. See generally *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 329 (O’Regan, J., concurring) (“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.”); see also *NM v. Smith* 2007 (5) SA 250 (CC) at para. 49; *Ferreira v. Levin* 1996 (1) SA 984 (CC) at para. 51.
103. See *Harksen v. Lane* 1998 (1) SA 300 (CC) at paras. 62–63 (noting that “the position of the complainant in society,” and whether the group affected has suffered discrimination in the past and is vulnerable, are important factors in the Court’s consideration of whether discrimination that does not fall within the fourteen specified grounds of section 8(2) of the Interim Constitution is unfair); see also *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 112 (O’Regan, J., concurring) (“The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.”). At first, this seems to be not directly on point regarding the ban on women’s ordination, since sex discrimination is included within the specified grounds. However, in analyzing a case where the plaintiff claims the right against sex discrimination, on the one hand, and the defendant Catholic Church hierarchy claims the right against religious discrimination, on the other hand—both of which are specified grounds for protection, the Court may need additional factors to determine which claim to favor. Since as between these two parties, women have been the more vulnerable group and the hierarchy of the Catholic Church has been the more powerful and dominating group, a *Harksen* factor test may prompt the Court to favor the claims of the women. Of course, the determination must be tailored to the situation of the particular plaintiff and defendant in the case before the Court, as in other circumstances the Catholic Church may be in the more vulnerable and discriminated-against position vis-à-vis a more powerful and discriminatory entity.

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.¹⁰⁴

The 2015 Beijing +20 Report echoes this approach specifically with respect to women's equality:

The empowerment of women in South Africa is about dealing with the legacy of apartheid and the transformation of society, particularly the transformation of power relations between women, men, institutions and laws. It is also about addressing gender oppression, patriarchy, sexism, racism, ageism, and structural oppression, and creating a conducive environment which enables women to take control of their lives.¹⁰⁵

Moreover, the rights enshrined in the Constitution apply not only to the state, but also to private conduct.¹⁰⁶

The Constitution is explicitly the supreme law of the land.¹⁰⁷ Section 39 also indicates that the Constitutional Court, when interpreting the Bill of Rights, “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;” and “[w]hen interpreting any legislation, and when developing the common law or customary law, [it] must promote the spirit, purport

104. *Makwanyane*, 1995 (3) SA 391 at para. 262 (Mahomed, J., concurring).

105. SOUTH AFRICA'S BEIJING +20 REPORT, *supra* note 27, at 9.

106. *See generally* S. AFR. CONST., 1996, § 8(2) (“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”). Additionally, the Constitution states that no person may unfairly discriminate on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” *Id.* § 9(3)–(4). Moreover, the Constitution is identified as the supreme law of the republic, and “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” *Id.* § 2 (emphasis added). Since the Constitution does not expressly limit itself to regulating the conduct of the government, it arguably could apply to private conduct as well, especially when read in light of sections 8(2) and 9(4).

107. *See* S. AFR. CONST., 1996, § 1 (stating that South Africa is founded on the value of “[s]upremacy of the constitution and the rule of law”). The Constitutional Court is the highest court in South Africa, and “makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.” S. AFR. CONST., Sixth Amendment Act of 2001, § 167(3). The only exceptions are purely factual issues. *See S v. Boesak* 2001 (1) SA 912 (CC) at para. 15 (“Unless there is some separate constitutional issue raised . . . no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA.”).

and objects of the Bill of Rights.”¹⁰⁸ Therefore, the Constitutional Court could arguably have jurisdiction to decide a lawsuit challenging the Catholic Church’s ban on the ordination of women.

IV. CONCLUSION: WOMEN’S RIGHTS AND RELIGIOUS RIGHTS SHOULD BE INTERPRETED TO COMPLEMENT (NOT CONTRADICT) EACH OTHER UNDER THE SOUTH AFRICAN CONSTITUTION

According to the above discussion, it seems clear that the rights of women who want to become priests, as well as the rights of congregants and men in the Catholic hierarchy who want female priests, are being violated by the Catholic Church in South Africa. The Constitutional Court may then undertake to balance the infringement upon the rights of women—including their religious rights—caused by the ban upon women in the priesthood, as well as the rights of progressive congregants and men in the church hierarchy, as against the infringement upon the rights of men in the Catholic hierarchy and congregants who do not want to allow women to become priests if they were required to lift the ban, in order to determine whether the discrimination is “unfair,” similar to how the Court determines that discrimination involving a right unspecified in the Constitution amounts to “unfair” discrimination under the Constitution.¹⁰⁹ The Court would likely determine that such discrimination is indeed unfair, because it not only violates women’s rights to equality, non-discrimination, association, occupation, and profession, but also their right to freedom of religion. Thus, the Court would be interpreting women’s rights and religious rights as complementing—not contradicting—each other under the South African Constitution.

It might be wise to acknowledge that any attempt by the Constitutional Court to force the Catholic Church in South Africa to ordain women as priests would likely be met with incredibly strong resistance, not only from conservatives in the Catholic Church but also in other religious traditions who still do not allow women to hold leadership positions, and would lead to claims of religious discrimination (even though such claims ignore the religious discrimination that the ban itself imposes upon women).¹¹⁰ In certain circumstances, an evolutionary process, instead of a revolutionary process, of social change could arguably produce better, more solid and lasting results, rather than the turmoil, resentment, and resistance that a drastic and

108. S. Afr. Const., 1996, § 39(1)–(2); see also *K v. Minister of Safety and Sec.* 2005 (6) SA 419 (CC) at para. 44 (developing the common law regarding vicarious liability to bring it in line with the Constitution and the Bill of Rights).

109. See *Prinsloo v. Van der Linde* 1997 (3) SA 1012 (CC) at para. 23 (discussing the “differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination”); see also *Harksen v. Lane* 1998 (1) SA 300 (CC) at para. 53. Although both *Prinsloo* and *Harksen* involved discrimination by the state rather than discrimination by private parties, a similar analysis could be applied to private parties.

110. See generally *S v. Makwanyane* 1995 (3) SA 391 (CC) at paras. 87–89 (holding that, in the context of death penalty cases, public opinion is not irrelevant, but it cannot dictate the outcome of a case decided under the South African Constitution).

sudden change might engender. The Court, for example, would certainly acknowledge that the religious beliefs of the Catholic Church hierarchy must be taken seriously and that the Catholic Church has frequently been a force for social justice and tremendous good in society.¹¹¹ The Court would also likely affirm that the people advocating for retention of Canon 1024 banning women from becoming ordained hold their beliefs due to sincere religious convictions.¹¹² However, the Court would then likely echo Justice Sachs's sentiment that "[i]t is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others."¹¹³

Therefore, in this instance and under these circumstances, the Court may choose to issue a declaratory order indicating that the ban violates both women's rights (to equality, nondiscrimination, and others) and religious rights (of people whose religious tenets include women in the priesthood), that it is inconsistent with the Bill of Rights and constitutes unfair discrimination, and therefore that it is unconstitutional. Taking a moderate approach, the declaratory order could indicate that the Court is not a proper venue through which to resolve disputes concerning religious tenets nor the appropriate forum through which to craft a specific remedy, and therefore the Court could refer the matter to the hierarchy of the Catholic Church in South Africa to resolve the matter and to come up with an appropriate solution.¹¹⁴

The Court could encourage conversation and dialogue among the parties to the lawsuit and urge them to work together to come up with an appropriate solution.¹¹⁵ The Court could also suggest that the parties conduct a thorough factual examination

111. See generally *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at paras. 89–90 (discussing the many positive attributes of religion).

112. See *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at para. 38 ("The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out, that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.").

113. *Fourie*, 2006 (1) SA 524 at para. 92.

114. See *id.* ("Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies."). Through the remedy proposed in this paper, the Court would be taking sides only as the dispute pertains to the Constitution; it would not be wading into which side has the better interpretation of religious principles.

115. South Africa is a consultative and participatory democracy (as well as a representative democracy), and like the government, in the same spirit, private parties should be encouraged to participate and engage with each other in reaching compromises that are acceptable to all parties. See *Occupiers of 51 Olivia Rd., Berea Twp. and 197 Main St. Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC) at para. 15.

WOMEN'S RIGHTS AND RELIGIOUS RIGHTS IN SOUTH AFRICA

of the various manifestations of discrimination against women in the Catholic Church, including the ban on women's ordination and the deleterious consequences that such discrimination has wrought upon both women and men in the Church. The investigation could be spearheaded by well-respected and knowledgeable persons representing both sides. In addition to gathering statistical data and evidence, they could conduct public hearings allowing oral and written testimony to be submitted by interested stakeholders, which could be broadcast via television and the Internet, with highlights shown periodically. The subsequent report could help inform the negotiations and the compromise agreement that the parties ultimately reach.¹¹⁶ Hopefully, the ethos of *Ubuntu* would infuse this process, leading to a respectful solution by which everyone (or nearly everyone) could abide. Perhaps the parties might agree to allow each of the bishops in South Africa to decide individually whether to ordain women and then initially to place female deacons, priests, and bishops in positions where they are most wanted (for example, with more progressive, rather than conservative, congregations). This outcome would result in some congregations being led only by male priests, so that option would be available for people opposed to women's ordination, and some congregations being led by both women and men, so that option would be available for people welcoming women's ordination.¹¹⁷ Of course, the Church may decide to ignore the Court's decision entirely and retain the ban, but the simple fact that the Court declares the ban on women in the priesthood to entail unfair discrimination will most likely spark a heated public debate about the benefits and drawbacks of allowing women to be ordained, which in itself would be a very productive outcome.¹¹⁸

In sum, the Constitutional Court would likely hold that the Catholic Church's ban on the ordination of women is inconsistent with the Bill of Rights. Such a holding would probably garner a tremendous amount of publicity throughout the world, not only within the Catholic Church, but also within other religions that maintain bans on women in leadership positions. This public debate, as long as it remains respectful and peaceful, should be welcomed as a means through which to shed light on other manifestations of discrimination by certain interpretations of religious principles. Perhaps this decision could be yet another landmark in helping not only South Africa, but indeed the world, to move forward toward a more just, fair, and equitable society where all people—women and men—are respected as equals.

116. Such a report could also spark investigations in other countries of the world, and perhaps throughout the entirety of the Catholic Church as a whole.

117. See *In re Dispute Concerning the Sch. Educ. Bill of 1995* 1996 (3) SA 165 (CC) at para. 49 n.15 (extolling the virtues of diversity).

118. See *LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 92 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").